PARENTAL RIGHTS OVER TRANSGENDER YOUTH: FURTHERING A PRESSING AND SUBSTANTIAL OBJECTIVE?

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Parental rights are increasingly being invoked to oppose the growing inclusion of trans youth in education. Recently, some provinces have proposed or adopted laws and policies predicated on the belief that parents have a right to be informed of their child's choice of name and pronouns at schools and that trans youth should not be allowed to change the names and pronouns they use at school without parental consent, which I term "blanket veto and disclosure laws." In this article, I explore whether blanket veto and disclosure laws can be justified under two dominant conceptions of parental rights — parental authority and parental entitlement. Using the framework provided by section 1 of the Canadian Charter of Rights and Freedoms, *I argue that blanket disclosure and veto laws cannot be justified under either conception of parental rights. Conceived as protection of parental authority, blanket veto and disclosure laws are unjustified because they are not rationally or narrowly tailored to their objective. Conceived as protection of parental entitlement, the laws are unjustified because their objective is inconsistent with the values of a free and democratic society. Regardless of the conception of parental rights we adopt, blanket veto and disclosure laws are constitutionally and politically deficient.*

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I. INTRODUCTION

Parental rights movements have long mobilized to challenge governmental and institutional policies perceived to undermine parents' control over their children's education, medical decisions, upbringing, and values.[1] Oftentimes, the challenged policies limit parental authority in order to prevent harm to the child, protect their best interests, or recognize their constitutional rights. Recent years have seen a resurgence of parental rights rhetoric in opposition to education about trans realities and respect for trans youths' gender.[2] Deployed against trans-inclusive policies, the language of parental rights has served to "exacerbate anxieties parents may have about their children becoming who they are."[3] In Canada, growing opposition to trans inclusion in education led to the 1 Million March 4 Children on 20 September 2023.[4] Under the broad banner of defending parental rights and protecting children, some participants in the march called LGBTQIA2S+ counter-protesters "groomers," "pedophiles," and "child abusers," performed Nazi salutes, and chanted that "Canada has one flag" to express opposition to the Pride flag.[5] In one picture from the march, a child can be seen holding a sign stating "I belong to my parents."[6]

Against this background of parental rights discourse, some provinces have proposed laws and policies that would require schools to secure parental consent before respecting trans students' requested names and pronouns (hereinafter "blanket veto and disclosure laws").[7] The scope and mechanisms of these laws are heterogeneous and often vague, but they typically apply until the age of 16, do not include any exceptions for mature minors or concerns about the child's safety, and sometimes include an obligation to disclose the child's request to use different names and pronouns to their parents.[8] Even in the absence of an express disclosure requirement, youth are pushed to out themselves to parents if they want

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1 Corinne L Mason & Leah Hamilton, "How the 'Parental Rights' Movement Gave Rise to the 1 Million March 4 Children," *The Conversation* (20 September 2023), online: [perma.cc/V2QA-6R6Z]; Jenna Benchetrit, "Where did the Term 'Parental Rights' Come From?" *CBC News* (23 September 2023), online: [perma.cc/46SS-28JS]; Brooke Schultz, "The History Behind 'Parents' Rights' in Schools," *Associated Press* (14 November 2022), online: [perma.cc/SQP8-PTES].

2 Jenna Benchetrit, "How the Parental Rights Movement Resurged in Response to Trans Inclusivity in Classrooms," *CBC News* (8 April 2023), online: [perma.cc/ZT7X-T7WQ]; Mason & Hamilton, *ibid*; Schultz, *ibid*. The surge in parental rights rhetoric, especially in the United States, has also targeted education on racism: LaToya Baldwin Clark, "The Critical Racialization of Parents' Rights" (2023) 132:7 Yale LJ 2139.

3 Cris Mayo, "Distractions and Defractions: Using Parental Rights to Fight Against the Educational Rights of Transgender, Nonbinary, and Gender Diverse Students" (2021) 35:2 Educational Pol'y 368 at 369.

4 Mason & Hamilton, *supra* note 1.

5 Jacqueline Gelineau, "Kelowna Residents Shocked by Apparent Nazi Salute at Anti-SOGI March," *Victoria News* (26 September 2023), online: [perma.cc/3CZP-GA8X]; see also Canadian Anti-Hate Network, "Important Context About the '1 Million March 4 Children'" (15 September 2023), online: [perma.cc/N97J-W9CR]; Michelle Cyca, "'Parents' Rights' Rhetoric is Rooted in Radical Conspiracy Theories," *The Walrus* (11 October 2023), online: [perma.cc/R39S-7C39].

6 Rowan Jetté Knox, "This broke my heart today" (20 September 2023), online (social media post): [perma.cc/HA5Q-SYZE].

7 To ease writing, I indiscriminately refer to both laws and policies as "laws." The *Charter* and the *Oakes* test apply equally to both: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 40, 46 [*Wilson Colony*].

8 The language of the Saskatchewan law is ambiguous. Its terms seem to contemplate but do not mandate disclosure. However, the model school policy offered in its appendix requires courts to seek out parental consent as soon as a request to change name or pronouns is made, effectively creating a disclosure requirement: Saskatchewan, Ministry of Education, *Use of Preferred First Name and Pronouns by Students* (Regina: Ministry of Education, 22 August 2023), online: [perma.cc/MH7H-GLFY] [Ministry of Education]. See also Bill 137, *The Education (Parents' Bill of Rights) Amendment Act, 2023*, 3rd Sess, 29th Leg, Saskatchewan, 2023 (third reading 20 October 2023), SS 2023, c 46 [*Parents' Bill of Rights*].

to use different names or pronouns at school. Moreover, in line with governments' stated desire to ensure parental involvement in children's gender development, some schools have interpreted ambiguous laws as imposing a disclosure requirement.[9]

At present, blanket veto and disclosure laws have been adopted by Saskatchewan and New Brunswick, have been announced in Alberta, and comments by members of the Ontario cabinet suggest that the province may follow suit.[10] Invoking the language of parental rights, Saskatchewan Premier Scott Moe explained the law's purpose as "protecting parents' rights in education" whereas New Brunswick Education Minister Bill Hogan argued that refusing a child's chosen pronouns was "a parent's right."[11] The invocation of parental rights is often framed as a right against schools, although it is the child's decisional autonomy that blanket veto and disclosure laws override. The laws were reportedly influenced by religious and anti-trans advocacy groups and were heavily criticized by human rights groups, healthcare associations, teachers' unions, and the children's advocates from both provinces.[12] Shortly after their adoption, the laws were challenged in court for violating trans children's right to equality and right to life, liberty, and security of the person.[13] The rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* apply to children as well as adults.[14] In Saskatchewan, the government invoked the notwithstanding clause to circumvent a judicial injunction against the law.[15] Litigation is ongoing in both provinces.

In this article, I highlight fundamental problems with invoking parental rights to restrict or abrogate the rights and freedoms of trans youth. By distinguishing between parental

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9 *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2023 SKKB 204 (Affidavit, Nicholas Day) [*UR Pride Centre*] (on file with author).

10 *Parents' Bill of Rights*, *supra* note 8; Ministry of Education, *supra* note 8; New Brunswick, Department of Education and Early Childhood Development, *Policy 713: Sexual Orientation and Gender Identity* (Fredericton: DEECD, 2023) online: [perma.cc/U8J5-XNBS]; Emma Teitel, "Stephen Lecce's Stance on Gender Identity in Schools is a Recipe for More Homeless Youth," *Toronto Star* (2 September 2023), online: [perma.cc/A326-B634]; Ben Cohen, "Doug Ford Takes Aim at Ontario School Boards Over 'Indoctrinating' Students on Gender Identity," *Toronto Star* (10 September 2023), online: [perma.cc/2WSF-V5GX]; Janet French, "Alberta Premier Says Legislation on Gender Policies for Children, Youth Coming this Fall," *CBC News* (1 February 2024), online: [perma.cc/6GFG-CKRX].

11 Jeremy Simes, "'We Are Not Backing Down': Premier Moe Says Legislation on Parental Rights Coming This Fall," *CBC News* (8 September 2023), online: [perma.cc/8YHS-5SQD]; Sean Boynton, "As Anti-LGBTQ2 Hate Grows in Canada, Advocates Say It's 'Never Been as Scary,'" *Global News* (8 January 2023), online: [perma.cc/MP5T-3HBQ].

12 Jeremy Simes, "Christian Group Says It Influenced Saskatchewan Government Over Pronoun Rules," *The Globe and Mail* (8 September 2023), online: [perma.cc/3NWG-GQG2]; Barbara Simpson, "Group Sounded Alarm on 'Harmful Part' of 713," *Telegraph-Journal* (15 June 2023) A.1; Scott Martin, "Saskatchewan Implements Anti-Trans School Policies, Endangering Youth," *Rabble* (23 August 2023), online: [perma.cc/UBR3-CDUE]; Canadian Union of Public Employees, "CUPE Statement on the Government of Saskatchewan's Anti-Trans Policy" (29 August 2023), online: [perma.cc/D8UG-7HX6]; Alec Salloum, "Sask. Advocate for Children Says Pronoun Policy Likely Violates Human Rights Code," *Regina Leader-Post* (15 September 2023), online: [perma.cc/B3WL-CZSC]; Hadeel Ibrahim, "N.B. Child and Youth Advocate Calls for Reversal of 'Shoddy' Changes to LGBTQ Policy for Schools," *CBC News* (12 June 2023), online: [perma.cc/9NVR-FT6Y].

13 Andrew Benson, "First Hearing for Sask. LGBTQ2 Group Lawsuit Over Government Pronoun Policy in Schools Announced," *Global News* (5 September 2023), online: [perma.cc/4GW8-DPWW]; Hadeel Ibrahim, "CCLA Lawsuit Asks Court to Quash Parental Consent Rule in N.B.'s Gender-Identity Policy," *CBC News* (8 September 2023), online: [perma.cc/38B3-YATA].

14 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See e.g. *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 [*AC v Manitoba*]; *R v Sharpe*, 2001 SCC 2 at para 158.

15 The Canadian Press, "Saskatchewan Legislature Passes Pronoun Bill in Special Sitting," *Toronto Star* (20 October 2023), online: [perma.cc/BG3P-8GU4]; "Sask. Premier 'Jumping the Gun' with Turn to Notwithstanding Clause for Pronoun Policy: Expert," *CBC News* (2 October 2023), online: [perma.cc/25TX-D6CL] [CBC News, "Pronoun Policy"]; *Parents' Bill of Rights*, *supra* note 8.

authority and parental entitlement, I demonstrate how blanket veto and disclosure laws either fail to use rational means of furthering their aims or pursue aims that are incompatible with the values of liberal democracies. In other words, parental rights arguments are either illogical or illegitimate, failing to accord with the warrants of instrumental or substantive rationality.[16] While I focus on blanket veto and disclosure laws, my arguments are likely applicable, *mutatis mutandis*, to many measures predicated on parental rights.

I develop my arguments by focusing on how different conceptions of parental rights fit into the justificatory analysis prescribed by section 1 of the *Charter*. Under the *Charter*, laws that impair human rights and freedoms are nonetheless constitutional if they "can be demonstrably justified in a free and democratic society."[17] This justification exists where the law is rationally connected to a pressing and substantial objective, impairs the rights and freedoms as little as possible, and is proportionate overall.[18] This justificatory standard is known as the *Oakes* test. Would the objective of protecting parental rights constitutionally justify blanket veto and disclosure laws if the laws were found to impair trans youth's right to equality and right to life, liberty, and security of the person?

I argue that parental rights cannot be used to justify blanket veto and disclosure laws under the *Oakes* test because, under one understanding of parental rights, the laws are not appropriately tailored to their objective and, under another understanding of parental rights, the laws lack a pressing and substantial objective. Regardless of how we understand parental rights as a governmental objective, blanket veto and disclosure laws fail the *Oakes* test. These laws also likely fail the proportionality prong of the *Oakes* test; however, defending this claim is beyond the scope of this article.

One of my goals in making this argument is to foreclose slippages between two conceptions of parental rights. Because blanket veto and disclosure laws fail different parts of the *Oakes* test depending on how we understand parental rights, there is a risk that governments would invoke one conception of parental rights to get past the pressing and substantial objective requirement of the *Oakes* test and invoke a different conception of parental rights to establish rational connection and minimal impairment. This would effectively allow governments to reach the last proportionality stage of the *Oakes* test even though the laws should fail at an earlier stage of the *Oakes* test under either conception of parental rights.

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16 Scholars have proposed many conceptualizations of substantive rationality. See e.g. Stephen Kalberg, "Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History" (1980) 85:5 Am J Soc 1145; Brad Hooker & Bart Streumer, "Procedural and Substantive Practical Rationality" in Alfred R Mele & Piers Rawling, eds, *The Oxford Handbook of Rationality* (Oxford: Oxford University Press, 2009) 57; Carla Bagnoli, "Constructivism in Metaethics" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2021 Edition, online: [perma.cc/R9H4-PFW7]. I do no propose to select among them here. For my purposes, it suffices to say that such parental rights arguments rely on values that cannot be reconciled with various values that are fundamental to liberal democracies, such as liberty, equality, and opposition to domination. For someone who holds onto those values, parental rights arguments in favour of restricting the rights and freedoms of trans youth are irrational.

17 *Charter*, *supra* note 14, s 1.

18 *R v Oakes*, 1986 CanLII 46 at paras 69–70 (SCC) [*Oakes*]. For a more recent case, see *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 38 [*Frank*].

What are these two conceptions of parental rights? For the purposes of this article, I call them "parental authority" and "parental entitlement."[19] Under the conception of parental rights as parental authority, parental rights refers to a "protected sphere of parental decision-making which is rooted in the presumption that parents … are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself."[20] Conceived in this manner, parental rights may include self-regarding elements such as one's "deep personal interest as parents in fostering the growth of their own children," but remain fundamentally bound up with and limited by children's best interests.[21] Parental authority is one of the foundations of contemporary Canadian family law.

Under the conception of parental rights as parental entitlement, the rights of parents qua parents are independent from the child's interests and amount to a freestanding right to make decisions for the child and exercise control over them. Subject to limits imposed by valid laws, parents have a personal and property-like interest in controlling their child regardless of whether the decisions they make further or injure the child's interests. Parental entitlement is justified because children are an extension of their parents, and the goal of parenting would be something like "expressing one's genes and values to and through children."[22] While children's best interests may matter, they remain independent from and sometimes in competition with parental entitlement. Parental entitlement is reminiscent of earlier conceptions of children as the legal property of their parents.[23]

Distinguishing between these two conceptions of parental rights is important due to the different relationships they entertain with the *Oakes* test. Preserving the best interests of the child by protecting parental authority is indubitably a pressing and substantial objective, but laws that are not tailored to serve children's best interests are unlikely to demonstrate a rational connection or minimal impairment. By contrast, laws that expand parental control in service of parental entitlement may well demonstrate a rational connection and perhaps minimal impairment — they do what they claim to do — but protecting parental entitlement seems unlikely to be a pressing and substantial objective given its objectionable property-like nature.

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19 This division of parental rights into two distinct conceptions is sketched, albeit using different terminology, in: Jonathan Montgomery, "Children as Property?" (1988) 51:3 Mod L Rev 323; Jeffrey Shulman, *The Constitutional Parent: Rights, Responsibilities, and the Enfranchisement of the Child* (New Haven, Conn: Yale University Press, 2014).

20 *B(R) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 at 372 (SCC), La Forest J [*Children's Aid Society*]. A unanimous Supreme Court adopted a narrower framing in *Augustus v Gosset*, 1996 CanLII 173 at para 53 (SCC) [*Augustus*], excluding any element of non-instrumental, self-regarding interest from parental rights. See also Shulman, *ibid*.

21 *Children's Aid Society*, *ibid*. We could identify two strands of parental entitlement. The first is an individualistic view ("they are my kids and I can do as I want with them"), and the second is a communitarian view ("I have a right to my children who share my culture and religion"). I am specifically concerned with the first, given the personal nature of gender identity; a child being trans does not prevent them from sharing the parent's culture or religion. However, I also believe that the communitarian view is best understood in terms of equality and the best interests of the child. Sharing a parent's culture and religion is, all other things being equal, in the best interest of the child insofar as they facilitate community with others and can provide a basis for self-identity. Sharing is, however, not the same as imposing. Additionally, equality dictates that no culture or religion should be favoured over another, and preventing parents from sharing their culture and religion with the child would unduly privilege the dominant culture and religion.

22 Merry Jean Chan, "The Authorial Parent: An Intellectual Property Model of Parental Rights" (2003) 78:3 NYUL Rev 1186 at 1201.

23 Montgomery, *supra* note 19. As La Forest J explains in *Children's Aid Society*, *supra* note 20 at 372: "Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents."

References to parental rights are often undertheorized and do not specify whether they are understood as parental authority or parental entitlement, facilitating unnoticed slippages and shifts between the two conceptions.[24] Whether they are deliberate or not, such slippages and shifts threaten to compromise the integrity of the *Oakes* analysis. A law's objective is meant to be constant throughout the analysis since it must be "sufficiently precise for the Court to go ahead with the justification analysis"[25] and "is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[26] Judges should be attentive to attempted slippages and find blanket veto and disclosure laws unjustified under the *Oakes* test. For many students, schools are the only safe spaces they have. They should not be deprived of them.

In the Part II of this article, I briefly argue that blanket veto and disclosure laws impair trans youth's right to equality and right to life, liberty, and security of the person. In Part III of the article, I deploy empirical evidence to suggest that blanket veto and disclosure laws are not minimally impairing nor rationally connected to serving the best interests of children by protecting parental authority. In Part IV of the article, I argue that protecting parental entitlement is not a pressing and substantial objective. The result is that no matter how we understand parental rights, the laws fail the *Oakes* test and, if they impair *Charter* rights and freedoms, should be found unconstitutional.

II. IMPAIRMENTS TO TRANS YOUTH'S CONSTITUTIONAL RIGHTS

Constitutional arguments against blanket veto and disclosure laws primarily centre on section 15 (right to equality) and section 7 (right to life, liberty, and security of the person) of the *Charter*. They may also violate section 2(a) (freedom of thought, belief, opinion, and

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[24] Since laws can have compound objectives, governments could also argue that blanket veto and disclosure laws protect both parental authority and entitlement. Laws with compound objectives can be analyzed in two ways. One way is to identify a primary and secondary objective. Where the law is unjustified as to its primary purpose, the precedent in *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) [*Big M Drug Mart*] suggests that it ought be struck down. Where none of the partial objectives can be described as primary, I suggest that courts should analyze the justifiability of the law under each objective. If the law is justified under each objective, it should be upheld. If any objective is not pressing and substantial, it should be excised from the compound objective and the analysis should continue solely on the remaining objective(s). This is logically necessary since any compound of the form "A v B" is necessarily valid if either A or B is true. If illegitimate objectives were not excised, any law could be justified by combining illegitimate and legitimate objectives, leading to absurd and repugnant conclusions. If the law fails the rational connection or minimal impairment branch of the *Oakes* test under one or more objectives, the court should ask whether the failure is a merely technical one that arises from the law's pursuit of dual purposes. If so, the law should be upheld. If the answer is no and the law fails the last proportionality branch of the *Oakes* test, every provision that relies on the impugned objective should be struck down. Since I argue, in this article, that protecting parental entitlement is not a pressing and substantial objective, it is not necessary to ask whether the laws' lack of rational connection and minimal impairment under the objective of protecting parental authority is merely technical.

[25] *Frank*, *supra* note 18 at para 56.

[26] *Big M Drug Mart*, *supra* note 24 at para 91. While the statement by Chief Justice Dickson referred to the idea of a legislation's objective changing over time rather than shifts occurring during the section 1 analysis, it stands to reason that the latter would be even more disallowed. See also *ibid* at para 141:

> It seems disingenuous to say that the legislation is valid criminal law and offends s. 2*(a)* because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend ... While there is no authority on this point, it seems clear that Parliament cannot rely upon an *ultra vires* purpose under s. 1 of the *Charter*. This use of s. 1 would invite colourability, allowing Parliament to do indirectly what it could not do directly.

expression) and section 12 (right to be free from cruel and unusual treatment or punishment). While my article focuses on whether these laws can be saved by section 1, it is worth briefly exploring how they impair constitutional rights, thereby engaging section 1. For reasons of space, I will not consider arguments under sections 2(a) and 12.

A. RIGHT TO EQUALITY

As restated by the Supreme Court in *Sharma*, a law impairs the section 15 right to equality if it:

> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[27]

Both criteria are easily met by blanket veto and disclosure laws. This conclusion aligns with existing precedent, which has consistently held that refusing to use a trans person's requested name and pronouns is discriminatory.[28]

Blanket veto and disclosure laws create a clear distinction between youth who are transgender and youth who are cisgender (that is, not transgender). By focusing on youth who request a change of name or pronouns for gender-related reasons, the policies facially treat trans youth differently from cis youth. The distinction is also evident in the laws' effect. Whereas cis youth's gender identity is respected by schools as a matter of course, only trans youth whose parents consent to their requested name and pronouns see their gender identity respected. Trans youth must also contend with the risk of family rejection as a result of their request being communicated to parents. The distinction is based both on the enumerated ground of sex and on the analogous ground of gender modality, which refers to the relationship between someone's gender identity and gender assigned at birth.[29]

The laws impose a burden on trans youth by refusing to respect their gender identity, which perpetuates stereotypes and prejudices and negatively impacts their psychosocial well-being. The laws perpetuate prejudices toward trans youth by depriving them of respect for

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27 *R v Sharma*, 2022 SCC 39 at para 28.

28 *EN v Gallagher's Bar and Lounge*, 2021 HRTO 240; *Nelson v Goodberry Restaurant Ltd dba Buono Osteria and others*, 2021 BCHRT 137; *Oger v Whatcott (No 7)*, 2019 BCHRT 58; *Cinq-Mars c Maxi/Loblaws Roberval inc*, 2022 QCCQ 416; *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 [*CF v Alberta*]; *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726.

29 Courts have long interpreted the protected grounds of sex as including trans people. See e.g. *Sheridan v Sanctuary Investments Ltd (No 3)*, 1999 CanLII 35172 (BC HRT); *Commission des droits de la personne et des droits de la jeunesse (ML) c Maison des jeunes A*, 1998 CanLII 28 (QC TDP); *CF v Alberta*, *ibid*; *Centre for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191 [*Centre for Gender Advocacy*]. For the definition of gender modality, see Florence Ashley, "'Trans' is My Gender Modality: a Modest Terminological Proposal" in Laura Erickson-Schroth, ed, *Trans Bodies, Trans Selves: A Resource by and for Transgender Communities*, 2d ed (New York: Oxford University Press, 2022) 22. See also Florence Ashley, Shari Brightly-Brown & G Nic Rider, "Beyond the Trans/Cis Binary: Introducing New Terms will Enrich Gender Research" (2024) 630:8016 Nature 293. The notion of gender modality was used by the Supreme Court in *Michel v Graydon*, 2020 SCC 24 at para 101. As the Supreme Court explained in *Hansman v Neufeld*, 2023 SCC 14 at para 84 [*Neufeld*], trans communities are "undeniably a marginalized group in Canadian society," suggesting that they would be protected under analogous grounds if they were not recognized under the grounds of sex.

their gender identity. They stereotype trans youth as confused and depict their sense of gender as unreliable, falling into the very trap that the Supreme Court has warned against in *Hansman v. Neufeld*.[30] Moreover, failure to respect trans youth's gender identity has a significant negative impact on their psychosocial well-being, as I will explore in greater detail in Part III. As the Saskatchewan Court of King's Bench explained when granting an interlocutory injunction against the province's blanket veto and disclosure law, youths "who are unable to have their name, pronouns, gender diversity, or gender identity, observed in the school will suffer irreparable harm."[31]

B. RIGHT TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

Section 7 grants the right to life, liberty, and security of the person. It is impaired where a law threatens someone's life, liberty, or security of the person and fails to accord with the principles of fundamental justice. These principles are violated, *inter alia*, by laws that are arbitrary, overbroad, and grossly disproportionate.

Blanket veto and disclosure laws significantly interfere with the liberty and security interests of trans youth. The right to liberty protects inherently private choices of fundamental importance, which would include one's sense of gender, as reflected in names and pronouns.[32] Gender is among the most important aspects of one's social and personal identity.[33] The right to security of the person is also engaged given the elevated risk of anxiety, depression, and suicidality among youth whose gender identity is not respected. The blanket veto and disclosure laws also create a risk of family violence and homelessness by forcing trans youth to come out to their parents if they want to change their name or pronouns at school.[34]

Once liberty and security of the person are in play, the question becomes whether the impugned law is in accordance with the principles of fundamental justice. I would argue that blanket veto and disclosure laws violate at least three such principles: they are arbitrary, overbroad, and grossly disproportionate. Since a comprehensive analysis of section 7 is beyond the scope of this article, it suffices to note that the laws are grossly disproportionate.[35] Gross disproportionality is a qualitative matter. As the Supreme Court explained in *Bedford*: "[G]ross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm."[36]

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30 *Ibid* at para 85.

31 *UR Pride Centre*, *supra* note 9 at para 98.

32 *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC); see also *R v Morgentaler*, 1988 CanLII 90 (SCC).

33 Florence Ashley, "Adolescent Medical Transition is Ethical: An Analogy with Reproductive Health" (2022) 32:2 Kennedy Inst Ethics J 127 at 134–38 [Ashley, "Adolescent Medical Transition"]. Some authors have argued that the right to identity under the *Convention on the Rights of the Child*, UNGA, 46th Sess, UN Doc E/CN.4/RES/1990/74 (1990) GA Res 44/25, which Canada has ratified, includes gender identity: John Tobin & Jonathan Todres, "The Right to Preservation of a Child's Identity" in John Tobin, ed, *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 281.

34 These risks can engage security of the person even if they are indirect: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 58–60 [*Bedford*].

35 An analysis of arbitrariness and overbreadth would also unavoidably replicate much of the arguments made in Part III, below regarding rational connection and minimal impairment.

36 *Bedford*, *supra* note 34 at para 122.

It is easy to see how blanket veto and disclosure laws could be found to be grossly disproportionate by considering plausible hypotheticals. Imagine, for instance, a trans student who is fearful of coming out to her parents due to their history of hatred and violence toward LGBTQIA2S+ people, and who attempts suicide due to feeling rejected by everyone after her school refuses to respect her chosen name and pronouns. This is, unfortunately, an all-too-common story.

At this stage, it is important to note that section 7 entertains a unique relationship to section 1. While arbitrariness, overbreadth, and gross disproportionality under section 7 are distinct from rational connection, minimal impairment, and proportionality under section 1 — the former being qualitative whereas the latter are both qualitative and quantitative — they are close conceptual relatives.[37] It is difficult to imagine a law that impairs section 7 being justified under section 1. For instance, an overbroad law is unlikely to be minimally impairing, since both concepts strive to capture laws that go further than necessary. This observation mirrors the Supreme Court's claim that, although "the possibility … cannot be discounted," a law that impairs section 7 "is unlikely to be justified under s. 1."[38] So far, the Supreme Court has never upheld a violation of section 7 under section 1.[39]

Having established that blanket veto and disclosure laws plausibly impair trans youth's *Charter* rights, I now turn to whether they can be justified under section 1 if we understand their objective as protecting parental authority.

III. RATIONAL CONNECTION, MINIMAL IMPAIRMENT, AND PARENTAL AUTHORITY

I readily concede that protecting parents' authority to make decisions in the best interests of their children is a pressing and substantial governmental objective. Parental authority is predicated on the presumption that parents are usually best positioned to make decisions in the best interests of their child and, in fact, tend to do so.[40]

This presumption operates as a conceptual limit on parental rights. As Justice Claire L'Heureux-Dubé explained for a unanimous Supreme Court in *Augustus*: "[T]he right of parents to choose medical treatment for their children … clearly exists for the sole purpose of enabling parents to ensure their children's well being. It cannot entail rights unrelated to that objective."[41]

In *Young v. Young*, judges were divided on how the *Charter* should apply to the best interests of the child test but generally agreed that parents' freedom of religion and expression were limited by the best interests of the child: "While parents are free to engage

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37 *Ibid* at paras 124–29.
38 *Ibid* at para 129.
39 The same is not true of courts of appeal. See e.g. *R v Michaud*, 2015 ONCA 585.
40 Whether that is a fair or true assumption is debatable.
41 *Supra* note 20 at para 53. In this passage, the unanimous Supreme Court clarified *Children's Aid Society*, *supra* note 20 by upholding the best interests of the child as an internal limit on parental authority.

in religious practices themselves, those activities may be curtailed where they interfere with the best interests of the child without thereby infringing the parent's religious freedoms."[42]

These views are consistent with Canadian family law; where parents act in ways that harm the child or diverge from the child's best interests, parental authority may be altered or extinguished pursuant to custody or child protection legislation.[43]

While the legal context of these decisions differs from that of blanket veto and disclosure laws, they remain informative as to the meaning and boundaries of parental authority. *Augustus* and *Young* concerned governmental restrictions on the legal authority of parents in favour of the child's best interests, whereas blanket veto and disclosure laws extend the legal authority of parents, seemingly to the detriment of children's best interests. The passages nonetheless shed light on the internal logic of parental authority and how parental rights are conceptually limited by the best interests of the child.[44] These conceptual limits apply even when trans youth are concerned. In the 2020 case *A.B. v. C.D.*, the Court of Appeal for British Columbia explained that there was no merit to the father's claim that his parental rights were violated by court orders prohibiting him from misgendering his trans son, among other things, since the father's conduct was against the adolescent's best interests and the adolescent was able to assert his own rights.[45]

If we understand parental rights as a grant of parental authority for the purposes of the best interests of the child, the justifiability of a blanket veto and disclosure laws turns on whether

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42 *Young v Young*, [1993] 4 SCR 3 at 94, L'Heureux-Dubé J, dissenting in result [*Young*]. All judges were substantially in agreement on this point: *ibid* at 25, La Forest & Gonthier JJ; *ibid* at 109, Sopinka, Cory & Iacobucci JJ; *ibid* at 121, McLachlin J. See also *Gillick v West Norfolk and Wisbech Area Health Authority*, [1986] AC 112 at 184 (HL (Eng)) ("[t]he principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child").

43 Custody laws vary in their precise terms but often allow anyone, parent or not, to apply for an order altering or extinguishing parental authority; the best interest of the child is the sole consideration when making such orders: see e.g. *Children's Law Reform Act*, RSO 1990, c C.12, ss 23(3), 24. Some statutes expressly state that parents must exercise their authority in the best interests of the child (*Divorce Act*, RSC 1985, c 3 (2nd Supp), s 7.1; *Children's Law Reform Act*, *ibid*, s 20(2)). Child protection laws typically do not apply until a certain threshold of harm is met, but child protection orders are based on the best interests of the child once the threshold is met and need not solely pertain to the situation that gave rise to harm (see e.g. *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1, ss 74(2), 101). Custody and child protection laws have been upheld by the Supreme Court (*Young v Young*, *ibid*; *Children's Aid Society*, *supra* note 20). This conception of parental rights as parental authority also appears to have historically prevailed in the United States (Shulman, *supra* note 19).

44 The centrality of the best interest of the child to parenting is not displaced by *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, which held that the government could include an exception to the criminal offence of assault for reasonable physical correction by parents. There is much to criticize about the decision, to be sure. However, protecting parents from the severe consequences of criminal convictions is not a repudiation of parental authority. Not only did parental authority continue to apply under family law, but the government still opposed physical correction albeit "preferring the approach of educating parents against physical discipline" (*ibid* at para 59). The majority of the Supreme Court suggested that the exception was compatible with the best interests of the child, explaining that "[t]he decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process" (*ibid* at para 62). The majority also interpreted the exception as only applying to "minor corrective force of a transitory and trifling nature" against a child who is neither below two years old nor a teenager (*ibid* at para 40). Under this interpretation, the majority almost seemed to suggest that discipline itself may be in the best interests of children insofar as it was a means of "carry[ing] out the reasonable education of the child" to meet children's need "for guidance and discipline" (*ibid* at paras 58–59). While I have many qualms with such claim, it suffices for our purposes to note that the decision neither abandons parental authority nor enshrines parental entitlement.

45 *AB v CD*, 2020 BCCA 11 at para 209.

they are compatible with or inimical to the best interests of the child. In Parts III.A and III.B, I survey empirical evidence that sheds light on the mental health impact of blanket veto and disclosure laws on youth. For analytical purposes, I analyze the impact of veto rights and disclosure requirements separately. However, the two are closely intertwined since parents cannot exercise their veto without being informed of the child's request and since parents who would exercise their veto are more likely to react negatively to disclosure. As my analysis shows, we have good reasons to believe that both veto rights and disclosure requirements will cause significant harm to youth.

A. VETOING A CHILD'S NAME AND PRONOUNS

Blanket veto and disclosure laws require schools to secure parental consent before respecting youth's requested names and pronouns, granting parents a veto right over their child's gender in school. We have good reasons to believe that a veto right of this kind is not rationally connected with the objective of protecting parental authority to make decisions in the best interests of their child. Granting parents a veto right over youth's choice of name and pronouns for gender-related reasons is almost certain to be detrimental.

For rational connection to exist, we would have to identify a range of situations where parents refusing a child's request to change their name and pronouns would be beneficial to the child. This is unlikely. Existing evidence does not suggest that parents are in a better position than their child to determine whether respecting the requested name and pronouns would be beneficial. Available empirical evidence suggests, to the contrary, that respecting a child's name and pronouns is associated with greatly improved mental health and that there is no reasonable basis on which any parent could determine that their child would not incur those benefits.

Respecting a child's name and pronouns is associated with greatly improved mental health. Research by Kevin McLemore has found that being misgendered is correlated with increased anxiety, depression, stress, and internalized stigma.[46] Misgendering refers to the use of pronouns or other gender terms that do not correspond to those requested by the person. Arjee Restar and colleagues have found that being able to change one's name and gender markers on official documents is correlated with decreased depression, anxiety, and psychiatric distress.[47] Two other studies have found that using trans youth's chosen names correlated with decreased depressive symptoms, suicidal ideation, and suicide attempts.[48] While the McLemore and Restar studies were conducted with adults, the mechanism of action — others' recognition of our deeply-held identities being beneficial — does not vary based on age. On the contrary, recognition may be even more psychologically important for

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46 Kevin A McLemore, "A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering" (2018) 3:1 Stigma & Health 53. See also Kevin A McLemore, "Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals" (2015) 14:1 Self & Identity 51.

47 Arjee Restar et al, "Legal Gender Marker and Name Change is Associated With Lower Negative Emotional Response to Gender-Based Mistreatment and Improve Mental Health Outcomes Among Trans Populations" (2020) 11 SSM - Population Health 100595.

48 Stephen T Russell et al, "Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth" (2018) 63:4 J Adolescent Health 503; Amanda M Pollitt et al, "Predictors and Mental Health Benefits of Chosen Name Use Among Transgender Youth" (2021) 53:2 Youth & Society 320.

youth as childhood and adolescence are critical times for the development of self-trust and self-esteem.[49]

Countless studies have found that social transition and social support in one's gender are psychologically beneficial for youth, and correlated with decreased depression, anxiety, suicidality, and other negative mental health outcomes.[50] Although these studies did not directly measure respect for chosen names and pronouns, their results can be extrapolated to respect for chosen names and pronouns for two reasons. First, the mechanism of action is the same, that is, they are beneficial for the same underlying reasons. Second, respect for chosen names and pronouns are central components of social transition and social support in one's gender; the studies are therefore indirectly measuring respect for chosen names and pronouns.[51] If someone is not allowed to use their chosen name and pronouns, they would not usually be considered to have socially transitioned or to be socially supported in their gender.[52]

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[49] Amy Mullin, "Children, Paternalism and the Development of Autonomy" (2014) 17:3 Ethical Theory & Moral Practice 413; Rachel E Wiley & Steven L Berman, "Adolescent Identity Development and Distress in a Clinical Sample" (2013) 69:12 J Clinical Psychology 1299; Kate C McLean & Monisha Pasupathi, "Processes of Identity Development: Where I Am and How I Got There" (2012) 12:1 Identity 8; see also Hilde Lindemann, "Holding on to Edmund: The Relational Work of Identity" in Hilde Lindemann, Marian Verkerk & Margaret Urban Walker, eds, *Naturalized Bioethics: Toward Responsible Knowing and Practice* (Cambridge: Cambridge University Press, 2009) 65; Quill R Kukla, "A Nonideal Theory of Sexual Consent" (2021) 131:2 Ethics 270; Robert Wallace & Hershel Russell, "Attachment and Shame in Gender-Nonconforming Children and Their Families: Toward a Theoretical Framework for Evaluating Clinical Interventions" (2013) 14:3 Intl J Transgenderism 113; Beth Schwartzapfel, "Born This Way?" *The American Prospect* (14 March 2013), online: [perma.cc/T798-J9NC].

[50] Robb Travers et al, *Impacts of Strong Parental Support for Trans Youth* (Trans PULSE for Children's Aid Society of Toronto & Delisle Youth Services, 2 October 2012), online: [perma.cc/JBY8-YDEB]; Jaimie Veale et al, *Being Safe, Being Me: Results of the Canadian Trans Youth Health Survey* (Vancouver: University of British Columbia & SARAVYC, 2015), online: [perma.cc/8CCH-KLRV]; Kristina R Olson et al, "Mental Health of Transgender Children Who Are Supported in Their Identities" (2016) 137:3 Pediatrics e20153223; Jon Arcelus et al, "Risk Factors for Non-Suicidal Self-Injury Among Trans Youth" (2016) 13:3 J Sexual Medicine 402; Lily Durwood, Katie A McLaughlin & Kristina R Olson, "Mental Health and Self-Worth in Socially Transitioned Transgender Youth" (2017) 56:2 J Am Academy Child & Adolescent Psychiatry 116; Ashley B Taylor et al, *Being Safe, Being Me 2019: Results of the Canadian Trans and Non-Binary Youth Health Survey* (Vancouver: Stigma and Resilience Among Vulnerable Youth Centre & University of British Columbia, 2020), online: [perma.cc/T3TP-NZN2]; Myeshia N Price & Amy E Green, "Association of Gender Identity Acceptance with Fewer Suicide Attempts Among Transgender and Nonbinary Youth" (2021) 8:1 Transgender Health 56; Jack L Turban et al, "Timing of Social Transition for Transgender and Gender Diverse Youth, K-12 Harassment, and Adult Mental Health Outcomes" (2021) 69:6 J Adolescent Health 991; Cal Horton, "'Euphoria': Trans Children and Experiences of Prepubertal Social Transition" (2023) 72:4 Family Relations 1890; Cal Horton, "'I Was Losing That Sense of Her Being Happy': Trans Children and Delaying Social Transition" (2022) 18:2 LGBTQ+ Family 187; Stanley R Vance Jr et al, "Mental Health and Gender Affirmation of Black and Latine Transgender/Nonbinary Youth Compared to White Peers Prior to Hormone Initiation" (2023) 73:5 J Adolescent Health 880; Nicole D Cardona et al, "Social Supports, Social Stressors, and Psychosocial Functioning in a Sample of Transgender Youth Seeking Gender-Affirming Clinical Services" (2023) Psychology Sexual Orientation & Gender Diversity; Anna L Olsavsky et al, "Associations Among Gender-Affirming Hormonal Interventions, Social Support, and Transgender Adolescents' Mental Health" (2023) 72:6 J Adolescent Health 860.

[51] Tanvi N Shah et al, "A Qualitative Exploration of How Transgender and Non-Binary Adolescents Define and Identify Supports" (2024) 39:1 J Adolescent Research 133 at 19–20; Jack Andrzejewski et al, "Perspectives of Transgender Youth on Parental Support: Qualitative Findings from the Resilience and Transgender Youth Study" (2021) 48:1 Health Education & Behavior 74.

[52] The model policy included in the appendix of the Saskatchewan blanket veto and disclosure law requires parental consent for changes in gender expression, in addition to names and pronouns: Ministry of Education, *supra* note 8 at 7. For similar reasons, data on social transition and support in one's gender are also relevant to respect for youth's desired gender expression. Data on parental support and support from institutions or authority figures may be especially relevant, since peers often have little say on whether a trans youth can wear clothes, make-up, or accessories that align with their gender identity due to cost considerations and institutional policies. By contrast, some peers will respect a student's name and pronouns regardless of parental or institutional approval.

Studies led by Kristina Olson have shown that youth who are supported and respected in their gender identity experience depression and anxiety at a rate roughly similar to the general population.[53] These findings are striking given other studies reporting that Canadian trans youth were 4.95 times more likely to have experienced suicidal ideation in the last year and 7.6 times more likely to have attempted suicide in their lifetime compared to cisgender, heterosexual youth.[54] In a study of trans adults in Ontario, strong social support was associated with a 49 percent reduction in past-year suicidal ideations and a further 82 percent reduction in past-year suicide attempts, resulting in a 90 percent overall reduction in suicide attempts.[55] The population-level benefits of socially supporting trans youth are difficult to overstate given the sheer levels of depression and suicidality that they experience without such support. In an Ontario study, 70 percent of adolescents and young adults whose parents were unsupportive or only somewhat supportive of their gender had considered suicide in the last year, and 57 percent had attempted suicide.[56]

Proponents of parental veto rights could concede that, on average, respect for children's requested names and pronouns at school is beneficial but argue that not all youth reap such benefits and that parents are best positioned to determine whether their child would benefit. Oftentimes, this response is accompanied by the belief that parents know whether their child is "truly" trans better than the child.

While the response is sensible on its face, scientific evidence suggests that following the youth's lead is the best way to ensure positive outcomes. Youth's self-knowledge in matters of gender identity is fairly reliable and stable, and parents have no means of predicting psychosocial outcomes better than by following the child's requests. Measures of gender cognition and identity among trans children are similar to those of cisgender children of the same gender identity and demonstrate a similar level of stability.[57] Youth who request a change in name and pronouns rarely change their mind and even more rarely regret it. In one study of young children, 97.5 percent of participants continued to identify with a gender other than the one they were assigned at birth an average of 5 years after their initial social

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53 Olson et al, *supra* note 50; Durwood, McLaughlin & Olson, *supra* note 50.

54 Mila Kingsbury et al, "Suicidality Among Sexual Minority and Transgender Adolescents: A Nationally Representative Population-Based Study of Youth in Canada" (2022) 194:22 CMAJ E767.

55 Greta R Bauer et al, "Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada" (2015) 15:525 BMC Public Health.

56 *Ibid*. Strong parental support was associated with a 93 percent overall reduction in suicide attempt, a similar reduction as strong social support among trans adults. For data on suicidality among trans people, see also Margaret L Lawson et al, "Pathways to Care for Adolescents Attending a First Hormone Appointment at Canadian Gender Affirming Medical Clinics: A Cross-Sectional Analysis From the Trans Youth CAN! Study" (2024) 74:1 J Adolescent Health 140; Kingsbury et al, *supra* note 54; Taylor et al, *supra* note 50; Noah Adams, Maaya Hitomi & Cherie Moody, "Varied Reports of Adult Transgender Suicidality: Synthesizing and Describing the Peer-Reviewed and Gray Literature" (2017) 2:1 Transgender Health 60; Greta R Bauer et al, "Suicidality Among Trans People in Ontario: Implications for Social Work and Social Justice" (2013) 59:1 Service Soc 35.

57 Selin Gülgöz et al, "Similarity in Transgender and Cisgender Children's Gender Development" (2019) 116:49 Proceedings National Academy Sciences 24480; James R Rae et al, "Predicting Early-Childhood Gender Transitions" (2019) 30:5 Psychological Science 669.

transition.[58] None of the participants expressed regret.[59] Even among youth who later change their mind, trying out names and pronouns can be an important part of gender exploration.[60]

By contrast, numerous studies suggest that parents' views on their child's gender history and identity are unreliable.[61] Given that gender identity is deeply individual and personal, parents' insights into their child's experience of gender are usually limited to what the child chooses to share.[62] Parents are often surprised when trans youth come out, even if the child has long questioned or known their gender identity.[63] Studies suggest that parents often misremember or downplay their child's experience of gender.[64] Some parents report missing "early signs of their child's identity or questioning that they hadn't noticed or understood as such at the time."[65] If parents were well positioned to ascertain whether a change of name and pronouns at school would benefit their child, we would expect the percentage of youth who re-identify with the gender they were assigned at birth to converge with the percentage of parents who do not support their trans child's gender identity. Based on the study cited in the previous paragraph, we know that the first number is around 2.5 percent. In a New England study, however, 54 to 63 percent of parents initially reacted negatively to their child's coming out and 44 to 50 percent of parents still reacted negatively three years later.[66] We can conclude that parents' rejection or lack of support for their child's gender identity is unrelated to their ability to accurately determine the child's "true" gender identity or whether respecting their name and pronouns is in their best interest.

No reliable means of predicting a child's future gender development better than self-report has been identified in the scholarly literature thus far, casting further doubt on parents' ability

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58 Kristina R Olson et al, "Gender Identity 5 Years After Social Transition" (2022) 150:2 Pediatrics e2021056082. See also *Re Kelvin*, [2017] FamCAFC 258 (Austl); Blake S Cavve et al, "Reidentification With Birth-Registered Sex in a Western Australian Pediatric Gender Clinic Cohort" (2024) 178:5 JAMA Pediatrics 446.

59 Lily Durwood et al, "Retransitioning: The Experiences of Youth who Socially Transition Genders More Than Once" (2022) 23:4 Intl J Transgender Health 409.

60 Florence Ashley, "Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth" (2019) 24:2 Clinical Child Psychology & Psychiatry 223.

61 Annie Pullen Sansfaçon et al, "Blossoming Child, Mourning Parent: A Qualitative Study of Trans Children and Their Parents Navigating Transition" (2022) 31:7 J Child & Family Studies 1771; Natacha Kennedy, "Deferral: The Sociology of Young Trans People's Epiphanies and Coming Out" (2022) 19:1 J LGBT Youth 53; F Hunter McGuire et al, "Differences in Patient and Parent Informant Reports of Depression and Anxiety Symptoms in a Clinical Sample of Transgender and Gender Diverse Youth" (2021) 8:6 LGBT Health 404; Stephanie L Budge et al, "A Qualitative Content Analysis of Concordance and Discordance Regarding Identity, Affect, and Coping in Families with Transgender and Nonbinary Youth" (2023) 19:1 LGBTQ+ Family 1; Sabra L Katz-Wise et al, "Longitudinal Family Functioning and Mental Health in Transgender and Nonbinary Youth and Their Families" (2024) 33:4 J Child & Family Studies 1321. The same also appears to be true of clinicians: Tim Kaiser et al, "Out of Sight, Out of Mind? High Discrepancy Between Observer- and Patient-Reported Outcome After Routine Inpatient Treatment for Depression" (2022) 300 J Affective Disorders 322.

62 See e.g. Florence Ashley, "Youth Should Decide: The Principle of Subsidiarity in Paediatric Transgender Healthcare" (2023) 49:2 J Medical Ethics 110 [Ashley, "Youth Should Decide"]; Florence Ashley, "What is it Like to Have a Gender Identity?" (2023) 132:528 Mind 1053.

63 Kennedy, *supra* note 61.

64 Damien W Riggs & Clare Bartholomaeus, "Gaslighting in the Context of Clinical Interactions with Parents of Transgender Children" (2018) 33:4 Sexual & Relationship Therapy 382; Sansfaçon et al, *supra* note 61.

65 Sansfaçon et al, *ibid* at 1780; see also Cal Horton, "'It Felt Like They Were Trying to Destabilise Us': Parent Assessment in UK Children's Gender Services" (2023) 24:1 Intl J Transgender Health 70.

66 Arnold H Grossman et al, "Parental Responses to Transgender and Gender Nonconforming Youth: Associations with Parent Support, Parental Abuse, and Youths' Psychological Adjustment" (2021) 68:8 J Homosexuality 1260. See also Helen Morgan et al, "Knowledge is Power: Trans Young People's Perceptions of Parental Reactions to Their Gender Identity, and Perceived Barriers and Facilitators to Parental Support" (2023) 19:1 LGBTQ+ Family 35.

to predict their child's future gender development. In a recently published literature review, my colleagues and I concluded that "existing evidence does not support the view that gender assessments are effective at predicting or preventing regret," finding that proposed methods for assessing gender identity could either be boiled down to self-report or consisted of "stereotyping or arbitrary considerations."[67] Our conclusion is reflected in expert opinions and consensus statements. The leading international guidelines for trans healthcare admit, in relation to younger children, that "there are no reliable means of predicting an individual child's gender evolution."[68] As explained by Damien Riggs and Clare Bartholomaeus, "affirming responses are the best approach, rather than subjecting a young child to an unnecessary experience of psychosocial assessment that is always subjective, and does not provide any more objective take on the child's gender than that already provided by the child."[69] Given that the best clinicians and researchers admit the impossibility of predicting a child's future gender identity with any greater reliability than by following the child's lead, the idea that parents are better positioned than the child to determine whether respecting the requested name and pronouns at school would be beneficial strains credulity.[70]

Based on this evidence, we can conclude that a parental veto over youth's choice of name and pronouns at school does not further parents' ability to make decisions in the best interests of their child. For youth whose parents consent to the change of name and pronoun, the effect of the policy is mostly neutral.[71] Where parents would exercise their veto right and withhold consent, the child's well-being is negatively impacted. The net impact of a veto right is negative; there is no plausible scenario in which youth are likely to benefit from the policy. If granting a veto right does not further the best interests of the child in an identifiable range of situations, it does not have a rational connection to the objective of protecting parental authority as a vehicle for the best interests of the child. To borrow the language of Chief Justice Dickson in *R. v. Edwards Books and Art Ltd.*, the "legislative garment" is not "tailored to suit its purpose."[72] Nor is it "carefully designed to achieve the objective in question."[73]

In some scenarios, no scientific evidence is even needed to ascertain that a veto right is contrary to the best interests of the child, highlighting the conceptual weakness of blanket veto and disclosure laws. One such example involves mature minors. Where the child is a mature minor, their best interests are defined by their views and preferences pursuant to the Supreme Court's precedent in *A.C. v. Manitoba*.[74] Youth below the age of 16 can be mature minors, especially when the decision at hand is not beyond their comprehension nor a matter

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67 Florence Ashley et al, "Do Gender Assessments Prevent Regret in Transgender Healthcare? A Narrative Review" (2023) Psychology Sexual Orientation & Gender Diversity at 7.

68 Eli Coleman et al, "Standards of Care for the Health of Transgender and Gender Diverse People, Version 8" (2022) 23 Intl J Transgender Health S1 at S68. See also Amets Suess Schwend et al, "Depathologising Gender Diversity in Childhood in the Process of ICD Revision and Reform" (2018) 13:11 Global Pub Health 1585 at 1590.

69 Riggs & Bartholomaeus, *supra* note 64 at 388.

70 See also Ashley, "Youth Should Decide," *supra* note 62.

71 I say "mostly" rather than "completely" since youth may be indirectly harmed by a veto right. The existence of a veto right can be stigmatizing and create unnecessary fears among youth who are unsure of whether their parents would consent. As explored in Part III.B, veto rights also pressure youth to "out" themselves before they can secure acceptance, even if they are not yet ready to come out to their parents.

72 1986 CanLII 12 at para 127 (SCC) [*Edwards Books*].

73 *Oakes*, *supra* note 18 at para 70.

74 *Supra* note 14.

of urgent lifesaving medical care.[75] One would be hard-pressed to argue that one's choice of names and pronouns falls in either of these categories, despite the potentially serious consequences of not respecting them that I highlighted. Given the convergence between a mature minor's views and their best interests, granting parents a blanket veto right necessarily falls short of furthering the best interests of mature minors. School teachers and counsellors are typically trained in childhood development and have experience working with youth, making them well-positioned to assess whether a student is a mature minor. Adding an exception for mature minors would not limit the law's ability to meet its objective; veto rights therefore fail to be minimally impairing. If we follow the logic of *Oakes* itself, it could be argued that this also constitutes a lack of rational connection — there is no rational inference to be drawn between a parent withholding consent and the best interest of a mature minor.[76]

A second example involves parents who are subject to a court order restricting their parental authority over matters that include the child's use of names and pronouns at school. Courts occasionally restrict the decision-making authority of one or more parents in the best interests of the child. Where the parent does not have the decision-making authority to veto a child's choice of name and pronouns at school as a matter of family law, there is no legitimate parental authority furthered by laws granting them a veto right. Not only was their parental authority validly limited or abrogated, but a judicial decision found that parental authority over such decisions was not in the best interests of the child. Plainly, the law is not minimally impairing since excluding parents whose decision-making authority was restricted or abrogated from having a veto right would not undermine the law's objective. We can also question, as above, whether a rational connection exists. These two examples further illustrate the fact that existing blanket veto and disclosure laws were not carefully designed to serve the objective of protecting parental authority.

Before turning to disclosure requirements, I wish to consider and respond to three potential counter-arguments. According to the first counter-argument, parents are entitled to share their conception of the good life with their child and this right entails the ability to veto choices made by their child that do not accord with their conception of the good life. The counter-argument is, in my humble opinion, meritless on two counts. While parents may typically be entitled to share their ideal of the good life, they are not entitled to impose it without concern for the child's views or needs. Children are neither the property nor an avatar of their parents. A child's ability to pursue their own vision of the good life, preferably with the guidance and support of their parents, is both in their best interests and critical to liberal democracy.[77] Moreover, were we to recognize an entitlement to impose one's ideal

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75 *MacKinnon v Harrison*, 2011 ABCA 283 at paras 18–19; *ibid* at para 85.

76 My reasoning parallels that of the Supreme Court in *Oakes*, where the majority held that no rational connection existed since "possession of a small or negligible quantity of narcotics does not support the inference of trafficking," despite the fact that the law applied to larger quantities of narcotics as well: *Oakes*, *supra* note 18 at paras 77–78. Following *Oakes*, however, courts have tended to use the minimal impairment branch when considering the absence of exceptions under a law. Since failing the rational connection and minimal impairment branches of the *Oakes* test leads to the same legal result, little turns on which characterization is more appropriate.

77 David Dyzenhaus, "Regulating Free Speech" (1991) 23:2 Ottawa L Rev 289 at 315:

> 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

of the good life, it would be no less circumscribed by the best interests of the child. Even parents' ability to share their religious faith can be limited or denied where courts find that it would not be in the child's best interests.[78]

According to the second counter-argument, vetoing a child's request to change their name and pronouns is in the best interests of the child since it prevents permanent medicalization. The counter-argument is misconceived on multiple counts. Respecting a child's choice of name and pronouns does not lead to permanent medicalization, permanent medicalization should not be assumed to be inherently harmful, and denying social transition to prevent medical transition may constitute conversion practices, which are a criminal offence in Canada. The counter-argument takes for granted that vetoing a child's requested name and pronouns will impact their likelihood of pursuing gender-affirming medical care in the future. There is no evidence for such a proposition. Desires for gender-affirming interventions are highly heterogeneous among trans communities — not every trans person medically transitions — and there is no evidence that social transition plays a causal role in medical transition.[79] While youth who socially transition often go on to access gender-affirming medical care, the developmental evidence that I surveyed earlier suggests that children who are trans are more likely to both socially and medically transition. Preventing social transition most likely only keeps trans youth closeted longer. Moreover, we should resist the assumption that permanent medicalization is inherently, uniquely, or overwhelmingly negative given the importance of gender self-determination, ample evidence of the psychosocial benefits of gender-affirming care, and critical disability studies' challenges to the idea that medical support makes a life less happy or worth living.[80] As someone who medically transitioned, permanent medicalization has meant little more than taking a few pills every day without noticeable side effects. Taking them has not inconvenienced my routine since I already take other medicines and vitamin supplements, which have had far greater adverse effects. Moreover, the label "permanent medicalization" is misleading, given the heterogeneity of interventions included in gender-affirming care.[81] In sum, while experiences with gender-affirming care vary, we cannot assume that permanent medicalization is inherently undesirable. The counter-argument also raises the spectre of conversion practices. Denying youth's requested name and pronouns in the hopes of preventing them from "growing up trans" and medically transitioning would plausibly

culture as the backdrop that individuals will be able to lead autonomous lives. See also Mark Friedman & Anthony Sangiuliano, "Limiting Rights to Protect Morality: Upholding Charter Values as a Pressing and Substantial Objective" (2021/2022) 26:1 Rev Const Stud 101.

78 *Young*, *supra* note 42.

79 Mathilde Kennis et al, "Gender Affirming Medical Treatment Desire and Treatment Motives in Binary and Non-Binary Transgender Individuals" (2022) 19:7 J Sexual Medicine 1173; Sandy E James et al, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016) at 102–103, online: [perma.cc/Y3JF-VVDE]; Katherine Rachlin, "Medical Transition Without Social Transition: Expanding Options for Privately Gendered Bodies" (2018) 5:2 Transgender Studies Q 228.

80 Ashley, "Adolescent Medical Transition," *supra* note 33 at 144–48; Christine Wieseler, "Epistemic Oppression and Ableism in Bioethics" (2020) 35:4 Hypatia 714; Eli Clare, *Brilliant Imperfection: Grappling with Cure* (Durham, NC: Duke University Press, 2017). See also Eva Feder Kittay, "Ideal Theory Bioethics and the Exclusion of People with Severe Cognitive Disabilities" in Hilde Lindemann, Marian Verkerk & Margaret Urban Walker, eds, *Naturalized Bioethics: Toward Responsible Knowing and Practice* (Cambridge: Cambridge University Press, 2009) 218.

81 See Ashley, "Adolescent Medical Transition," *supra* note 33 at 138–39.

constitute conversion practices, which are criminalized in Canada.[82] Since it relies on an unsubstantiated and implausible causal hypothesis, the counter-argument fails to buttress a rational connection.

According to the third and last counter-argument, parents are best positioned to determine whether their child's request to change their name and pronouns is attributable to social contagion. The counter-argument fails because there is no sound evidence of significant levels of social contagion among trans youth, no way to ascertain whether a child's gender identity is attributable to social contagion, and no evidence that respecting children's names and pronouns is not in the best interests of youth whose gender identity is attributable to social contagion. The hypothesis of social contagion, often framed under the label of "Rapid-Onset Gender Dysphoria," is widely contradicted by research.[83] While there is a rise in youth coming out as trans and seeking clinical services, the leading professional view is that this rise is attributable to trans youth's increasing access to information, support, and services. Claims of social contagion have been criticized by the Canadian, Australian, and World Professional Associations for Transgender Health as well as by a coalition of 62 professional associations that includes the American Psychological Association, the American Psychiatric Association, and the Society of Pediatric Psychology.[84] Even if we accepted claims of social contagion, there remains no evidence that parents could ascertain which youth are "really" trans nor any evidence that changing one's name and pronouns would be harmful to these youth.[85] On the contrary, rejecting youth's expressed sense of self could undermine their self-trust and self-esteem, making it more difficult for them to go back to using their previous name and pronouns should they ever wish to do so.[86] In sum, even if there were an epidemic of social contagion — which we have no evidence for — granting parents a veto right would still not enhance their ability to make decisions in the best interests of the child.

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82 Florence Ashley, *Banning Transgender Conversion Practices: A Legal and Policy Analysis* (Vancouver: UBC Press, 2022) at 21–32. See also Florence Ashley, "Interrogating Gender-Exploratory Therapy" (2023) 18:2 Perspectives on Psychological Science 472. It should be noted that scholarly and community understandings of conversion practices may not align perfectly with the definition found in Canada's federal ban.

83 Arjee Javellana Restar, "Methodological Critique of Littman's (2018) Parental-Respondents Accounts of 'Rapid-Onset Gender Dysphoria'" (2019) 49:1 Archives Sexual Behavior 61; Florence Ashley, "A Critical Commentary on 'Rapid-Onset Gender Dysphoria'" (2020) 68:4 Sociological Rev 779 [Ashley, "A Critical Commentary"]; Lisa Farley & RM Kennedy, "Transgender Embodiment as an Appeal to Thought: A Psychoanalytic Critique of 'Rapid Onset Gender Dysphoria'" (2020) 21:3 Studies in Gender & Sexuality 155; Greta R Bauer, Margaret L Lawson & Daniel L Metzger, "Do Clinical Data from Transgender Adolescents Support the Phenomenon of 'Rapid Onset Gender Dysphoria'?" (2022) 243 J Pediatrics 224; Sansfaçon et al, *supra* note 61; Kennedy, *supra* note 61; V Jo Hsu, "Irreducible Damage: The Affective Drift of Race, Gender, and Disability in Anti-Trans Rhetorics" (2022) 52:1 Rhetoric Society Q 62.

84 Australian Professional Association for Trans Health, "AusPATH Position Statement on 'Rapid-Onset Gender Dysphoria (ROGD)'" (30 September 2019), online: [perma.cc/ZSW7-2SCC]; Canadian Professional Association for Transgender Health, "CPATH Position on 'Rapid-Onset Gender Dysphoria'," online (pdf): [perma.cc/7D9C-8XT5]; World Professional Association for Transgender Health, "WPATH Position on 'Rapid-Onset Gender Dysphoria (ROGD)'" (4 September 2018), online (pdf): [perma.cc/UNA2-55TS]; Coalition for the Advancement & Application of Psychological Science, "CAAPS Position Statement on Rapid Onset Gender Dysphoria (ROGD)" (26 July 2021), online: [perma.cc/8PE3-ZBX7].

85 On the distinction between causation and prognosis: Ashley, "A Critical Commentary," *supra* note 83 at 790–91.

86 Florence Ashley et al, "Gatekeeping Gender-Affirming Care is Detrimental to Detransitioners" [unpublished] (under review).

B. DISCLOSING A CHILD'S REQUEST

In addition to granting parents the right to veto their child's choice of name and pronouns at school, blanket veto and disclosure laws have the effect of forcing, coercing, or pressuring youth to come out or be outed to their parents.

The shape of disclosure requirements varies across different banket veto and disclosure laws. Because parents have a veto over their child's requested name and pronouns, youth are required to come out or be outed to their parents if they wish to have their chosen name and pronouns respected. Therefore, veto rights always indirectly operate as a disclosure requirement from the perspective of the child. However, laws may also impose a disclosure obligation on the school. Under Saskatchewan's model school procedure, for instance, schools must seek out parental consent as soon as the student requests the use of a different "name, gender identity, and/or gender expression."[87] Seeking out parental consent is a form of disclosure since it only occurs if a request is made. Some provinces could go even further in the future; in the United Kingdom, cabinet members have proposed a disclosure requirement as soon as a youth is questioning their gender.[88] Some schools may adopt a similar approach even in the absence of a legal obligation due to politicians' public statements around blanket veto and disclosure laws. Whether it be forced, coerced, or pressured, these approaches all require disclosure from the perspective of trans youth.

Disclosure requirements may be rationally connected to the objective of protecting parental authority.[89] Whereas veto rights never operate to the benefit of children, we can imagine scenarios in which parental involvement in their child's life may be beneficial despite the youth's objections. Some youth may be fearful of parental rejection when, in fact, the parent would turn out to be supportive of their gender. Strong parental support is associated with vastly improved mental health, and parents can play a critical role in helping trans youth navigate difficulties around self-acceptance, interpersonal relationships, stigma, bullying, harassment, discrimination, and violence.[90] The disclosure requirement could, in a few cases, enhance some parents' ability to foster their child's best interests, and to help them flourish into self-trust and self-love. However, as I point out later, disclosure requirements can be harmful to the child even when parents would be supportive.

While they may display a rational connection to their objective, disclosure requirements are unlikely to be minimally impairing. Disclosure requirements apply regardless of the youth's perspective or the likely impact of disclosure or of remaining closeted. While they may be beneficial in a narrow range of cases, they also predictably lead to grave harm in

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87 Ministry of Education, *supra* note 8 at 4. See also Bryann Aguilar, "Ford Says It's Important Parents are Informed About Children's Decisions Amid Debate Over Pronouns in Schools," *CTV News* (8 September 2023), online: [perma.cc/BWM4-AWP6].

88 The approach has notably been explored in the United Kingdom: Pippa Crerar, "Teachers in England Will Have to Tell Parents if Children Question Their Gender," *The Guardian* (17 July 2023), online: [perma.cc/32HU-XRA9]; Harriet Williamson, "Schools to be Forced to 'Out' Trans and Non-Binary Children to Parents Under 'Dangerous' New Tory Guidance," *PinkNews* (16 April 2023), online: [perma.cc/LZ6Z-8MB3].

89 Though see Bauer et al, *supra* note 55.

90 *Supra* note 21. Youth may be fearful or anxious about coming out to their parents even if they expect them to be supportive: Michelle N Saltis, Claire Critchlow & Jennifer A Fulling-Smith, "Discovering Gender and Coming Out: The Gender Identity Journeys and Coming Out Stories of Transgender and Gender Expansive Youth" (2022) 16:3 J LGBTQ Issues in Counseling 226 at 237.

other cases. Trans youth's fear of parental disclosure is, unfortunately, often very reasonable. Trans youth are at serious risk of physical, sexual, and emotional violence, conversion practices, and homelessness due to disclosure. Many youths may choose to remain closeted and forego school support out of fear of their parents. Forced, coerced, and pressured disclosure may also cause significant and unnecessary distress among youth who want to come out to their parents but are not ready yet. In other words, the disclosure requirement operates to the benefit of a few children but to the disbenefit of many others. Excluding such scenarios by creating exceptions and granting schools a measure of discretion in the application of blanket veto and disclosure laws would not undermine the laws' objective. Applying a disclosure requirement where the requirement operates to the detriment of the child does not enhance parents' ability to make decisions in the best interests of their child. Blanket disclosure requirements are broader than necessary and, as a result, not minimally impairing.

The scientific literature highlights the severe risks of blanket disclosure requirements. The family is tragically much less likely to be a site of love and support for trans youth. As previously noted, one study found that around half of parents respond negatively to their trans child's coming out.[91] Given the importance of parental support for trans youths' well-being, a parent's negative reaction to their child coming out is likely to have a significant negative impact on the child in terms of anxiety, depression, and suicidality.[92] While family life has improved for Canadian trans youth over the last decade, 72 percent of trans youth feel that their family does not care about their feelings, 49 percent do not feel like they have someone who loves them and that they can count on, and 25 percent of them never, rarely, or only sometimes feel safe at home.[93] Around 15 percent of trans youth have run away from home at least once, often due to feeling unsafe or experiencing sexual or physical abuse.[94] Trans youth are over eight times more likely to be homeless than other youth, often as a result of being kicked out or fleeing an unsafe family situation.[95]

It is likely that these negative outcomes disproportionately impact youth who oppose disclosure, although I am unaware of data specific to the question. Trans youth's fears of disclosure are often based on their parents' past comments on trans people and LGBTQIA2S+ communities or on their parents' political, religious, or moral views. Studies show that political, religious, and moral views are correlated with attitudes toward trans

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91 Grossman et al, *supra* note 66. See also Morgan et al, *supra* note 66. In the United States, 64 percent of youth's family makes them feel bad for their gender: Human Rights Campaign Foundation, *Gender-Expansive Youth Report* (HRC Foundation, 2018) at 8, online: [perma.cc/26C7-YDCD].

92 *Supra* note 21. Most studies on social support also separately looked at parental or family support. The studies suggest that parental and family support tend to have an even greater impact on trans youth's psychological well-being than other sources of support.

93 Taylor et al, *supra* note 50 at 20, 68, 86. In 2015, the number of youth who never, rarely, or only sometimes did not feel safe at home was 36 percent: Veale et al, *supra* note 50 at 55.

94 Taylor et al, *ibid* at 19; Veale et al, *ibid* at 16.

95 Alex Abramovich & Jama Shelton, "Introduction: Where Are We Now?" in Alex Abramovich & Jama Shelton, eds, *Where Am I Going to Go? Intersectional Approaches to Ending LGBTQ2S Youth Homelessness in Canada & the U.S.* (Toronto: Canadian Observatory on Homelessness Press, 2017) 1 at 2. Trans youth made up 6 percent of homeless youth in 2015 compared to estimates at the time suggesting that around 0.73 percent of youth identified as transgender: Jody L Herman et al, *Age of Individuals Who Identify as Transgender in the United States* (The Williams Institute, 2017), online: [perma.cc/C3VR-4SGV]. The disproportion could be higher, as some sources report a lower percentage of trans youth. It is also likely that the disproportion would be much higher if we only looked at youth who were out as trans to their parents, since youth who are closeted are less likely to be kicked out or run away due to anti-trans abuse.

people.[96] This is not to say that no conservative or religious parent accepts their trans children — many do. However, it does suggest that trans youth have some basis for predicting parental reactions and that negative outcomes may be disproportionately concentrated among trans youth who fear coming out to their parents.

Parental support may be ideal but is not always possible; for many trans youths, the next best thing is to stay closeted in order to avoid rejection, abuse, and homelessness. For youth who feel unable to safely come out at home, schools are an essential site of support and acceptance.[97] Support and acceptance by peers and teachers serve a protective function that can mitigate the negative impacts of being unable to come out. Misgendering is also distracting, which can undermine trans youth's equal access to education. The mission of schools in fostering a positive, safe, and inclusive learning environment is undermined when some youth do not feel respected in their gender or free to express it.[98]

Disclosure requirements also negatively impact trans youth's ability and willingness to seek out counselling and support from school employees. Trans youth are at a greater risk of bullying, harassment, discrimination, and violence at school. Yet, in Canada, only 53 percent of trans youth report having someone they can confide in and talk to about their problems.[99] As a result of disclosure requirements, some youth will inevitably feel unable to tell a teacher or school counsellor about their experiences of bullying, harassment, discrimination, and violence out of fear that they will be outed to their parents. This is true regardless of the exact language of blanket disclosure requirements since many youth who are aware that blanket veto and disclosure laws exist will be uncertain of their scope or implementation by the school. While these fears may arise even in the absence of a disclosure requirement, the requirements nonetheless enhance them — especially given the current widespread public debates around blanket veto and disclosure laws.

To satisfy the minimal impairment branch of the *Oakes* test, governments must demonstrate that no law or policy that impairs trans youth's rights significantly less would be equally effective at protecting parents' ability to foster the best interests of their child.[100] It is unlikely that governments can meet this burden. We can readily conceive ways to promote parental involvement in trans youth's lives without threatening children's well-being. Possible alternatives include (a) creating exceptions for mature minors and parents whose authority is restricted; (b) allowing schools not to apply the disclosure requirement in situations where disclosure is likely to be harmful or against the child's best interests; and (c) replacing the disclosure requirement with a policy that encourages and supports youth in safely coming out to their parents. Since my arguments regarding mature minors and court

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96 Jackson S Burton et al, "Determinants of Public Opinion Toward Gender-Affirming Surgery in the United States" (2023) 9:3 Transgender Health 241; Anna Brown, "Deep Partisan Divide on Whether Greater Acceptance of Transgender People is Good for Society" (11 February 2022), online: [perma.cc/T8AZ-QQH5]; Long Doan, Natasha Quadlin & Brian Powell, "Americans' Perceptions of Transgender People's Sex: Evidence from a National Survey Experiment" (2019) 5 Socius 1; Aaron T Norton & Gregory M Herek, "Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults" (2013) 68:11/12 Sex Roles 738.

97 Cardona et al, *supra* note 50; Shah et al, *supra* note 51.

98 On the importance of fostering a learning environment that is equal and free of discrimination, see notably *Ross v New Brunswick School District No 15*, 1996 CanLII 237 at para 82 (SCC) [*Ross*].

99 Taylor et al, *supra* note 50 at 68.

100 *Wilson Colony*, *supra* note 7 at para 54, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.

restrictions on parental authority regarding veto rights apply *mutatis mutandis*, I will not repeat them here.[101] For greater clarity, I am here assuming that veto rights are not rationally connected to their objective and that alternatives do not have to require parental consent, which would operate as an implied disclosure requirement.

The objective of disclosure requirements would not be substantially undermined by allowing schools to maintain confidentiality where disclosure would likely be contrary to the child's best interests since the scope of parental authority is delineated by the best interests of the child. Discretion is not foreign to schools; in the absence of blanket veto and disclosure laws, schools are called upon to exercise their judgment in a multitude of ways.[102] Indeed, blanket veto and disclosure policies would be unnecessary if schools were not afforded the discretion to withhold some information from parents. The Supreme Court has previously highlighted the importance of discretion for proper school functioning, stating that "[s]chool authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students."[103] In that case, school staff were allowed to search a 13-year-old student without the consent or knowledge of his parents. Teachers' training in childhood development and experience serving as mandatory reporters under child protection laws give them tools to evaluate, in conversation with the student, whether disclosure is likely to be harmful or contrary to their best interests.[104] In many schools, this alternative reflects the status quo ante.

A flexible disclosure requirement would not eliminate all risks and concerns from the perspective of trans youth. Some trans youth will be unable to articulate the reasons why they are fearful of their parents' reaction to disclosure. Close relationships often involve a degree of intuitive knowledge that is difficult to put into words, a fact that is only heightened for youth. By relying on articulable fears and observable factors, teachers and school authorities are likely to underestimate the risks posed by disclosure. Even parents who claim to support trans communities and their rights sometimes respond negatively to their own child coming out.[105] Flexible disclosure requirements may also discourage some youth from seeking support and would restrict youth's control over the manner and timing of disclosure. Many youth wish to delay disclosure not to reject parental involvement but to give themselves time to explore their gender, test the waters at home, and prepare for disclosure by gathering information or establishing a support network.[106]

A policy that encourages and supports youth toward safely coming out to their parents without requiring disclosure may suffice to meet the legislative objective of protecting parental authority. While the option may keep some parents in the dark for longer, it would

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101 The logic of *AC v Manitoba*, *supra* note 14 does not exclude decisions about disclosure from the range of decisions that mature minors can make for themselves. Section 7, its constitutional foundation, includes rights to privacy. See also *R (Axon) v Secretary of State for Health*, [2006] EWHC 37 (Admin) (KBD) for a persuasive treatment of the question in the English context.

102 Both as a matter of law and of practice, schools routinely set codes of conduct, take disciplinary measures, and determine the consent of lessons without parental involvement or consent.

103 *R v M(MR)*, 1998 CanLII 770 at para 49 (SCC).

104 On mandatory reporting, see e.g. *Child, Youth and Family Services Act, 2017*, *supra* note 43, s 125.

105 Marie-Amélie George, "Exploring Identity" (2021) 55:1 Fam LQ 1 at 19; Katherine A Kuvalanka et al, "An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children" (2019) 57:1 Fam Ct Rev 54 at 62; see also Riggs & Bartholomaeus, *supra* note 64; Ashley, "A Critical Commentary," *supra* note 83 at 789.

106 Saltis, Critchlow & Fulling-Smith, *supra* note 90 at 237–39.

arguably promote the involvement of a larger number of parents overall by creating a safe space for youth to explore their gender and navigate disclosure instead of staying closeted. Furthermore, even from the standpoint of the few parents who are left in the dark, the alternative does not protect parental authority substantially less since parental authority does not include a right to cause unnecessary distress or harm, which is likely to occur when depriving youth of control over the manner and timing of disclosure. Additionally, there is at present no clear evidence that parents who would react positively to their child's coming out are in favour of depriving their child of control over the manner and timing of disclosure. Nor can we adopt such a conclusion as a matter of common sense. On the contrary, many parents of trans youth have expressed their opposition to mandatory disclosure requirements — suggesting that they may not meaningfully serve their interests.[107]

In the language of the *Oakes* test, we have good reasons to believe that blanket disclosure requirements are not minimally impairing. We can conceive of at least three alternatives that would equally further governments' objective in promoting parents' authority to make decisions that further the best interests of the child while better protecting the autonomy, privacy, and equality of trans youth.

Canadian law often assumes that parental authority supports the best interests of the child. The assumption is important given the large number of decisions involved in parenting and given that the state has often used its parens patriae jurisdiction in a discriminatory manner. When it comes to trans youth, however, the evidence demonstrates that parents frequently make decisions that are harmful to their children.

Blanket veto and disclosure laws cannot be justified as a protection of parental authority under the *Oakes* test. Veto rights only operate to the detriment of trans youth, and thus do not further parents' legitimate authority. Disclosure requirements impair the rights and freedoms of trans youth more than necessary since we can imagine alternatives that adequately protect parental authority while minimizing the detrimental impact of disclosure requirements.[108]

IV. PRESSING AND SUBSTANTIAL OBJECTIVES AND PARENTAL ENTITLEMENT

In Part III of the article, I have argued that blanket veto and disclosure laws fail the rational connection and minimal impairment branches of the *Oakes* test if their goal is to protect parents' authority to further the best interests of their child. What if a government sought to circumvent this conclusion by unmooring itself from the best interests of the child and framing its objective as protecting parents' personal entitlement to make decisions for

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107 Canadian Parents of Trans Kids, "Attention Canadian education ministers" (29 August 2023), online: [perma.cc/EU2E-ULFG]; Magan Carty, "N.B. Gender-Identity Policy Will Keep Kids in the Closet, Says Father of Trans Teen," *CBC Radio* (17 August 2023), online: [perma.cc/CKA9-SLK6].

108 While I have focused on the *Oakes* test, these arguments also inform the application of section 7 principles of fundamental justice since rational connection is conceptually related to the principle of arbitrariness and minimal impairment is conceptually related to the principle of overbreadth. Compare *Oakes*, *supra* note 18 at para 70; *Bedford*, *supra* note 34 at paras 98, 101. It should be noted that section 1 is quantitative and involves an aggregate weighing of benefits and risks, whereas arbitrariness and overbreadth are qualitative and can be violated by virtue of a law's impact on a single person.

the child and exercise control over them? In this part, I argue that while blanket veto and disclosure laws would doubtless further such parental entitlement, protecting or promoting parental entitlement is not a legitimate governmental objective.[109] Therefore, the laws would still fail to be justified under the *Oakes* test.

Notwithstanding the fact that courts "have distanced [themselves] from the ancient juridical conception of children as chattels of their parents,"[110] some parents and politicians invoke parental rights in terms that are reminiscent of property-like relationships.[111] This sentiment was visible among some participants at the 1 Million March 4 Children in September 2023, with one child being photographed holding a sign that read: "I belong to my parents."[112] It is also reflected in family law cases, where some parents use language that connotes control and ownership rather than stewardship.[113] A property-like conception of parental rights has also been defended by some legal scholars, with one United States author expressing the view that people do not primarily become parents to contribute to children's welfare but rather to "[express] one's genes and values to and through children," and that parents should have "a limited property right [over children] … in order to do the expressive work of procreation and childrearing."[114] Understanding parental rights as parental entitlement does not, to be sure, deny the importance of the child's well-being. However, parental entitlement reframes the well-being of the child as a competing interest rather than as the underlying purpose or raison d'être of parental rights. From the perspective of parental entitlement, parents have a right to control their children for their own purposes, but governments can sometimes impair that right to protect children.

Can governments legitimately adopt laws and policies with the objective of furthering parental entitlement, if these laws impair *Charter* rights and freedoms? I would argue that they cannot. Section 1 of the *Charter* places limits on the objectives that governments can legitimately pursue, stating that governments can only impair people's rights and freedoms pursuant to a law or policy that is "demonstrably justified in a free and democratic society."[115] Under Supreme Court precedent, governments are limited to pursuing objectives that are compatible with a free and democratic society, reflect pressing and substantial

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109 It is true that courts rarely find government objectives to be invalid: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf 2007 supplement) vol 2 at 38-53–38-56; Marshall Rothstein, "Section 1: Justifying Breaches of *Charter* Rights and Freedoms" (2000) 27:2 Man LJ 171 at 174. However, this observation should not be elevated into a rule or used to reject well-reasoned challenges to the validity of a law or policy's objective, lest we render this part of the *Oakes* test meaningless.

110 *Children's Aid Society*, *supra* note 20 at 372, La Forest J.

111 I would suggest that these parents and politicians overestimate the scope of parental control and underestimate the scope of correlative parental obligations in part due to the complexity of enforcing family law, especially outside of divorce and child protection proceedings. Oftentimes, the state is unaware that parents are harming their children or believe that taking the child away from their parents would be even more harmful. It is also difficult to challenge decisions regarding the child where parents agree on them, as courts are relatively inaccessible to minors. However, the procedural realities of child law do not alter parents' duty to act in the best interests of the child nor the fiduciary logic underpinning their authority. In other words, this mistaken impression is attributable to tolerance rather than entitlement.

112 Knox, *supra* note 6.

113 See e.g. *Nova Scotia (Community Services) v GM*, 2021 NSSC 186 at para 128 (the non-affirming mother argued that her trans son "belongs to her"). See also Knox, *supra* note 6.

114 Chan, *supra* note 22 at 1190, 1201.

115 *Supra* note 14.

concerns, and are directed at "the realization of collective goals of fundamental importance."[116]

Protecting or promoting parental entitlement is not a legitimate governmental objective. It does not protect tangible interests other than a property-like interest in the child, which is repulsive to a free and democratic society. By selectively invoking parental entitlement against trans youth, governments also betray discriminatory and moralistic motives that are incompatible with a free and democratic society and do not reflect the realization of collective goals of fundamental importance.

A. RIGHTS FOR THE SAKE OF RIGHTS

Parental entitlement is an entitlement for the sake of entitlement, a right for the sake of rights. Laws that impair *Charter* rights and freedoms must be based on pressing and substantial concerns. Once we exclude the best interests of the child from consideration, however, parents' knowledge and control over their child's ability to live out their gender at school does not grant parents any clear personal benefit nor solve any identifiable social problem.[117] It is a right to dictate another's life, not a right to determine one's own life.[118]

While a person may well be interested in controlling someone else's life, such an interest does not strike me as tangible or substantial. It attracts abstract, unclear benefits. It is superficial. In this regard, parental entitlement can be compared to the objective of "preserving the social contract" that the Supreme Court recently rejected in *Frank*.[119] According to the majority, preserving the social contract "superficially and vaguely evokes a political philosophy which is ill-suited to withstand the rigours of the s. 1 justification analysis."[120]

Protecting parental entitlement and preserving the social contract both appeal to an abstract understanding of what rights people should have yet afford us with no clear sense of what one concretely stands to gain by having these rights. As the Office of the Child and Youth Advocate of New Brunswick has pointed out, "[a]ny concept of parental rights which starts and stops with asserting that parents should have unlimited control over the child is an analysis too limited to stand."[121] To borrow the Supreme Court's words in *Frank*, protecting

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116 *Oakes*, *supra* note 18 at paras 65 ("[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance," and "[i]t is necessary ... that an objective relate to concerns which are pressing and substantial" at 69). See also Hogg, *supra* note 109 at 38-47–38-48; *R v KRJ*, 2016 SCC 31 at para 61 ("[a] law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society").

117 On the relevance of governments identifying a social problem, see *R v Zundel*, [1992] 2 SCR 731 at 764 [*Zundel*]. The identification of a social problem must be rooted in evidence: *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 984, 990.

118 Parents can, to be sure, incur personal benefits from their relationship to their children. The love and affection of a child undoubtedly confers psychological benefits, for instance. However, blanket veto and disclosure laws do not appear to confer any benefits of the sort. On the contrary, the laws are likely to undermine the parent-child relationship since the impact of vetoes and disclosure requirements on youth's freedom are likely to cause resentment.

119 *Supra* note 18 at para 49.

120 *Ibid*.

121 Kelly A Lamrock, *On Balance, Choose Kindness: The Advocate's Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy* (Fredericton: New Brunswick Child & Youth Advocate, 2023) at 12, online: [perma.cc/EG9D-SAD9].

parental entitlement "is at once too general, providing no meaningful ability to analyze the means employed to achieve it, and too narrow, effectively collapsing any distinction between legislative means and ends."[122] For the protection of parental entitlement to be a pressing and substantial objective, it must be a means to a further end such as addressing an identifiable social problem or providing an identifiable personal benefit to the parent. If we accept that blanket veto and disclosure laws are directed at parental entitlement, they "would have no real objective other than the measure itself."[123]

If courts were to recognize protecting parental entitlement without more as a pressing and substantial objective, the requirement of a pressing and substantial objective would be rendered meaningless. Any law or policy that grants rights expands someone's sphere of control. The right to take your neighbour's property, for instance, could be justified as expanding your right to property. This outcome is undesirable and contrary to Supreme Court precedent. As then-Justice Beverley McLachlin explained in *Zundel*, regarding a law that criminalized the spreading of false news:

> If the simple identification of the (content-free) goal of protecting the public from harm constitutes a "pressing and substantial" objective, virtually any law will meet the first part of the onus imposed upon the Crown under s. 1. I cannot believe that the framers of the *Charter* intended s. 1 to be applied in such a manner.[124]

Allowing rights for the sake of rights as a legitimate objective would render not only the pressing and substantial branch of the test meaningless but also the rational connection and minimal impairment branches. Granting someone a right is always rationally connected to the objective of expanding their sphere of control, and no alternative measure is as effective at expanding their sphere of control. Establishing rational connection and minimal impairment becomes tautological, threatening the integrity of the *Oakes* test. Any government could simply recharacterize its objective as a right for the sake of rights to skip to the last stage of the *Oakes* analysis.

To borrow the language of then-Justice McLachlin, I cannot believe that section 1 was intended to be applied in such a manner. Courts should guard against the possibility of governments adopting a more objectionable objective to circumvent the rational connection and minimal impairment branches of the *Oakes* test. To pursue good poorly may be an ill, but it is far worse to pursue evil well. The former is misguided or overreaching, the latter is cruel. Recognizing a pressing and substantial interest in rights for the sake of rights would trivialize the first three steps of the *Oakes* test, making it easier for governments to justify laws with objectionable or trifling objectives than laws with praiseworthy ones. Such an outcome would, in my view, belie the spirit of section 1 of the *Charter*.

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122 *Frank*, *supra* note 18 at para 53.
123 *Ibid*.
124 *Supra* note 117 at 762.

B. PROPERTY-LIKE INTERESTS

While parents' interests in controlling their children could perhaps be framed as tangible by comparing them to property rights, I do not believe that such a framing would be compatible with a free and democratic society.

Under this argument, a parent's interest in doing as they please with their child is akin to a person's interest in doing as they please with their house or car. If preserving one's property is a tangible interest, so must be parental entitlement. To understand the fundamental problem with the analogy, we must keep in mind that property rights are rights over objects for the purpose of using them as means to an end. Houses and cars critically shape one's privacy, safety, and ability to pursue other interests. A house provides physical protection and a space to engage in various fulfilling activities. A car makes it easier for me to get groceries to live, or attend singing lessons so I can express myself. Using an object as a means to an end is not particularly objectionable. But to seek out personal benefits by using children as a means to an end is a whole other matter.[125]

Human dignity proscribes control of another for purposes that are completely foreign and antithetical to their interests, desires, needs, and priorities. To treat someone solely as a means to an end is a quintessential form of dehumanization, of denying the dignity of persons.[126] The distinction between treating someone as an end in themselves and treating them as a means to an end epitomizes the difference in moral status between persons and objects — to treat someone solely as a means to an end is to treat them in a property-like manner. To be sure, many laws incidentally allow people to treat others solely as a means to an end. What sets blanket veto and disclosure laws apart is that they embrace treating children as means to an end as its very purpose rather than incidentally.

Laws that aim to protect parental entitlement treat children as though they were the property of their parents. The idea of having property-like rights over another person is antithetical to a free and democratic society, and ought to be repulsive to Canadian law. A property-like right over children cannot be justified by the dependence of minors. Dependency justifies parental authority, but not parental entitlement. The law of fiduciary relationships reflects the idea that relationships of trust and dependence require more protection from the whim of others, not less. Fiduciaries are beholden to "loyalty, good faith and avoidance of a conflict of duty and self-interest."[127]

Courts have long rejected as undesirable if not appalling the idea that minors are the property of their parents. As Justice La Forest expresses in *Children's Aid Society*: "Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents."[128] In his history of child law in the United States, legal scholar

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125 Taking this idea to its extreme could even legitimate sexual violence. While sexual violence would certainly violate the proportionality requirement of the *Oakes* test, the fact that it may not be excluded at the first step of the *Oakes* analysis if we follow this line of reasoning ought to give us pause.

126 See e.g. Thomas E Hill, Jr, "Humanity as an End in Itself" (1980) 91:1 Ethics 84.

127 *Norberg v Wynrib*, [1992] 2 SCR 226 at 274, citing *Can Aero v O'Malley*, 1973 CanLII 23 at 606 (SCC).

128 *Supra* note 20 at 372. See also *J v C (An Infant)*, [1969] UKHL 4; *McGee v Waldern*, 1971 CanLII 200 (ABKB).

Jeffrey Shulman revealed how the country's courts had already begun moving away from viewing children as property before the Revolutionary War, under the influence of John Locke's educational theory.[129] By the mid-1900s, they firmly opposed any grant of "preeminent and sovereign authority" to the parents as incompatible with liberal democracy, likening such authority to the status of children as property of their fathers in ancient Rome.[130]

A property-like interest in children is inconsistent with the liberal foundations of Canadian constitutionalism.[131] Children are afforded the same rights and freedoms as adults under the *Charter*. While limiting these rights and freedoms for their own benefit is often easier than it is for adults, granting someone property-like control over them fundamentally offends their rights to dignity, privacy, and life, liberty, and security of the person. A society that subjects someone's freedom to the whims of another cannot be described as free. A conception of parental rights that ignores the needs and interests of the child is selfish and egotistical, a far cry from the "collective goals of fundamental importance" that *Oakes* calls for.[132]

Recognizing a property-like interest in children would be inconsistent with the conception of parenting embodied in the *Convention on the Rights of the Child*, which was ratified by Canada.[133] The *Convention on the Rights of the Child* is predicated on the idea that children are not the property of their parents but rather persons with inherent dignity and worth and endowed with fundamental human rights.[134] To be subjected to another's will regardless of one's needs, priorities, and aspirations cannot be squared with human dignity. Parental entitlement would also directly violate article 3 of the *Convention on the Rights of the Child*, which states that "[i]n all actions concerning children," including those undertaken by legislative bodies, "the best interests of the child shall be a primary consideration."[135] This inconsistency matters to the *Oakes* test since "[g]enerally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society."[136] Protecting a property-like interest in children cannot be accepted as a legitimate objective under section 1 of the *Charter*.

C. DISCRIMINATORY MOTIVES AND MAJORITARIAN VALUES

Blanket veto and disclosure laws selectively invoke parental rights to target trans communities, betraying discriminatory motives that are inconsistent with the values

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129 Shulman, *supra* note 19 at 39, 58, 82, 91, 203.

130 *The Etna*, 8 F Cas 803 (Dist Ct Me 1838) at 804. See Shulman's discussion of this case, *supra* note 19 at 1–3, 5. The judges used the unfortunate and racist language of "civilized people" in lieu of "liberal democracy," betraying their association of the United States political structure with whiteness.

131 Judges describe this notion of children as property in negative terms, evincing the evolution of Canadian values since those days when children were considered the property of their parents: *Children's Aid Society*, *supra* note 20 at 372. To recognize parental entitlement would fail to recognize the evolution of Canadian society.

132 *Supra* note 18 at para 65.

133 See e.g. *AC v Manitoba*, *supra* note 14 at para 93; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at paras 69–71 (SCC).

134 *Supra* note 33, Preamble.

135 *Ibid*, art 3(1).

136 *R v Keegstra*, [1990] 3 SCR 697 at 750. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056–57.

embodied in section 1 of the *Charter*. As the Supreme Court of Canada has explained in *Neufeld*, transgender communities are "undeniably a marginalized group" whose history is "marked by discrimination and disadvantage."[137] Oftentimes, especially for youth, they are "stereotyped as diseased or confused simply because they identify as transgender."[138] The view that many trans youth are merely confused and should not be affirmed lies at the heart of blanket veto and disclosure laws. Laws that are founded on such discriminatory motives, I would argue, are incompatible with a free and democratic society and do not reflect collective goals of fundamental importance.

The context surrounding appeals to parental entitlement sheds light on its legitimacy as a governmental objective. Blanket veto and disclosure laws only apply to situations where youth request a change of name or pronouns at school for gender-related reasons. They do not apply where the request is unrelated to gender, nor to other types of requests made by children in schools. To convince ourselves of the discriminatory motives behind the laws, we need only imagine the government's response to parents forcing their cisgender child to use a name and pronouns that do not align with their gender assigned at birth — I suspect that the situation would be described in terms of child abuse rather than an exercise of parental rights. Blanket veto and disclosure laws, rather than enshrining parental entitlement as a general principle of law, create a trans-specific exception to the general rule that parental authority exists to further the best interests of the child.

Blanket veto and disclosure laws operate as a licence to discriminate. They seek to grant parents the power to impose their values, attitudes, and beliefs about trans people and gender transition onto the child. In most situations, parents are of course free to *share* their values, beliefs, and aspirations with their children. However, it is quite another thing than to grant parents the right to *impose* such values, beliefs, and aspirations over the child's own. Such imposition is contrary to the values of equality and protection of minorities that underlie the Canadian constitution.[139]

Canadian courts have repeatedly refused to recognize a pressing and substantial objective where the law's purpose was fundamentally discriminatory. The Supreme Court's decision in *Vriend v. Alberta*, a case revolving around the exclusion of sexual orientation from provincial human rights law, is informative.[140] The Supreme Court rejected the exclusionary law, arguing that "a legislative omission [that was] on its face the very antithesis of the principles embodied in the legislation as a whole … cannot be said to indicate any discernible objective … that might be described as pressing and substantial."[141]

Blanket veto and disclosure laws are similar in nature, creating a singular exception to child and education law's central objective of furthering the best interests of the child, protecting parental authority only for that purpose. In many cases, the laws are also antithetical to the institutional objective of eradicating discrimination in schools.[142]

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137 *Supra* note 29 at para 84.
138 *Ibid* at para 85, citing *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1 at paras 136–37.
139 *Reference re Secession of Quebec*, 1998 CanLII 793 at para 79 (SCC).
140 1998 CanLII 816 (SCC).
141 *Ibid* at para 116.
142 *Ross*, *supra* note 98 at para 98. I say "in many cases" because not every school has expressly adopted such an objective.

Laws whose principal operation is to single out marginalized groups have also been rejected for lacking a pressing and substantial objective in cases such as *Rosenberg v. Canada (Attorney General)*[143] and *Centre for Gender Advocacy*.[144] In an opinion penned by Justice Rosalie Abella, the Ontario Court of Appeal in *Rosenberg* rejected a law that sought to exclude same-sex spouses from pension plans.[145] In *Centre for Gender Advocacy*, the Quebec Superior Court rejected the claim that preserving the stability of names and of the register of civil status was a pressing and substantial objective since it was selectively invoked against trans migrants.[146]

The Supreme Court's contrasting precedents in *Big M Drug Mart* and *Edwards Books* also shed light on the constitutional significance of selectively invoking a governmental objective that would otherwise be valid.[147] Both cases revolved around laws creating a day of rest that coincided with the Christian Sabbath. In *Big M Drug Mart*, the Supreme Court held that the federal law was not backed by a pressing and substantial objective because, although it furthered the secular objective of creating a day of rest for labourers, it primarily aimed to "[compel] the observance of a Christian religious duty."[148] A year later in *Edwards Books*, however, the Supreme Court upheld a provincial law that also created a day of rest that coincided with the Christian Sabbath since the law was not motivated by religious consideration.[149] Importantly, the statute in *Edwards Books* did not punish groups whose religion followed another day of rest; the statutory day of rest simply shifted for those employers.

By selectively expanding parental rights in situations that involve trans youth, blanket veto and disclosure laws are far more reminiscent of *Big M Drug Mart* than *Edwards Books*. Promoting cisnormativity and singling out trans youth are no more pressing and substantial objectives than promoting Christianity and singling out members of other religious faiths. Just as *Big M Drug Mart* pursued that end through the means of a statutory day of rest, so do blanket veto and disclosure laws further their discriminatory ends through the means of expanding or protecting parental entitlement.

This is not to say that the government cannot adopt legislation that reflects a moral or political view. However, as scholars Mark Friedman and Anthony Sangiuliano have compellingly argued, "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."[150] To be legitimate, laws and policies rooted in moral concern must instead reflect "society's fundamental and stable moral commitments, which all citizens can rally around regardless of their divergent moral views or transient political convictions."[151] To this, one might add that the legislating of majoritarian values could not be a collective goal of fundamental importance because marginalized groups are equally part

143 (1998), 38 OR (3d) 577 [*Rosenberg*].
144 *Supra* note 29.
145 *Supra* note 143.
146 *Supra* note 29 at paras 240–44. This conclusion was not appealed.
147 *Big M Drug Mart*, *supra* note 24; *Edwards Books*, *supra* note 72.
148 *Big M Drug Mart*, *ibid* at para 141.
149 *Edwards Books*, *supra* note 72 at para 126.
150 Friedman & Sangiuliano, *supra* note 77 at 113.
151 *Ibid*.

of this collectivity and must see their desire to pursue their own conception of the good life recognized in law.[152]

This view was adopted by the Supreme Court in *R. v. Butler*. Justice Sopinka, writing for the majority, rejected the validity of laws predicated on the "dominant, if not exclusive, purpose [of advancing] a particular conception of morality" since it is "inimical to the exercise and enjoyment of individual freedoms."[153] For an essentially moral objective to be valid, he explained, it must be predicated on "some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[154]

If governments cannot impose their moral views on the acceptability of trans childhood and overtly ban changes of name and pronouns at school for gender-related reasons, they should not be allowed to grant others the right to do so. Governments should not be allowed to do indirectly what they cannot do directly.[155] By singling out trans youth and subjecting them — and no one else — to parental entitlement, blanket veto and disclosure laws transparently seek to privilege the views of those who are hostile to trans inclusion and oppose their children's gender-related changes of name and pronouns. Children who are not trans retain the right to have their gender identity, a central element of their sense of self, respected and affirmed at school. As Friedman and Sangiuliano explain, "the individual's 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."[156] Parental entitlement over trans youth is incompatible with the egalitarian and liberal philosophy that lies at the heart of Canadian law and should be rejected as a legitimate objective under the *Oakes* test.

V. CONCLUSION

Schools should be a place where all students can learn and flourish as persons without feeling devalued or fearing for their safety.[157] Despite often being framed as protecting the rights of parents against schools, it is the autonomy and equality of trans youth that blanket veto and disclosure laws infringe. Parents should not have the power to control their children for their own purposes, nor make decisions that are decidedly against the best interests of their children. Canadian child law has long recognized the best interests of the child as its

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152 The idea that laws must be justifiable to marginalized groups is reflected in the philosophical notion of public reasons: John Rawls, "The Idea of Public Reason Revisited" (1997) 64:3 U Chicago L Rev 765; Leif Wenar, "John Rawls" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2021 Edition, online: [perma.cc/65X4-SNF7]. Some authors have argued that it is a requirement of the rule of law: Paul Gowder, *The Rule of Law in the Real World* (New York: Cambridge University Press, 2016). The idea is also related to Joseph Raz's normal justification thesis, which holds that authority is justified when those subject to the authority are more likely to comply with reasons applicable to them by following the rule than by following the reasons directly: Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised ed (Oxford, UK: Clarendon Press, 1994) at 210–37.

153 [1992] 1 SCR 452 at 492.

154 *Ibid* at 493.

155 See notably *Big M Drug Mart*, *supra* note 24 at para 141.

156 Friedman & Sangiuliano, *supra* note 77 at 114 (paraphrasing Dyzenhaus, *supra* note 77 at 315).

157 Mayo, *supra* note 3 at 369.

cornerstone, understanding parenting in terms of parental authority rather than entitlement. As legal scholar Jeffrey Shulman eloquently expresses:

> [T]he law can help us learn how, as parents, to practice sacrifice, to surrender control. Our primal creation myth tells us that children are not born to be obedient. For most of us, our own parenting experience confirms the ancient truth that children will not be made in anyone else's image. Not easily, at any rate. It should be our joy that children become someone else, though it be a joy tinged with elegiac tones.[158]

As I have argued in this article, blanket veto and disclosure laws fail the *Oakes* test regardless of whether we understand parental rights as parental authority or parental entitlement. Protecting parental authority is a legitimate objective, but the laws are neither rationally connected to this objective nor minimally impairing. Veto rights do not enhance parents' ability to further the best interests of their child, only granting them power to act contrary to those interests. Disclosure requirements go further than necessary to protect parental authority and, overall, operate to the detriment of trans youth. For its part, protecting parental entitlement is not a legitimate governmental objective. Granting parents property-like control over their children ought to be repulsive in a free and democratic society. If blanket veto and disclosure laws are found to impair a *Charter* right or freedom, they should be held unconstitutional and declared of no force or effect regardless of the conception of parental rights invoked in court.[159]

This conclusion is an important one because of the conceptual ambiguity of parental rights, which can refer to parental authority and parental entitlement alike, creating a risk of slippage or shifting objectives. If it goes unnoticed, this slippage or shifting objective could lead to the laws being upheld by applying different conceptions of parental rights at different stages of the *Oakes* analysis. Not only would such an outcome be undesirable for trans youth, but it would threaten the very integrity of the *Oakes* test.

While I have articulated my arguments around the *Oakes* test, the fundamental problems I highlight with blanket veto and disclosure laws have broader implications. The legitimacy of laws depends on the permissibility of their aims and the rationality of the means they select in pursuing those aims. Laws that do not accord with the warrants of rationality and laws that pursue aims which are incompatible with the values of liberal democracy are illegitimate and should be rejected, regardless of constitutionality. The moral and political objectionability of blanket veto and disclosure laws is worth emphasizing, given the decision

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158 Shulman, *supra* note 19 at 227.

159 Given the arguments I have made toward the end of the last part regarding the objectionability of allowing a government to do evil well while prohibiting the government from doing good poorly, I have to ask whether the government's reliance on a repulsive or illegitimate objective would not be contrary to the principles of fundamental justice under section 7. This argument was suggested by Justice Binnie, dissenting on other grounds in *AC v Manitoba*, *supra* note 14. The judge argued that denying a youth decisional authority regardless of maturity contradicted the principles of fundamental justice because it "takes away the personal autonomy of A.C. and other 'mature minors' *for no valid state purpose*" (*AC v Manitoba*, *ibid* at para 222 [emphasis in original]). However, his reasoning did not clearly distinguish between invalid objectives and measures that fail to further an otherwise valid objective. We could, of course, argue that illegitimate objectives are a form of arbitrariness or gross disproportionality, but these would run against the Supreme Court's statements in *Bedford*, *supra* note 34 at paras 111, 121, 123. Were we to reject the existence of any principle of a fundamental justice relating to the illegitimacy of governmental objectives, critical precedents such as *AC v Manitoba* could be circumvented by adopting a more objectionable objective. I leave this interesting question for a future article.

made by the Government of Saskatchewan to circumvent constitutional scrutiny by invoking the notwithstanding clause.[160]

The relevance of my arguments extends beyond blanket veto and disclosure laws. Trans youth are not the only marginalized group being targeted by contemporary parental rights movements.[161] Nor are blanket veto and disclosure laws the only measure targeting trans youth under the banner of parental rights.[162] The fundamental problems I highlight recur across many invocations of parental rights. I would suggest that these problems may be inherent in parental rights movements. If they were rooted in well-supported concerns over the well-being of youth, the rights and interests of youth could serve as a rallying cry and the language of parental rights would be superfluous. By organizing under the banner of parental rights, parental rights movements betray the fact that they care far more about empowering parents than protecting youth. Children are not vessels of parental desire. They must be shaped in their image, not ours.

160 CBC News, "Pronoun Policy," *supra* note 15.
161 For one example, see Baldwin Clark, *supra* note 2.
162 Madeleine Carlisle, "What Florida's 'Don't Say Gay' Bill Could Mean for LGBTQ Kids," *TIME* (9 February 2022), online: [perma.cc/B96M-8AED].

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