This article is concerned with the question, 'Can democracy be reconciled with judicial review on the basis of liberal, constitutionally entrenched values?'. Charter critics answer 'No'. David Beatty has responded by saying that judges should resort to value-based interpretation only in assessing the means to implement legislative objectives and not the objectives themselves. An analysis of the Supreme Court judgment in Ref. Re Criminal Code, ss 193 & 195.1(1)(c) shows that Beatty’s approach is unworkable because one cannot determine what an objective is without resorting to value-based understandings of what the Charter requires.

The analysis also reveals that the issue in the case, the criminal regulation of soliciting by prostitutes, brings to the surface an important question for liberal political theory: Is it justifiable to use the criminal law to force certain activities into the private, because their public manifestation is offensive? It is argued that using the criminal law in this way contradicts the liberal commitment to individual autonomy. But it is argued further that this commitment does not entail that the state adopt a policy of global neutrality between different conceptions of the good life. Rather the state should not be neutral when conceptions are premised on inequality. This insight is shown to have a basis in Supreme Court jurisprudence, in the majority reasoning in R. v. Keegstra, and to

Dans cet article, l’auteur se demande si « la démocratie peut être conciliée avec le contrôle judiciaire dans le cadre des valeurs libérales enclavées dans la Constitution? » Les critiques de la Charte répondent « non ». D’après David Beatty, les juges devraient utiliser une interprétation fondée sur les valeurs uniquement lorsqu’ils ou elles examinent les moyens employés pour mettre en œuvre les objectifs législatifs et non lorsqu’ils examinent les objectifs eux-mêmes. Une analyse de la décision rendue par la Cour suprême dans le Renvoi relatif à l’art. 193 et à l’art. 195.1(1)(c) du Code criminel démontre que l’approche de Beatty est inapplicable, parce qu’on ne peut déterminer ce qu’est un objectif sans recourir aux interprétations fondées sur les valeurs prescrites par la Charte.

L’analyse démontre aussi que la question en litige, la criminalisation de la sollicitation aux fins de la prostitution, soulève une question importante pour la théorie politique libérale: Peut-on légitimement utiliser le droit criminel pour forcer la population à pratiquer certaines activités uniquement dans le privé, parce que leur manifestation publique est choquante? L’auteur soutient qu’une telle utilisation du droit criminel est contraire à l’engagement libéral envers l’autonomie de l’individu. Il maintient toutefois que cet engagement n’exige pas que l’État adopte une politique de neutralité générale entre les différentes conceptions de la bonne vie. L’État

* Assistant Professor of Law and Philosophy, University of Toronto. I thank Ted Alexander, Alan Brudner, Cheryl Misak, Dick Risk, Carol Rogerson, Bob Sharpe, and Lorraine Weinrib for very helpful discussion of drafts of this essay. I learned a great deal from the debate which followed a talk on the topic of the essay to the Philosophy Group of Erindale College, University of Toronto. Most of all, I must thank David Beatty for extensive written comments as well as much discussion, due in part to his utter disbelief in almost all of my claims.
offer a solution to the conflict between liberalism and democracy identified by Charter critics.

devrait plutôt prendre position lorsqu’il s’agit de conceptions fondées sur l’inégalité. L’auteur démontre que ce raisonnement est exprimé par la Cour suprême dans la décision rendue par la majorité dans l’affaire R. c. Keegstra. D’après lui, ce raisonnement permet de résoudre le conflit entre le libéralisme et la démocratie décrit par les critiques de la Charte.
I. INTRODUCTION

Jeremy Bentham, the great Nineteenth-Century philosopher, democrat and social reformer, scorned judges. In his view, they relied on a spurious rhetoric of objectivity to conceal the fact that they were declaring as the law their own subjective and thus arbitrary perceptions of right and wrong.

Bentham thought the common law to be a bog of judicial subjectivity. He had, if possible, an even poorer opinion of charters of rights, written constitutions which expressly give judges the power to determine the validity of legislation in terms of enumerated moral standards. For Bentham, charters are more than nonsense, they are "nonsense upon stilts". Not only do charters expressly give judges the power to determine the law in accordance with what they like, but they give that power to a particularly inappropriate group. For judges are not elected and hence they are not politically accountable representatives of the people. If judges are representative of anything, it is the elite political class from which they are recruited. Bentham thought that charter adjudication is predictable or non-arbitrary only to the following extent: one might expect that judges will exercise their judgment to thwart the legislative will of a democratic parliament when that will is in conflict with the interests of their class.

Bentham's critique of the judiciary and of charter adjudication is thus double-edged. He wants to claim both that charters provide explicit room for judicial arbitrariness and that the room is likely to be filled by reactionary judgments. The two edges do cut against each other, since, in a sense, the more sure one is that the room will be filled by reaction, the less arbitrary adjudication will seem. This does not create a serious tension for Bentham since his critique is at bottom based on democratic ideals. In his view, it is bad for judges, no matter their political stripe, to second-guess a democratically elected legislature. That the judges who in fact get the job of charter adjudication are likely to be anti-democrats just makes things worse.

This same double-edged critique thrives today in the work of the critics of the Canadian Charter of Rights and Freedoms. Recently, David Beatty has attempted to answer such critics by arguing that the structure for adjudication which the Charter sets up is, correctly understood, inherently democratic. Moreover, Beatty claims that his argument shows that there can be an accommodation between democracy


and judicial review on the basis of the liberal rights enumerated by the Charter.

Beatty’s argument hinges on section 1 of the Charter, because it requires that judges find that the reasonable legal limits on Charter rights and freedoms are those which can be “demonstrably justified in a free and democratic society”. In particular, Beatty relies on the two-stage test of *R. v. Oakes*,4 which sets out the procedure for adjudication in terms of section 1. The test (hereinafter “the Oakes test”) says first, that if a legislative objective limits a Charter right, it must itself be shown to be justifiable by concerns which are pressing and substantial in terms of Charter values. Second, the specific means adopted to implement the objective must be proportional to it. This second stage breaks down into three components, all of which must be satisfied: the means must be rationally connected with (carefully designed to achieve) that legislative objective, the means must impair as little as possible the right or freedom in question and the effects of the measure must be proportional to the objective.5

The Oakes test thus seems to require judges to assess the compliance or noncompliance of any limitation on expression with a mix of substantive and procedural rule of law requirements. Judges are required to make explicit their understanding both of what substantive objectives are constitutionally valid when measured against Charter values and of what measures are appropriate, in terms of the same values, to implement valid substantive objectives.

In effect, Beatty’s democratic solution requires judges to focus almost exclusively on the second stage of the test. On his approach, judges live up to the ideal of democracy by not second-guessing the legislature as to what are appropriate legislative objectives. Rather they should determine in a morally neutral fashion what the objective is and then seek to determine whether the means provided to implement the objective are proportional. Judges should invoke Charter values to evaluate means, not objective, and in particular by asking whether the means adopted to implement the objective interfere as little as possible with Charter-guaranteed rights and freedoms.

Beatty regards his approach as liberal because it does seek to safeguard individual freedoms. He thinks it is democratic because it does not put obstacles in the path of the legislative selection of appropriate objectives. He contrasts his liberal approach with a conservative one, which balances rights and freedoms at the first stage of the Oakes test; that is, when deciding whether the legislation relates to concerns which the Charter recognizes as pressing and substantial in a free and democratic society. His reason is that if rights and freedoms are balanced at stage one of the Oakes test, judges might conclude the issue by finding that the legislative objective is justifiable, which, according to Beatty, will generally be the case. Thus the judges will fail to ask what for

5 Ibid. at 138-39.
Beatty is the vital question: "Do the means for implementing the objective interfere as little as possible with Charter-guaranteed rights and freedoms?".6

Charter critics are unlikely to find Beatty's solution persuasive. First, for them section 1, in mentioning freedom and democracy in the same breath, only makes more manifest the institutional contradiction that results when unelected officials are given the authority to determine what is valid law. Since, on their understanding, liberalism requires that an elite arbitrarily decides what constraints are appropriate on majority decision-making, the liberal understanding of freedom and the ideal of democracy, the very ideas which section 1 mentions in the same breath, are contradictions which one would join only in the cause of deception. Second, the Oakes test, by making it clear that the content of democracy as well as freedom is to be determined by reference to the values of the Charter, reduces the value of democracy to the judges' subjective interpretation of those values. Third, it will not matter to these critics at which stage of the Oakes test judges impose their constraints on the legislature; what matters is that judges have any role whatsoever in determining what should be law. Indeed, it might seem that Beatty's solution makes things worse. The fact that the same values underpin both stages of the test allows a greater pretence of objectivity by dint of a perfunctory ritual of deference to the legislature at stage one.

The question whether the Oakes test imposes any real constraints on Charter adjudication thus goes to the heart of debates about the very legitimacy of the Charter. Here I will argue that Beatty's solution does not work because it assumes wrongly that the questions of the meaning and the constitutional validity of particular legislative objectives are for the most part distinct. That is, he thinks that the determination of statutory objectives can be achieved in abstraction from the interpretative context created by the Charter. In contrast, I will suggest that many of the Charter cases that end up in the Supreme Court of Canada are likely to be there precisely because these questions are fused. I will also argue that this conclusion does not entail accepting the verdict of the Charter critics. One can grant that tests such as the one in Oakes are "interpretative all the way down" without therewith supposing that Charter adjudication is as subjective, elitist, and anti-democratic as the critics allege. The basis for my argument is a recent decision of the Supreme Court which will seem at first reading to supply yet more grist for these critics' mill.

II. PROSTITUTION AND FREE SPEECH

Section 2(b) of the Charter reads:

2. Everyone has the following fundamental freedoms:
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication....

6 Beatty, supra, note 3 at 61-62.
While freedom of expression is thus given express protection in the *Charter*, it is uncontroversial that speech can be limited if it is shown that the limitation is required by section 1 of the *Charter*; that is, by the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

In *Ref re Criminal Code, ss 193 & 195.1(1)(c)*,7 the Supreme Court of Canada decided that it is legitimate to criminalize public communication for the purpose of prostitution, despite the fact that prostitution itself is clearly legal. Thus it upheld section 195.1 of the *Criminal Code*.8 That section makes it a criminal offence, punishable on summary conviction, to solicit for the purpose of prostitution in a public place. "Public place" is defined broadly in section 195.1(2) as "any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view". While the section deals with interference with pedestrian and vehicular traffic, it also includes, in section 195.1(1)(c), the situation when a person "stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute".

The constitutional issue was complicated by two further questions. First, does section 195.1 violate section 7 of the *Charter* because, by drastically constraining the exercise of a legally sanctioned profession, it deprives prostitutes in contravention of the "principles of fundamental justice" of "the right to life, liberty and security of the person"? Secondly, does section 195.1 in conjunction with section 193 of the *Criminal Code*, or section 193 by itself, violate either section 2(b) or section 7 of the *Charter*? Section 193 prohibits the keeping of a "common bawdy-house" and the combination of it and section 195.1 seem to make it next to impossible for prostitutes to operate effectively by severely constraining both public communication and private activity.

(All the judges agreed that section 193 did not by itself nor in conjunction with section 195 violate the *Charter*. However, they disagreed strongly on the question whether section 195 constituted an unjustifiable limitation of the right to freedom of expression. Dickson C.J.C., La Forest and Sopinka JJ. concurring, held that section 195, while it did abridge freedom of speech, did so justifiably given the legislative objective of section 195. They also held that section 195 did not violate section 7. Lamer J. (as he then was) presented a different argument to the same effect. Wilson J., L'Heureux-Dubé J. concurring, held that the infringement on freedom of expression involved in section 195.1(1)(c) could not be demonstrably justified as a reasonable limit on freedom of expression and that the infringement was also in contravention of section 7.

---

The importance of the majority holding is exemplified in the prosecution of *Now Magazine* subsequent to the decision. *Now* is distributed free in public places throughout Toronto and it carries a wide range of often very explicit advertisements for prostitution services. Since the distribution takes place in public and the advertisements are aimed at soliciting customers for prostitutes, it might seem to fall within the ambit of section 195.1(1)(c). Although it was decided not to proceed with the prosecution, and although it might have been thought unlikely that a judge would find *Now* guilty, that the prosecution was contemplated at all is significant.

As those who greeted the prospect of *Now*’s conviction with outrage pointed out, it seems that soliciting is liable to be punished even when it is not accompanied by acts which could be said to be a public nuisance. Their concern went beyond the issue of police harassment of the sex trade, for they supposed that the Supreme Court had opened the door to police action to restrict freedom of expression on the dangerous ground that someone has taken offence at the content of the expression.

Here I will argue that while Wilson J.’s dissent is much to be preferred, Lamer J.’s reasoning captured a part of the problem which Wilson J. missed. In seeing this, we illuminate a problem which is embedded not only in the *Charter*, but in the liberal democratic theory which underpins it.

A. *The Legislative Objective*

In his judgment, Lamer J. dealt with the section 7 issue first. In sum, he reasoned that section 7 does not protect a right to economic liberty, only the right of individuals to have their interaction with the justice system governed by principles which should govern the administration of justice. That is, the principles which section 7 incorporates have more to do with process than substance. While he said that respect for individual liberty permeates the *Charter* as a whole, nevertheless section 7 permits the state to “deprive an individual of life, liberty and security of the person as long as it abides by the principles of fundamental justice”.

Since on this approach it follows that any substantive *Charter* challenge must base itself on a substantive right protected by the *Charter*, Lamer J. moved on to discuss the limitation on freedom of expression. He found that the right to freedom of expression was indeed limited by section 195.1(1)(c) and so he applied the *Oakes* test.

In his view, the section did address a substantial and pressing societal concern, namely, the “mischief caused by street soliciting”. He thought that the objectives went far beyond preventing the nuisance of traffic congestion and general street disorder, for the section was part

---

9 *Now Magazine* is published by M. Hollett, Toronto.
10 *Supra*, note 7 at 47.
of a strategy of indirect attack on prostitution. He said that while legislators have not made the act of prostitution illegal, perhaps as a “carry-over from the Victorian age”, they “are indeed aiming at eradicating that practice”. In his own summary, the objective was also to minimize “public exposure of an activity that is degrading to women, with the hope that potential entrants in the trade can be deflected at an early stage, and to restrict the blight that is associated with public solicitation for the purposes of prostitution”.

Given this broad construction of objective, it is no surprise that he found that the scheme set out in section 195.1 was rationally connected with the legislative objective, constituted as minimal an impairment of the affected right as was possible, and that the effects of the measures were proportional to the objective.

By contrast, Dickson C.J.C. and Wilson J. started with the freedom of expression issue. Like Lamer J., they found that there was a limitation on the right to freedom of expression, but, again by contrast, they narrowly construed the objective. For them, the section was aimed not at curbing prostitution itself, but at the nuisance of solicitation in public places. Why then did the two judges who adopted the same narrow construction of objective disagree?

Dickson C.J.C. and Wilson J. both agreed that the measures adopted in prohibiting communication were rationally connected with the objective of preventing the nuisance of solicitation. As Wilson J. put it, if communication for this purpose is criminalized, this “must surely be a powerful deterrent to those engaging in such conduct”. Where the two judges disagreed was at the second stage of the Oakes test, whether the means adopted were proportional to the objective sought to be achieved in the sense that they infringed to the least extent possible on Charter protected values. In this regard, Wilson J. emphasized the broad definition of both “public place” and “communication” in the section. Any communication for the purpose of solicitation in any area open to the public, whether or not any members of the public were present, would complete the offence. Indeed, “no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete”. Prostitution was itself “a perfectly legal activity” and the legislative objective was not to make it illegal but to deal with the nuisance of street solicitation. It thus seemed to her that “to render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support”. Section 195.1(1)(c) therefore failed to meet the proportionality test in Oakes.

12 Ibid.
13 Ibid. at 59-60.
14 Ibid. at 65.
15 Ibid. at 12 and 73.
16 Ibid. at 74.
17 Ibid. at 75.
18 Ibid. at 76.
Dickson C.J.C. dealt with this proportionality issue rather baldly. He recognized that the "means used to attain the objective of the legislation may well be broader than would be appropriate were actual street nuisance the only focus". Since the objective extended to "the general curtailment of visible solicitation for the purposes of prostitution" it was his view that the legislation was not "unduly intrusive". In this regard, he asserted that the intrusive nature of enforcement of the provision was sufficiently outweighed by the interest in decreasing the social nuisance of street solicitation to find a justification in terms of section 1.

One explanation of why Dickson C.J.C. and Wilson J. diverged in the second stage of the Oakes test can be sought in their different evaluations of the particular communicative act. In Dickson C.J.C.'s view, "it can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression". Here he relied implicitly on a distinction akin to that gaining some ground in American constitutional thought between "high value" and "low value" speech. According to that distinction, "high value" speech is speech about what the political structure of a society should be, including speech about what major legislative decisions are appropriate. "Low value" speech is anything else, including speech for the purposes of commerce.

Dickson C.J.C. did not elaborate on the notion of core or high value speech in this judgment. However in the recent Supreme Court decision on hate propaganda, R. v. Keegstra, he made it clear that for the purposes of Charter adjudication, the category of high value speech has a different content than the American one. For him high value speech does include speech which aims to influence social and political decision making. But for him the category also includes speech which seeks to attain truth and speech which expresses diversity and thus assists in individual self-fulfilment. Moreover, the fact that speech falls into this category does not, as it would in the American context, mean that it is immune to limitation. While the Chief Justice recognized that one of the reasons for protecting freedom of speech is our recognition that our judgments of truth and falsity are fallible, he asserted that when the probability of a judgment being true is close to zero, we can assign the judgment minimal weight within the category of high value speech.

Thus it seems that in Ref. re, Dickson C.J.C., because he supposed that soliciting is not high value speech, also supposed that the interest in protecting it is less weighty than that involved in protecting core speech. It follows that this less weighty interest can be easily outweighed.

---

19 Ibid. at 14.
20 Ibid. at 13.
23 Ibid. at 67-69.
by an interest in protection from social nuisance which requires an intrusive abridgment of the former.

In Ref re, Wilson J. implicitly rejected such a distinction. In her view, "economic choices are...for the citizen to make (provided that they are legally open to him or to her)" and as such deserve constitutional protection "whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter".24

Once we see this difference, we are better placed to understand another disagreement between Dickson C.J.C. and Wilson J. in regard to section 7 of the Charter, that is, whether section 195.1(1)(c) offended the right not to be deprived of "life, liberty and security of the person...except in accordance with the principles of fundamental justice". For Wilson J., since prostitution is legal and, on her interpretation, the limitation of expression was invalid, it followed a fortiori that it was unjustifiable to contemplate imprisonment as a possible penalty for engaging in such expression.25

Her argument in this regard provides an effective rebuttal to Lamer J. One can grant him that rights under section 7 do not extend to the right to exercise one’s chosen profession, but that does not address the crucial issue, which is whether one may be validly deprived of liberty when one uses constitutionally protected means to pursue a profession which, as all the judges emphasized, is permitted by the law. Indeed, Wilson J. reasoned that even if the premise of her argument did not hold, so that section 195.1(1)(c) was a constitutionally valid limitation on expression, it would be the case that the potential for imprisonment created a distinct ground of invalidity. That is, it was not reasonable and justifiable to use imprisonment as a sanction to deal with the nuisance of street solicitation. She said that she had indicated elsewhere her view that "an infringement of liberty which violates the principles of fundamental justice must be very difficult, if not impossible, to justify as a reasonable limit under s. 1".26

Dickson C.J.C. did not consider himself bound to deal with Wilson J.’s analysis of section 7. He simply said that, in view of his attitude to the infringement of expression, he did not have to set out his attitude to this issue. It seems safe to infer that what he meant was that the same considerations which allow the non-core interest in freedom of expression to be outweighed by an interest in being protected from a social nuisance, permit the potential sanction of imprisonment to be part of the scheme of protection. Notice that this does not really answer Wilson J.’s section 7 analysis, especially her point that section 7 has to be considered as a distinct ground of invalidity.

From this account, it might well seem that the application of the Oakes test in this decision vindicates Charter critics. For Dickson C.J.C. and Lamer J. arrived at the same result despite quite different inter-

24 Ref. re, supra, note 7 at 69.
25 Ibid. at 81-82.
26 Ibid.
pretations of legislative objective, and Dickson C.J.C. adopted the same construction as Wilson J. in her dissent. In addition, as I will now show, moral convictions do drive all three speeches; they are interpretative all the way down. For Dickson C.J.C. and Wilson J. failed to narrowly construe legislative objective in a way that avoids the moral condemnation of prostitution which Lamer J. took to be as, at least partly, constitutive of that objective.

B. Legal Moralism

The moral element which informs Dickson C.J.C.'s reasoning is easy to detect. He recognized that Parliament had sent a "mixed message" by enacting sections 193 and 195.1(1)(c) while permitting prostitution to remain legal, but he said that principles of fundamental justice did not ensure the enactment of "optimal legislation". Parliament did not have to "refrain from using the criminal law to express society's disapprobation of street solicitation". And that should be the Court's position until faced directly with the question of Parliament's competence to criminalize prostitution.27 Here he repeats words he had used before in R. v. Morgentaler28: "The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions".

Wilson J., in the course of her section 7 analysis, quoted this passage from Morgentaler. She then pointed out that it must be "equally true that where the legislature has not criminalized a certain activity it is because the legislator has determined that this uniquely coercive and punitive method of expressing society's collective disapprobation of that activity is not warranted in the circumstances". It followed for her that, whatever the reasons which lay behind the deliberate omission to make prostitution illegal, and whatever one's personal views on the subject, the legality of prostitution had to be recognized in any section 7 analysis.29

Her insight here is profound and can, I suggest, be elaborated as follows. To find that communication for the purposes of soliciting is non-core speech, and thus that the interest in protecting it is not weighty, and that a section 7 analysis is superfluous, one has to adopt the following proposition. The opinion that prostitution is immoral and should be stamped out is the constitutionally valid, legislative opinion which explains the provision in question; that is, the devaluation of the speech act of soliciting is premised on a moral judgment about the worth of the vocation of prostitution. It follows that Lamer J.'s broad construal of legislative objective is capable, while Dickson C.J.C.'s is not, of sustaining the criminalizing effects of section 195.1(1)(c). But it does not seem that the rest of the scheme of section 195.1, nor for that matter

27 Ibid. at 18.
29 Ref. re at 77 (emphasis in original).
section 193 (the bawdy house provision) can be justified without adopting that same broad construal. That this is the case is further shown by the fact that in reality neither Dickson C.J.C. nor Wilson J. actually succeed in expurgating morality from their characterization of legislative objective. And Wilson J.'s difficulties in this regard show why her reasoning does not escape the scope of her own insight.

Both Dickson C.J.C. and Wilson J. tell us that the problem before the Court is not merely a “social nuisance,” but one “arising from the sale of the public display of sex.”30 And Wilson J. says further that in issue is the offensive aspect of having to witness “prostitutes negotiating openly for the sale of their bodies....the high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children.”31

Here the judges are alerting us to an element often important in using the social disvalue of a nuisance as a justification for attaching criminal sanctions to that activity in order to discourage it. In many if not most cases in which people engage in the activity, they do so because it produces some social value for them and for others. Consider, for example, the many grocery stores in Toronto whose outdoor displays attract customers, make for a more colourful and vibrant city and maximize the space available for shopping, while creating often quite severe problems for pedestrians who merely want to proceed on their way along the sidewalk. Note that this situation is especially dangerous to children, who might carelessly venture out into the street in order to avoid their sidewalk pursuits being interrupted by the throngs outside the stores. Here the decision not to prohibit such displays is one that balances a social value against a disvalue and finds that the nuisance, while obvious and even on occasion dangerous, does not warrant regulation by criminal sanctions.

The point is that in order to tip the balance so that criminal sanctions aimed at eradicating the nuisance are warranted, the same element of social disapprobation which Wilson J. wants to avoid often seems essential. Society must consider the activity which creates the nuisance as something which deserves the scrutiny of the criminal law. Thus both section 193 and the whole of the scheme set out in section 195 are driven by what seems to be a morally condemnatory attitude towards prostitution. Indeed, if my understanding of Wilson J.'s section 7 analysis is correct, then it is difficult to see how she could limit it to section 195.1(1)(c). If section 193 and the rest of section 195 are aimed, albeit indirectly, at eradicating prostitution, then surely one has to ask whether the rights guaranteed by section 7 do not constitute a distinct ground for holding sections 193 and 195 invalid? This is because section 193 raises the potential for deprivation of liberty for doing something collectively which when done individually is recognized as legal.

30 Ibid. at 13 and 73.
31 Ibid. at 73.
In my view, the problem just identified arises partly because the real issue in the case did not arise directly and thus plays its role as a sub-text of the judgments. That issue is the constitutional validity of a provision which criminalizes prostitution with a view to its eradication. If it would be appropriate for the Court to strike down such a statute as invalid, and if the Criminal Code is an indirect way of seeking to achieve the same objective, then it should follow that the provisions of the Criminal Code implicated in the attempt are strong candidates for invalidity. Key to a decision about the invalidity of such a statute would be the fact that it illegitimately deprives people of the right to exercise their chosen profession by threatening them with deprivation of liberty.

Of course, both Beatty and the Charter critics would respond that the Court has no business making a decision about the constitutional validity of this legislative objective. Where they would differ is that Beatty would think that the Court was entitled to intervene at the second stage of the Oakes test, if it were found that the means adopted to implement the objective were not proportional.

It might seem that this problem can be solved by, as it were, coming clean about objective, as Lamer J. did. But then one is left with the question of why it was that Dickson C.J.C. and Wilson J. sought, albeit unsuccessfully, to avoid adopting Lamer J.'s broad and moralistic construal of objective. I think that it is in exploring this question that we discover the real roots of the problem which faced the judges. As I will now show, that question cannot be answered without at the same time indicating the liberal vision of the moral limits of the criminal law.

### III. Harm, Offensiveness and Neutrality

Liberals are committed to an ideal of individual autonomy, according to which individuals should be left to decide for themselves both what the good life is and how to pursue it. So liberals require that the state remain neutral on the question of how individuals should live their lives, at least to the extent of refraining from coercively imposing any conception of good on individuals. Thus liberals regard the use of the coercion of criminal sanctions to prevent individuals from pursuing their chosen activities as standing in need of a special justification. That justification must be such that it avoids legal moralism; it must not rely merely on the fact that some people regard the activity as immoral, but must adduce some other warrant or ground to justify coercion. The avoidance of legal moralism is taken as a mark of liberalism, since it expresses the liberal commitment to official or state neutrality in regard to different conceptions of the good life.

Wilson J., in her characterization of the legislative objective of section 195, points to the two kinds of justification for coercion which liberals have adopted. As we have seen, she says that the “high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children”. She points here to what we can call the Harm Principle and the Offense Principle.
The Harm Principle says that only activities which cause harm to individuals can be justifiably prohibited. One cannot, that is, prohibit an activity because one regards it as immoral, but because it harms. It need not be supposed that the Harm Principle is itself morally neutral. One will adopt it because one thinks that a society that limits coercion to occasions when a harm is shown is morally better for that reason. But important for advocates of the Harm Principle is that beliefs about the immorality of conduct cannot count as justificatory arguments for invoking the sanctions of the criminal law.

The Offense Principle seeks to supplement the Harm Principle by permitting prohibition on account not of the immorality of the activity but of its offensiveness. Both principles have considerable judicial backing in Canadian jurisprudence. For example, in deciding whether pornography falls within the definition of obscenity under the Criminal Code, judges resort either to a test of whether the content is likely to provoke harm or whether the content offends community standards. Notice that the principles risk collapsing into each other if one allows either that what is harmful is what the community considers to be harmful or that offense to community standards is a harm. Liberals (and judges) suppose that if legal moralism is to be avoided, the criteria of harm have to be identified quite apart from the question of what the community happens to think is immoral. But this is often difficult to do.

For example, Wilson J. does not tell us what the harmful effects are on those compelled to witness prostitution. She does not, that is, advert as Lamer J. does to the violence and drug dealing which might be thought to be necessary concomitants of street solicitation. Nor does she at this point focus on the social nuisance of street soliciting. Instead, she talks of the effects that result from “witnessing” prostitution.

Now one might suppose that in her special case of children, the harmful effect of witnessing the act is that children might be influenced to think that the exchange of sexual services for money is a worthwhile activity. But even if one thought that there was some special harm to children in witnessing solicitation, we do not know what the harm is to adults merely in witnessing it, beyond that they might find the activity offensive. One cannot get rid of these difficulties even if one understands Wilson J.’s point as one exclusively about the Offense Principle. That principle, I will argue, contradicts the liberal commitment against legal moralism.

In order for the Offense Principle to avoid legal moralism it must not punish people merely on the grounds that their conduct is immoral. Thus Dickson C.J.C. and Wilson J. both seek to find in the model of the tort of public nuisance safe liberal — that is not moralistic — ground for their construal of a valid legislative objective. And Joel Feinberg, in the most sustained attempt by a liberal political philosopher

---

to find such ground, relies on that same model. I have already suggested that, in the case of prostitution, an expression of social disapprobation through the criminal law cannot be divorced from a judgment of the immorality of prostitution, and I want now to provide an argument for this claim.

One argument for the Offense Principle is Lord Devlin’s. He said that a society has the right to use the criminal law to protect itself against moral disintegration. That is, a society can use the criminal law to protect its core morality — the moral ideas constitutive of its identity. He further identified the core as that which the average, reasonable person would feel strongly about. One way of justifying this test for the core is straightforwardly utilitarian — the law should reflect the moral preferences which the majority of people in a community hold. But, as H.L.A. Hart and others point out, such a test is unacceptable to a liberal since it puts all the liberties which liberals value at the mercy of what the majority happens to think is right.

Nevertheless, Hart, and Feinberg following him, still regard the Offense Principle as a legitimate supplement to the Harm Principle. Hart says in this regard that “the use of punishment to protect those made vulnerable to the public display by their own beliefs leaves the offender at liberty to do the same thing in private, if he can. It is not tantamount to punishing men simply because others object to what they do”. And he thinks that this argument justifies the English law on prostitution, which “has not made prostitution a crime but punishes its public manifestation in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive”.

Put differently, Hart’s justificatory argument seems to be as follows: if the ordinary citizen finds being compelled to witness some activity deeply offensive, and if that activity can be and is allowed to be pursued in private, it is legitimate to punish public manifestations of the activity. It is legitimate because that the activity can and is allowed to continue in private shows that it is not the activity itself that is objected to but merely its public manifestation.

But this argument for the Offense Principle is both illiberal and ultimately will collapse into something like Lord Devlin’s position. It is illiberal, first, because although some would find its roots in some of

36 Ibid. at 47-48.
37 Ibid. at 45.
John Stuart Mill’s remarks in *On Liberty*, it is important to Mill’s conception of the truth in moral matters that people not be shielded from what might offend them.

Feinberg recognizes that Mill’s view of truth requires the clash of different opinions. But he maintains that the kind of conduct that is involved when the category of offense seems relevant does not have what Mill regarded as the “‘redeeming social importance’ peculiar to assertion, criticism, advocacy, and debate”. Feinberg thus relies implicitly on the (American) distinction between high and low value speech and a further step is required in order to address the claim that what is in issue is not the clash of high value (that is, political) opinions but the offense involved in being an unwilling witness to some offensive activity or display.

In this regard, Jeremy Waldron argues that it does not seem sufficient for Mill that people know of the activity through some verbal expression, since it is only the shock of actual experience that gives true appreciation of what is at stake: “The moral, philosophical and religious confrontation that Mill is calling for must be public confrontation between the practising adherents of rival and antagonistic ethics.” That is, it is important that competing conceptions of the good life collide in public space because it is only through that public collision that awareness and experience are generated. The state must remain neutral in this process, by intervening only when this is justified according to the Harm Principle. If that is not the case, then lifestyles different from the mainstream conceptions of the good life will be driven into the closet where their existence can make “little contribution to the common good”. As Waldron says, what Mill called the “‘despotism of custom’ which... is the deadliest enemy of individuality and progress, might creep in under the cover of standards of decency to threaten those values all over again”.

The argument for the Offense Principle is illiberal, secondly, because it fails to take into account a common effect on those who are forced to confine activities which are fundamental to their conceptions of the good life to the closet of privacy. To require that they do is inconsistent with a liberal commitment to the worth of individual autonomy and involves legal moralism.

Suppose, for example, that in issue is a public and physical display by two gay men of their affection for each other — the kind of display considered normal though perhaps a little excessive between heterosexual partners. Surely in this situation homophobic people can say that their distress is caused by public indecency? It will not matter to the homophobes that they are not exposed to even more physical

manifestations of affection. What matters is that in public they are forced to confront clear evidence of what is likely happening in private.

But if, while heterosexual public displays of affection are not considered indecent, such displays by homosexuals are, then the relevant difference is the public perception of immorality. And that perception will force the non-conformist to hide his or her non-conformity in the closet, which is surely an effective and harmful sanction.

As Anthony Ellis has shown, Feinberg's account of the Offense Principle works only to the extent that it misleadingly trades off examples which we simply find disgusting.\(^42\) That is, Feinberg groups together and mixes, on the one hand, examples of explicit sexual behaviour, or mixed-race displays of affection, with, on the other hand, bizarre situations in which verminous people publicly excrete and eat their excretions. Ellis points out that while the smells and sights associated with the latter class do easily fall into a category of social nuisance, the former class requires further justification. In other words, we need a distinction between acts which are claimed to be offensive and acts about which one can say little more than they are disgusting, since the class of the offensive seems to amount to an assault on our moral sensibilities.

Feinberg to some extent perceives this need and says that the characteristic of the class of the offensive is "the public exhibition of that which, because of its extremely personal or intimately interpersonal character, had best remain hidden from view, according to prevailing mores".\(^43\) He speaks of the embarrassment involved in the public display of nudity, "which has an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed" and of the kind of result that is not "mere 'offense', but a kind of psychic jolt that can be a painful wound".\(^44\) But as Ellis points out, many public displays and events which are not widely considered indecent or offensive cause reactions of embarrassment and sexual stimulation and provoke unwanted thoughts.\(^45\)

Feinberg, as Ellis notes, tries to save the Offense Principle by placing restrictive conditions on its application, which he bases on

\(^{43}\) Feinberg, *supra*, note 33 at 73.
\(^{44}\) *Ibid.* at 87.
\(^{45}\) Ellis, *supra*, note 42 at 18-19.
Prosser’s analysis of the balance of interests in adjudicating claims of nuisance. These are:

(i) The offense felt must be a reaction that could reasonably be expected from “almost any person chosen at random, from the nation as a whole”.

(ii) The offensive behaviour must not be reasonably avoidable.

(iii) The offense must not be the result of abnormal susceptibility.

(iv) The person restrained from offensive behaviour “must be granted an allowable alternative outlet or mode of expression”.

Condition (i) might seem so strong that it rules out everything except the simply disgusting cases. But, as Feinberg’s own discussions of obscenity and pornography make clear, the test of reasonableness is not any more statistical than Lord Devlin’s appeal to the reasonable man. That is, reasonableness is in the eye of the judge or the philosopher.

In addition, by adapting Ellis’ argument slightly in the light of the discussion above we can see that Feinberg’s conditions cannot save the Offense Principle. Those who find an activity offensive because they regard it as deeply immoral will be no less offended by the fact that it happens in private. And it is no response to them to say that they are abnormally susceptible when they continue to object to the activity confined to the private. What they object to is what they know to be going on and the public display is merely evidence of that. It is no accident that the Criminal Code criminalizes both public solicitation and the keeping of ‘common bawdy houses’.

Nor is it any comfort to those whose activities are confined to the private because others find these offensive, that the private is given to them as an “allowable alternative outlet or mode of expression”. For this confinement devalues a choice of the good life in a debilitating way wholly inconsistent with a commitment to autonomy and an aversion to

46 Feinberg fails to pay sufficient attention to certain warning signals in Prosser. Prosser opens his chapter on nuisance by stating: “There is perhaps no more impenetrable jungle in the entire law than that which surrounds ‘nuisance’”. Prosser sees the source of this problem as largely the extension of the term from private actions for a “series of catch-all criminal offense, consisting of an interference with the rights of the community at large....[and whose] normal remedy is in the hands of the state”. See W.P. Keeton, ed., PROSSER AND KEETON ON TORTS, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1984) par. 86 at 616-18. Compare J.G. Fleming, THE LAW OF TORTS, 7th ed. (Sydney: The Law Book Company Ltd, 1987) at 379-81. In particular, Prosser argues at 652, par. 90 against the inappropriateness of tort remedies when the public nuisance is said to be such because of its possible effect “on the morals of the people, such as houses of prostitution, obscene movies, and massage parlours....The law of torts does not attempt to give redress to those who have been led into sin....”. Feinberg’s response would surely be that the remedy is sought in criminal law not in tort, and it is one based on offense and not on morality as such, or sin. However, that the remedy is based in the criminal law only makes things worse since, on my argument, it is legal moralism that activates the remedy.

47 I reproduce Ellis’ summary, supra, note 42 at 20-21.

48 See, e.g., the discussion in Chapter 11 of OFFENSE TO OTHERS, supra, note 33.
legal moralism. In addition, as Waldron would argue, it is a positive benefit for people to be compelled to witness what shocks their moral sensibilities, else they are deprived of the knowledge of alternative conceptions of the good life, or their own conceptions atrophy through lack of challenge. 49

Thus, the difference between Lord Devlin, on the one hand, and Hart and Feinberg, on the other, is merely that Hart and Feinberg would stop criminal regulation short of reaching into the private. But that compromise is illiberal and, because it fails to satisfy both those who have taken offense and those who have given it, it is hardly a compromise at all.

In fact, the Offense Principle turns the Harm Principle, to which the Offense Principle is meant to be but a supplement, on its head. For the Harm Principle works by establishing that a harm exists according to liberal criteria of what counts as harm, and then deciding by a consequentialist argument what should be done; for example, whether the criminal law is an appropriate part of the regime to eradicate the harm. That is, one first makes the argument that there is a harm, and then one engages in the question of what can be done about it. But the use of the model of public nuisance in the area of regulating offensiveness reverses that process by allowing the preferences that people happen to have to drive morality, with morality acting as a check only to the extent that the private is protected. What people happen to think is right, or, more accurately, what judges think that people think, calls the shots.

We now have an answer to the question I asked at the end of the last section. Dickson C.J.C. and Wilson J. sought a morally neutral construal of objective because they were reluctant to attribute to the legislature an attitude of legal moralism inconsistent with liberal principles. Moreover, the inconsistency is with principles protected by the Charter, for it is uncontroversial that a fundamental commitment of the Charter is to individual autonomy and thus to official neutrality between individual conceptions of the good life.

In other words, both judges, in order to find a meaning for a legislative objective that is constitutionally valid, look not merely to meanings which legislators might actually have intended, but also for a meaning that coheres with Charter commitments. And, since those commitments are to liberal, moral values, such as the value of individual autonomy, their morally neutral construal of objective is not itself morally neutral. They seek to purge moral elements from their construal of objective for the moral reason that the state should be neutral in regard to different conceptions of the good life.

This description of the judges' reasoning is important because it shows where Beatty's understanding of constitutional adjudication is

49 Waldron, supra, note 40 at 420-21, maintains that Mill would have been "horrified" by Bruce Ackerman's liberal utopia in which people can screen out stimuli they find distressing. See B. Ackerman, Social Justice in the Liberal State (New Haven: Yale University Press, 1980) at 179-80.
mistaken. It is relatively uncontroversial to state that, in determining the meaning of a statute, judges should engage in what is called "purposive interpretation". Judges should determine statutory meaning in light of the purpose of the statute. Indeed, the ready equation of "meaning" and "legislative objective" shows how prevalent this idea is. But "purpose" can mean at least two different things. It can mean the purpose which legislators actually intended the statute to have, which one determines by looking at the statute itself and, perhaps, at directly relevant preparatory materials such as parliamentary debates, committee reports, and so on. Or it can mean the purpose of the statute determined by understanding the statute in the appropriate interpretative context.

The first meaning of purpose, which is the one to which Beatty is committed, is unhelpful. Since the whole impulse for proposing a purposive approach is to solve problems about what the statute in fact means, it does not help to require judges to resort to what the statute in fact means. The idea of purpose becomes helpful only when it is understood not merely as the purpose of a particular statute, but as the purpose of the legal system.

This second understanding of purpose is not novel. It has a distinguished pedigree in judicial interpretation of statutes in the light of what judges took to be the values of the common law. Judges adopted an interpretative principle which is sometimes called a principle of charity. That principle says that judges should attempt to solve problems of interpretation by making statutes the best instruments they can be, which means interpreting statutes as if they were enacted in order to comply with fundamental legal values.50

It is important to see that this wider understanding of purposive interpretation does not suppose that problems of interpretation arise only because legislators failed to clearly communicate their meaning. Problems of interpretation also arise, perhaps even primarily arise, because of controversy about how particular statutes mesh with fundamental legal values. Indeed, since what these values are is itself a controversial question, the deepest roots of interpretative difficulties lie in conflicting understandings of what the fundamental values are and what their content is.

Charter adjudication is thus just an instance of an old tradition. But it is a striking instance. In the process of the gradual accretion of judicial understanding of the fundamental values of the common law, statutes will not, except in unusual circumstances, be radically out of step with judicial understanding. However, in a charter of rights and freedoms the purposes or fundamental values of the legal system are freshly and expressly stated in a document which gives judges the task of interpreting statutes in light of these purposes and values. Thus, the question of what particular statutes mean does become more radical. This is particularly the case with statutes enacted prior to a charter of

50 The most famous exposition of this principle is, of course, Ronald Dworkin's: see LAW'S EMPIRE (Cambridge, Mass.: Harvard University Press, 1986).
rights and freedoms, especially those whose historical roots are in eras prior to the one which directly gave birth to the charter.

In the nature of things, many of these statutes will have been enacted by legislators whose understanding of fundamental legal values was quite different from present understanding. Thus, such statutes will raise novel interpretative problems. However, judges who adopt a purposive approach will still interpret legislation on the basis of a principle of charity; that is, they will try to solve interpretative problems on the basis of reasoning about how the statute should be understood in the light of fundamental legal values. In a real way, this principle of charity expresses a doctrine of legislative deference for charter adjudication, because it requires judges, in so far as this is possible, to preserve statutes rather than strike them down.

In short, pace Beatty, the issues of constitutional validity and statutory meaning or legislative objective cannot be kept distinct, nor can they be determined in a morally neutral fashion. Nor, as I have tried to show, can the issues of meaning and validity be kept distinct at either stage of the Oakes test. In order for the judges to decide at the second stage whether the means were constitutionally valid in terms of proportionality to objective, they had to rely on a (purposive) understanding of the meaning of that objective.

Moreover, since the Charter does seem committed to the liberal ideal of individual autonomy, the judges in this case seem to have erred too far on the side of charity. For, by allowing in their different fashions a criminal regulatory scheme for prostitution to stand, the judges manifested the problem of a liberal political theory which adopts the Offense Principle as a supplement to the Harm Principle. The judges did, that is, allow legal moralism to drive their judgments.

If this analysis of the decision is right, then it seems that judges are faced with an intractable dilemma when adjudicating under the Charter. Either they opt for a kind of global non-interventionism, which means both that the inequities of the legislative status quo are perpetuated and the promise of the Charter remains unfulfilled, or, as an unelected elite, they use the Charter to thwart the democratic will when it appears to them that legislation is in contravention of Charter commitments. It is that dilemma which the Charter critics I referred to at the outset will think is exposed by my analysis of the decision in Ref. re. They will say that the analysis shows that judges are doomed to veer endlessly between subservience to the status quo and elitist reasoning according to their moral likes and dislikes. This is contradictory to democracy because it gives judges the power to substitute their own convictions of the good life for the views expressed by the majority through legislation.

Does my account then show that judges are doomed by the Charter to a discourse inappropriate to a democratic culture? Notice in this regard that Charter critics would seem committed to Lamer J.'s mode of reasoning, at least to the extent that he thought it appropriate to work
out what the moral message was that in fact prompted the legislation in issue and then to enforce that message. For that, it would seem, is the democratic and honest thing for a judge to do. But that also requires adopting Lord Devlin's view of the appropriate moral basis for judicial interpretation. Indeed, it is hardly democracy, but rather populism, since these Charter critics will think with Lord Devlin that legislation is wrong when it is out of step with popular thought on morality.

Ronald Dworkin has argued that this kind of populism does not take into account the place that the idea of a "moral position" plays in our understanding of the minimum justification required for legislation on morally controversial matters. In short, we do not think that legislation is even minimally justified unless it has gone through a process of justification or moral argumentation which avoids several obvious mistakes. Only when the position on which the legislation is based is a moral one in this sense should it be a candidate for incorporation into the law. Speaking of Devlin, Dworkin says that: "What is shocking and wrong is not his idea that the community's morality counts, but his idea of what counts as the community's morality".

However, Charter critics would point out that even if one concedes that legislation must be based on a moral position, one has not answered two crucial and closely related questions. First, how stringent is the test for what counts as a moral position to be, and, second, who is to adjudicate the issue of whether a position is in fact moral? If the test is the stringent one required by a liberal commitment to official neutrality between competing conceptions of the good life, then we will require judges to oversee legislatures with the dramatically contradictory results that Ref re exposes. Far better to give legislatures the final say in moral matters and to enhance the process of moral argumentation by encouraging general participation in politics and by making elected politicians more directly accountable to their electorate.

A full answer to the Charter critics is well beyond the scope of this essay. But a partial answer, which sketches the outline of the full one, lies in seeing that a liberal alternative exists to the kind of political position which produces the problem exposed by Ref. re.

IV. PROSTITUTION AND HATE PROPAGANDA

In a nutshell, the partial answer is that the issue of prostitution is one which judges should not adjudicate. This problem arises not because of a fault inherent in a liberal ideal of adjudication, but rather it inheres in the issue itself, which is not susceptible to regulation by coercive legislation.

There are two different routes to this answer. One arises as the response to my critique of the Offense Principle, and is informed by a commitment to a global official neutrality between conceptions of the

---

52 Ibid. at 255.
good life. A commitment to global neutrality says: the only appropriate adjudication between conceptions of the good life is by individuals deciding that question for themselves, in the light cast by a free market of ideas. The only legitimate coercive intervention in people's lives is then on the basis of the Harm Principle. The Offense Principle cannot legitimate coercion, since it is based ultimately in moral convictions or prejudices which a liberal will discount.

This liberal, or perhaps more accurately libertarian, position will regard coercive restraints on prostitution which cannot be justified under the Harm Principle as illegitimate. These restraints are the archaic survivors of regimes which sought to restrict general experimentation in the possibilities of human sexuality, often by picturing women as helpless beings, who had to be protected from the pollution of sexual contact outside the limits of monogamy. To do away with such restrictions is a victory for humankind in general, but also for women in particular. It properly recognizes women as autonomous individuals, fully capable of entering into all those contracts which seem to them to be appropriate, including transactions pertaining to sexual services.53

Proponents of this position would suggest that prostitution is just one among many experiments available for those who seek to establish the good life for themselves. Thus, judges who are empowered by a liberal democratic constitution to test the validity of legislation should strike down all coercive restrictions on prostitution, except those few that might be directly justified by the Harm Principle. In particular, judges should protect the speech employed in advertising prostitution, since it is by that means that the possibilities available can be communicated by those who choose to do so, to those who might choose to engage in the experiment.

An altogether different route to the answer that prostitution is not susceptible to regulation by coercive legislation is a feminist one.54 Many feminists greatly doubt that (female) prostitution involves fully autonomous women offering services to men that increase the prospects for individual experiments with the good life. Rather they think that most prostitutes come from the ranks of women, increasingly from the ranks of young single mothers, who are forced to resort to selling sexual services as a means of earning a living, either because there seems no


other option open to them, or because the other options seem qualitatively even worse. Moreover, for the most part these women do not sell their services to men interested in sexual experimentation as a part of the good life, but to men who view an oppressive status quo as legitimate. These men view women as generally subordinate and in particular as the willing objects of male sexual desire. They thus regard the exchange of money as evidence of the woman’s consent to be used as the subordinate object which they take all women to be. In sum, such feminists would say that, at least to a large extent, the resort of many women to prostitution is a result of the general situation of inequality in which women find themselves.

Now this route might seem to be the one that Lamer J. took, since he relied on arguments about the way in which prostitution degrades and subordinates women to justify as a valid legislative objective the use of the criminal law to eradicate prostitution. But feminists would point out that when the criminal law is invoked to regulate or eradicate prostitution, it addresses neither the causes of women’s subordinate status nor the attitudes which are constitutive of those causes. Instead, the criminal law gets used as a means of controlling women, usually in the cause of some right-wing campaign. One can see this without deciding one way or the other the issue of whether prostitution is an activity which should be morally condemned and thus prohibited by criminal sanctions. Even if the answer to that question is positive, it would be astoundingly hypocritical to issue that condemnation, yet not deal with the social problems which result in the most vulnerable of those in the sex trade plying their trade in a fashion which increases their vulnerability. For those who fall into this category work on the streets where they are most at risk from various sources, including the criminal law.

The situation as it stands is hardly less hypocritical. Until society has mustered the collective will to deal with what seem to be the circumstances which both force young people onto the streets and increase their vulnerability there, we have to postpone judgment of the morality of prostitution absent from these circumstances. And until that time, the only provisions which should be accepted as constitutionally valid are those which are aimed at eradicating those circumstances and protecting, without intrusively regulating, those still subject to them.\textsuperscript{55}

To those holding this position, the protection of speech is important, not because it is about politics in the usual sense of that word, nor because it is about communicating a conception of the good life. Rather, speech is protected because without that protection people whom society has already made vulnerable are made even more so. This shows that the interest in protecting speech can be a weighty one even when the interest does not pertain either to the kind of political communication which the American high value/low value distinction privileges or to the

\textsuperscript{55} Child prostitutes would be a special case, but still the criminal law would be inappropriate.
more capacious category which Dickson C.J.C. outlined in Keegstra.56 As Wilson J. suggests,57 speech is protected simply because if it is not, those who are engaged in a legal profession are disabled from practising it; and that is one reason why speech is given specific constitutional protection.

In short, this feminist position is that prostitution should be left as far as possible untouched by the criminal law because the criminal law cannot legitimately deal with the problem of prostitution. For Wilson and L’Heureux-Dubé JJ., the legal basis for this position lies in the fact that there is a recognition of this point in the legislative avoidance of a direct attack on prostitution.58 But it goes further, in line with the discussion above, by ruling all indirect attacks unconstitutional.

Does it then matter that this conclusion is reached via a different route than the libertarian one? It does, because this feminist conclusion about the inappropriateness of the criminal law is purely instrumental. It is not that these feminists think that the criminal law should be avoided because to use it would violate global official neutrality in regard to conceptions of the good life. They want the patriarchal conception of the good life, which gives prostitution its social meaning, to be eradicated. But they think that using the criminal law against prostitutes is likely to reinforce rather than subvert patriarchy. Thus, it remains in principle open to feminists to recommend that criminal sanctions be used where they would be more appropriate, perhaps, for example, in the regulation of pornography.59

Is there a basis for this argument in the Charter? The answer is positive once one sees that there is more to the Charter than a commitment to individual autonomy and thus official neutrality between conceptions of the good life. The basis of my argument is what I take to be a crucial difference between the majority and the dissentients in Keegstra, where the issue was the hate propaganda section of the Criminal Code, section 319(2): “Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [a crime].”

I think that this difference can be fairly said to arise from the different understandings of the role of section 15 of the Charter articulated by Dickson C.J.C. for the majority60 and McLachlin J. for the

56 Supra, note 22.
57 Supra, note 7 at 69.
58 Ibid. at 77.
59 A feminist understanding of pornography has much in common with a feminist understanding of prostitution: both by and large involve the commodification of women for the gratification of men and thus serve to perpetuate the inequality of the patriarchal status quo. But a feminist position can approve of the criminal regulation of pornography since, if appropriately done, that regulation will target the producers and distributors of pornography and not its victims. For a similar treatment of Canadian jurisprudence on obscenity and pornography, see D. Dyzenhaus, Obscenity and the Charter: Autonomy and Equality, 1 C.R. (4th) 367.
60 Wilson, L’Heureux-Dubé and Gonthier JJ.
dissentients. Section 15(1) of the Charter says that: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, ethnic origin, colour, religion, sex, age or mental or physical disability".

In Keegstra, Dickson C.J.C. said that hate propaganda is a form of expression which falls within the protection of section 2(b) of the Charter. In accordance with his understanding of the category of high value speech, he recognized that such propaganda, because it aims at influencing the political process, could not be said to fall outside the category. But, as I have already pointed out, he thought that the very low probability of such speech being true meant that it need not be accorded much weight within the category. However, this last consideration cannot be the touchstone of his reasoning, since he also suggested that the fact that true statements were used as part of hate propaganda did not detract from the harm which a hate propaganda law seeks to avert. More helpful, I think, is his suggestion that the two other values he took freedom of expression to serve — political process and individual self-fulfilment — are endangered by the expression of hate propaganda.

In this regard, while Dickson C.J.C. saw some harm in the fact that the society desired by the hate propagandists would be one hostile to democracy, he seemed to regard the danger to the value of autonomy or self-fulfilment as more weighty. He pointed out that autonomy "stems in large part from one's ability to articulate or nurture an identity derived from membership in a cultural and religious group". Since hate propaganda by definition seeks to denigrate the group at which it is directed, it also seeks to deny the possibility of autonomy to members of that group.

Now it is true, as Dickson C.J.C. recognized, that in denying hate propagandists freedom of expression one denies them the freedom to propagate the ideas, and so strengthen the position, of their group. But the theme which runs through his reasoning is that a precondition of autonomy is the equality promised by section 15:

The message of the expressive activity covered by s. 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred, Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

61 La Forest and Sopinka JJ.
62 Supra, note 22 at 158.
63 Ibid. at 185.
64 Supra, note 23 and accompanying text.
65 Supra, note 22 at 205.
66 Ibid. at 184-85.
67 Ibid. at 184.
68 Ibid. at 179.
McLachlin J., by contrast, found that there was no violation of section 15 of the Charter since that section protects individuals from inequality only when the source of the inequality is a law or some other action of the state. She thus, by implication, rejects a role for section 15 such that the value of equality which it protects has a fundamental place in the interpretation of the structure of Charter rights. And once that role is rejected, there is indeed no appropriate criterion to distinguish between the expression of hate propagandists and any other kind of expression.

Notice that the coercion of section 319(2) is justified for the former Chief Justice not by offense but by what he takes to be the harm of hate propaganda. That harm is not conceived narrowly. It is harm to an interest which individuals have in equality. It follows, as his judgment shows, that it is appropriate for the legislature to seek to establish by coercion a public culture which is built in part on a deeply moral value. But it also follows that when the coercion of the criminal law would in fact serve to increase inequality, then the particular coercive measure involved must be ruled unconstitutional. And if the feminist understanding of the world of prostitution is correct, then the coercive regime of sections 193 and 195.1 of the Criminal Code is unconstitutional since it targets the victims of inequality.

Even if this line of reasoning has a good foothold in the Charter, is it consistent with liberalism? The answer depends on what one takes liberalism to be. Should one understand it as the libertarian doctrine which adopts a stance of global neutrality, or as a doctrine which argues that a precondition for the autonomy which liberals value so highly is a backdrop of substantive equality?

To those who adopt the latter view, liberalism 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. This is the kind of liberalism for which such notable thinkers as John Stuart Mill, John Rawls and Ronald Dworkin have in their different ways argued.

I want to suggest some reasons that recommend egalitarian liberalism above its libertarian rival. One is that it does map onto the approach substantially adopted in some Charter adjudication, most notably in Keegstra. This is not to say that this brand of liberalism is incontrovertibly required by the Charter. As McLachlin J. perceptively pointed out in her dissent to that decision, the "conflict...is not between rights, but rather between philosophies". As I have already suggested, I understand her point to be that the issue cannot be decided on a purely

---

69 Ibid. at 238.
70 Ibid.
textual basis. It will be decided at a more abstract level, in this context, by the place one gives to the value of equality.

However, it is not insignificant that the Charter does give considerable textual attention to equality. More important is that, as the division in *Keegstra* seems to illustrate, a formalistic understanding of equality, such as the one adopted by McLachlin J., does seem to leave in place regimes of inequality which might make one wonder why the Charter was enacted in the first place.

The importance of the value of equality, when it is not understood formally, is that it requires that other values such as individual autonomy and freedom of expression be made sense of in the social context in which they are supposed to work in the general interest of individuals. In that context, harm is not conceived narrowly as something that happens when one individual physically injures another. Harm also includes harm to one's essential interests, most notably the intimately related individual interests in autonomy and equality.

In the absence of that context, values such as autonomy and freedom of expression take on a sacred quality which works mainly to the advantage of those whose position on the top of the social pile guarantees them access to the goods which are merely promised to most others. The status quo, with all its inequities, then gets perpetuated with the Charter serving to legitimate that process by stating promises which are never delivered.

It might seem, however, that even if egalitarian liberalism can plausibly be said to have a textual basis in the Charter, nevertheless to ask judges to embrace it invites wholesale judicial activism totally inconsistent with the spirit of democracy. That is, we have come full circle to the Benthamite criticism of Charter adjudication.

Notice that for Charter critics, McLachlin J.'s formalistic approach to equality is no more in keeping with the spirit of democracy than that recommended by egalitarian liberalism. As her dissent in *Keegstra* shows, the formalistic approach to equality can lead to judicial activism since, in that case, she voted to strike down the hate propaganda section. This shows that the egalitarian liberal approach is no more or less activist than any other interpretative approach. It all depends on the content of the legislation which has been enacted by Parliament.

Of course, this is precisely the problem that animates Charter critics. Judges, they think, should have no role in assessing the validity of legislation in accordance with their moral convictions. This claim presupposes that there is some legislative objective which can be determined uncontroversitely to be the expression of the democratic will. But, as I have argued, it seems much more likely that one of the reasons a statute comes under the scrutiny of adjudication is that there is no one uncontroverted meaning. This is clearly the position in *Ref. re*. But even in *Keegstra* there was no more than superficial agreement between the majority and the dissentents as to meaning. The majority took it to be

---

71 See s. 28, in addition to s. 15.
part of the very meaning of objective that proscribed material is material that seeks to diminish equal concern and respect, while the dissentients did not give equality this constitutive role in the determination of meaning.

This point is instructive since it reveals what I take to be the real worth of tests such as that in *Oakes*. A striking feature of the *Oakes* test, and I suspect of any interpretative test of this kind, is that the very same considerations that a judge employs in the initial characterization of the issue usually crop up throughout the application of the test. As we have seen, in the view of Charter critics this feature shows that these tests are mere facades, while in Beatty's view it shows that judges are wrong in allowing moral considerations to determine their initial characterization of objective.

In my view, what this feature tells us is that one can only find out what the objective is at the end of the process of interpretation. Thus, the characterization of objective can only be done provisionally at the start of the process of adjudication. But this does not mean that the process of interpretation is a mere rationalization of a particular "judicial hunch".

The first stage of the *Oakes* test requires that judges make manifest their understanding of an appropriate legislative objective, while the other stages require that understanding is justified both in terms of the normative commitments of the *Charter* and by the way it will work in the real world. It thus requires judges to engage in a discourse of moral argumentation which is inherently pragmatic.

To a large extent, the real work is done at the first stage of characterization of objective. It is really that characterization which determines whether the legislation meets the standards of the *Charter*. But it is not a characterization determined by a knee-jerk reaction. Rather, it is the product of the interpretative process which the rest of the *Oakes* test requires. We should not then be surprised if, in order to determine a judge's understanding of objective, we have to read the whole of the judgment. For that is precisely the point of the *Oakes* test — to make characterization of objective a matter of public justification.

This brings me to my last question. If egalitarian liberalism and democracy cannot be reconciled along the lines Beatty suggests, can they be reconciled at all? I think they can if we attend to the idea which was mentioned above of a "moral position". Recall that the idea was suggested by Dworkin to offer a criterion which would allow us to discriminate appropriately between the legitimate expressions of a community's morality and mere populism.

In crude outline, Dworkin says we have to know why we want democracy before we can answer any question about conflicts between democracy and liberalism.\(^2\) The answer to that question is to be found

---

\(^2\) See, e.g., R. Dworkin, *Do We Have a Right to Pornography?*, in R. Dworkin, ed., *A MATTER OF PRINCIPLE* (Cambridge, Mass.: Harvard University Press, 1985) 335, especially at 359-65. Dworkin concludes in this essay that there is a limited right to pornography. But as R. Langton has shown, his conclusion in this regard is in tension with his arguments; *Whose Right? Ronald Dworkin, Women, and Pornographers* (1990) 19 PHIL & PUB. AFF. 311.
in the classical utilitarian position that we want a political system that will respect the right of each person to count equally when individual preferences enter into the calculation of what should be done. But it follows that one cannot then adopt an attitude of global neutrality in regard to preferences. Preferences which subvert a structure which seeks to ensure that each individual counts equally have to be screened out. No one should be counted as less than equal merely because a majority disapproves of his or her way of life. Thus, a democratic society needs some appropriate screening mechanism or filter such as a liberal constitution.

In my view, Dworkin's argument provides the most plausible reconciliation of democratic and liberal ideals. Moreover, once the value of equality is given a fundamental role in interpretation, the argument seems to map nicely onto the Charter, which supposes in section 1 that democracy and freedom are not contradictory. As in fact seemed to happen in the Keegstra decision, the value which structures reasoning on apparent conflicts between democracy and freedom is the value of equality, since it is that value which provides the context for a just adjudication of such conflicts. In a sense, offense to community morality plays a role if the offense is to the values which a liberal democratic society must hold dear. The offense must be to the sensibilities of the community which make it possible for individuals to form and explore their own conceptions of the good life.

Of course, to adopt this argument is to take a very particular political position. But the lesson to be learned from Ref. re and from Keegstra suggests that judges have to take such a position. The judgment in Keegstra also suggests that once much of Charter adjudication is seen to be about appropriate conceptions of the political good, judges will have to engage explicitly in a debate about what conceptions should inform their interpretations. If they fail to do this, they will end up in the kind of confusion which seems to beset Ref. re. The requirement of more explicit interpretation would move them away from the merely personal conceptions of the good life which Charter critics fear, to those which are capable of a public justification in accordance with constitutional commitments.

Whether or not one thinks that such a judicial debate should form part of a properly functioning democracy is a question the answer to which goes beyond the scope of this essay. But I hope at least to have gone some way to providing that answer in arguing that the problems which beset the judges in Ref. re are not necessarily the product of a contradiction inherent in the very idea of judicial interpretation in accordance with liberal constitutional norms. Rather, they are the product of a commitment to global neutrality which liberals would be well advised to drop.

73 For an argument that bears directly on this issue, see R. Dworkin, Equality, Democracy and Constitution: We the People in Court (1990) 28 AlTA L. Rev. 324.
The decision in Moorcroft v. Doraty & Kebe appears to establish several specific duties for a solicitor retained after an offer to purchase real property is made and accepted. These include: (1) ensuring that his or her clients understand the initial agreement; (2) conducting a full and accurate search of title; (3) disclosing, in full, the state of the title prior to closing, and (4) advising on how to abort a binding contract with the vendor's consent or to breach it without such consent.

However, the writer's view is that the decision in Moorcroft doesn't accord with the approach taken by the Ontario Court of Appeal in its 1986 decision, Blinkhorn v. Ainsworth; Hodgson Third Party. In that case, the Court carefully examined all relevant provisions of an Agreement of Purchase and Sale in order to determine responsibility and liability. What is implicit in Blinkhorn is that a purchaser's solicitor will be absolved of negligence if he or she does not search for rights of way under an agreement excluding these from good title.

Applying this precedent to the facts in Moorcroft, the writer reaches a different result than that of the High Court. Although the property purchased by the Moorcrofts was subject to a right of way, by virtue of the agreement between the vendor and the purchasers, the Moorcrofts were precluded from rescinding the contract. The couple's solicitor was not