2024-09-03

For Me and Not Thee: Critiquing the Abstract Conception of Freedom of Expression Under the Charter

Byram, Joseph

UNIVERSITY OF CALGARY

For Me and Not Thee:

Critiquing the Abstract Conception of Freedom of Expression Under the *Charter*

by

Joseph Byram

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF LAWS

GRADUATE PROGRAM IN LAW

CALGARY, ALBERTA

SEPTEMBER, 2024

Abstract

In this thesis, I argue through a queer, critical lens that the doctrine of freedom of expression under section 2(b) of the *Charter and Rights and Freedoms* rests on an abstract conception of freedom of expression that inadequately protects individual difference and marginalized expression. This theoretical, doctrinal thesis begins from the observation that the *Charter* freedom of expression doctrine is failing to respond to social and political issues of expression, stemming from the abstract "ideal of impartiality" that runs through liberal rights which creates problems for the regulatory and social responses to issues of expression, particularly in the digital age. The doctrine, ultimately, fails to articulate an adequate conception of freedom of expression that can protect individual difference and advance social justice. The doctrine abstracts expression and expressive freedom away from its social and emotional roots, and eventually, from social conditions and inevitable moral judgments. Resultingly, the doctrine lacks conceptions of the value of expression and threats to expressive freedom in conceiving expressive freedom as non-interference of the state. This leads to two key problems. First, the doctrine inadequately answers the question of scope and limits of protection: how can freedom of expression be fundamental to the individual and yet limited by social interests? Instead of confronting this problem, the doctrine abstracts it away. Second, stemming from this inadequacy, the broad scope of protection under section 2(b) overprotects expression (here, so-called 'antiqueer' expression) that undermines the expressive freedom of others, and the limits under section 1 allow for ideological and moral judgments to impinge on marginalized (here, queer) expression. I conclude by suggesting that we ought to consider expression in relation to the lived experiences of individuals and that oppression is a preferable basis for conceptualizing freedom of expression protection for the digital age.

KEYWORDS: freedom of expression, free speech, rights, queer, digital, regulation, legal theory, constitutional law, Charter, section 2(b), freedom, polarization.

Acknowledgements

This thesis was researched and written on land traditionally known as Moh'kins'tsis to the Blackfoot, Wîchîspa Oyade to the Stoney Nakoda, and Guts'ists'i to the Tsuut'ina. It is the traditional territory of the peoples of Treaty 7, which includes the Siksika, Kainai, and Piikani Nations (comprising the Blackfoot Confederacy), the Tsuut'ina First Nation, and the Stoney Nakoda (including Chiniki, Bearspaw, and Goodstoney First Nations), and is home to the Metis Nation of Alberta Districts 5 and 6. Parts of this thesis were developed in places across Turtle Island in what is colonially known as Canada, including the Treaty 6 territory, which is the traditional and ancestral territory of the Cree, Dene, Blackfoot, Saulteaux, and Nakota Sioux, the unceded territories of the Syilx people of the Okanagan Nation, and traditional Anishinaabe, Huron-Wendat, and Haudenosaunee territory. I am grateful to live, learn, work, and make a home in these places, and strive to do so in a good way.

Thank you to my parents, Ken and Ellen, for your care and support through every stage of my life. Thank you to my brother Eric for your clear thinking and inspiring drive. Thank you to Dawn and Guy for welcoming your adult daughter and her weird partner to stay with you while we abandoned our careers for our passions.

Thank you to all those who challenged me and helped me learn at every stage of my academic and professional life. Thank you to Dan Howitt for arguing in the Colombian rainforest about the absurdity of 'free speech'. Thank you to Emily Lennox, Leah Strand, Ryan Strand-Seifried, Brianna Walsh, and Kristin Smith for shaping key aspects of this paper. Thank you to The Honourable Gay Benns, Danica Doucette-Preville, Angela Danko, Sean Corrigan, Ashleigh Niziol, and Lachlin McKinnon for your moral and intellectual guidance. Thank you to Erin Runnalls, KC for your mentorship and friendship. Thanks to Professors Sean Fluker, Greg Hagen, Jacob Weinrib,

and Lindsay Borrows, and to fellow students at the University of Calgary and Queen's University for your deep insights on law and justice. Thank you to Dr. Lyndsay Campbell for your patience, optimism, flexibility, and support throughout my prolonged LLM experience, and to Prof. Jennifer Koshan for taking time out of your summer to serve on my examining committee.

Thank you to Dr. Emily Laidlaw for your steadfast support and patience. I am grateful (and ridiculously lucky) to have you as a supervisor. At your own inconvenience, you have helped me pursue my passions and stay true to my values and ideas. I am inspired by your vitally important research and policy work, your dedication to your students, and your infectious energy and passion.

Thank you most of all to Paula Turcotte for tolerating my panic, rage, and grumpiness over the past couple of years. Thank you for loving me, unwaveringly, for who I am.

Dedication

To Don, for your wisdom.

Preface

The roots of this thesis date back to 2021, when I read *Ward v Quebec* (2021 SCC 43). I was, and still am, perplexed by divided opinions of the Court, and the Court's reasoning, which seemed to be disconnected from reality and justice. As a once-libertarian, I sympathized with a deontological view of rights and freedoms. But I was puzzled by *Ward.* In particular, I was (and am) puzzled by a line of reasoning that required a belief that a grown man publicly insinuating that a disabled child would be better off dead is an unfortunate consequence of liberty and tolerance . As I began to explore the values of freedom of expression for answers, I realized that the difficulties went much deeper into legal and political theory and practice.

Since 2021, many political and constitutional things have happened that have shaped how I think about rights and freedoms. Setting aside the absurdity in the US, social and political discourse about queer and transgendered people in Canada has soured in ways I have not seen in my lifetime. Notably, the Alberta government indicated in early 2024 that it plans to take legislative action that threatens the safety of transgendered youth and emboldens the discriminatory discourse that is building in the province. As this paper was being completed, encampments protesting the genocide of Palestinians in Gaza by the Israeli military were set up on university campuses across the globe, including Canada. The response by some institutions, like my own, relied on (their conveniently defined) limits of freedom of expression to shield their decisions to call in riot police. These actions and their responses demonstrated how blurry freedom of expression and its limits are; how not only regulation but violence can be wielded so easily and dismissively by those in power.

This thesis is a musing on polarization, discrimination, and the conceptualization of rights and free expression in Canadian constitutional law. It is ultimately about justice, specifically how

we think about justice in respect of freedom of expression. Justice, it seems to me, is not about principles but about realities: it is about making our experiences better, individually and collectively, not slavish devotion to clarity and precision. It is not about what limits might logically arise from an academic textbook but what such limits mean in reality. Many lawyers and academics may balk at such a concept but that reaction, I suggest, may be exactly the problem.

Table of Contents

Epigraph

'…You can say what you like, Gaffer, but Bag End's a queer place, and its folk are queerer.'

'And you can say what you like, …, Mr. Sandyman,' retorted the Gaffer, 'If that's being queer, then we could do with a bit more queerness in these parts.'

- JRR Tolkien, *The Fellowship of the Ring*

1 Introduction

1.1 The *Koan* of Freedom of Expression

In *On Freedom*, Maggie Nelson writes:

> Our desire to treat everyone with compassion, kindness, and forgiveness and to throw harmful assholes off a cliff is a big koan. Practicing freedom in a world of constrained, often shitty circumstances is a big koan. Our desire to retain control over what happens to our bodies and psyches while also seeking experiences of surrender and abandon is a big koan. Our desire for increased protection from institutions while insisting that they get the fuck out of our lives is a big koan.[1]

These 'koans'[2] echo through many of the controversies, tensions, and confusions within freedom of expression. We think we ought to be able to say whatever we want, but we simultaneously think that there ought to be *some* restrictions on what others express. We want to express ourselves, but our circumstances may prevent or discourage us from doing so. We may want the government to ensure we are not unwillingly exposed to nudity or gratuitous violence, but we do not want it to direct our political advocacy, style choices, movie options, or sexual practices.

These koans do not originate in law or theory: they arise through our lived experience of expression as humans. Responding to these koans, as with any social phenomenon, is a complex and messy task. But ignoring their complexity and messiness in pursuit of clean, logical, and objective constitutional principles misses what makes expression valuable as human activities worthy of constitutional protection.

In this thesis, I argue that the *Charter*[3] doctrine rests on an abstract conception of freedom of expression that inadequately protects individual difference and marginalized expression.

---

[1] Maggie Nelson, "The Ballad of Sexual Optimism" in *On Freedom: Four Songs of Care and Constraint*, (London: Random House, 2021) eBook, at Myth of Freedom section.
[2] Paradoxes, of sorts, in Buddhist meditation practice that invite deeper thought, rather than analytical answers.
[3] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

This critique of abstraction rests on two central points. One, the doctrine inadequately answers a central koan of freedom of expression: how can freedom of expression be fundamental to the individual and yet limited in some circumstances?[4] The doctrine inadequately answers why some expression can be regulated while most other expression remains staunchly protected. I will reference this problem colloquially as 'freedom for me and not for thee' or 'the koan'. Instead of confronting the koan, the doctrine abstracts it away.

Two, stemming from the koan, the abstract doctrinal conception of freedom of expression inadequately protects individuality and individual expression, particularly that of marginalized individuals (explored here through queerness and queer expression). Because the abstraction does not provide a clear conception of expression and expressive freedom, the reasons *why* expression and expressive freedom are valuable for the individual and therefore deserving of constitutional protection are obscured. The scope becomes broad, overprotecting objectionable expression and depending largely on external limits under section 1 to address this overbreadth. These limits, however, are fraught with issues, one of which is the difficulty with 'harm' in the expressive context and the imposition of majoritarian views on individual expression.

Underlying these two points is the abstract doctrine's avoidance of a moral understanding of justice and rights. Abstraction as impartiality foregoes articulating what is good and bad, right and wrong, about expression. By abstracting from social conditions and inevitable moral judgments, the doctrine lacks conceptions of the value of expression and threats to expressive

[4] This could be described as a problem of scope and limits. The problems of scope relate to problems of limits, and vice versa, so I do not directly confront the distinction in these terms. The problem, I suggest, goes deeper than the simple idea of constitutional protection (i.e. scope) and the justified limits, to the idea of expression and justice as concepts.

freedom; the contours of freedom of expression as a matter of justice are thus unclear and disconnected from our lived experiences.

This largely theoretical thesis begins from the observation that freedom of expression doctrine is failing to respond to social and political issues of expression, explored in Part II. The doctrine, ultimately, fails to articulate an adequate conception of freedom of expression that can protect individual difference and advance social justice. This abstraction confuses both our legal and social conceptions of freedom of expression, which is problematic for regulatory and social responses to issues of expression, particularly in the digital age.

In the social discourse about freedom of expression, the charge of 'me and not thee' is levelled with contempt against attempts to restrict expression. Most obviously (and aggressively), it is used to oppose attempts to restrict hateful, discriminatory, or offensive expression.

As I see it, this opposition is absurd.

I recently slid down the slope of an Instagram argument with an ideologically opposed acquaintance when I suggested that a premier of a Canadian province ought not share a stage with men who express hateful, bigoted, and woefully misleading views on a variety of social issues.[5] My acquaintance defended their view with the comment, "It's always 'rights for me and not for thee' with you liberals, eh?".

[5] Danielle Smith, "Free speech means you don't just have to talk to the mainstream media" (25 Jan 2024), online: <x.com/ABDanielleSmith/status/1750314605316833396>; Tim Bruch, Brendan Ellis, "Danielle Smith facing federal criticism after participating in Alberta Tucker Carlson events" CTV News Calgary (25 Jan 2024), online: <calgary.ctvnews.ca/danielle-smith-facing-federal-criticism-after-participating-in-alberta-tucker-carlson-events-1.6742272>.

They are not wholly incorrect. I am indeed saying that some individuals cannot express some things.[6] However, I am not suggesting that some individuals ought to be deprived of their constitutional rights and freedoms while others get to be protected. Rather, the constitutional conception of freedom *itself* ought not include such expression. If we can accept that *no one* is constitutionally protected to express everything and anything they choose, the live questions are: i) what expression is protected/limited? ii) why is expression protected or limited in the first place?

In answering i), it seems intuitive that expression that oppresses or undermines the expressive freedom of others ought not receive constitutional protection; such expressions ought not be part of the conception of expressive freedom.[7] Freedom of expression ought not be used as a weapon to undermine the individuality, identity, and difference of others. Answering ii) is more difficult. This paper does not fully flesh out this *why* nor its implications for constitutional law: it looks to explore problems and inadequacies of the existing doctrine's answer to *why*.

In its pursuit of justice as impartiality, the *Charter* doctrine sets aside individual difference for universal, neutral, and objective ideals of justice. It answers these questions by ascribing broad, formally equal protection for nearly all expressive acts under section 2(b).[8] To address issues of objectionable expression, the doctrine moves swiftly to section 1 to analyze whether governmental infringements of expressive acts are justifiable based on the objectives of a free and democratic society.

---

[6] More precisely, some things cannot be said in certain circumstances, but discussing these circumstances is beyond the scope of this paper.

[7] This statement about freedom raises a whole host of legal philosophical issues that an LLM thesis-writer would be foolish to address. I will more narrowly argue that the Charter doctrine of freedom of expression conceptualizes freedom of expression abstractly.

[8] Formal equality here refers to the notion of each individual being afforded the same by the law, regardless of individual backgrounds, circumstances, or difference.

The conception of *expressive freedom* emerging from this framework is unfortunately one of near-absolute freedom to express anything. The doctrine strips expression and expressive freedom of its substance as a social and emotional act. It does not capture the full value of expression as the experience of individual difference and selfhood. Resultingly, it conceptualizes freedom as the absence of state interference, setting aside consideration of social forces that may impinge individual expressive freedom. It construes the state as hostile and presumptively threatening to expressive freedom (and its interference as therefore wrongful), which bars consideration of the state's role in enhancing expressive freedom by remedying social oppression.

Objectionable expression, particularly oppressive expression, remains part of this near-absolute conception of expressive freedom and protected in constitutional law, but can be subjected to section 1 limits.[9] Problematically, section 1 relates to justifications for *violations* of the constitutional protection of expressive freedom, leaving intact its near-absolute conception. Moreover, the harm-based approach of limits under section 1 risks underprotecting marginalized expression by entrenching dominant majoritarian norms. Explored here through the lens of queer expression, the doctrine inadequately protects individual expression because it protects anti-queer expression under section 2(b) while also permitting limits that risk entrenching existing inequalities and marginalization under section 1. Additionally, it fails to account for why queer expression requires 'different' or special protection.

On this note, the abstract doctrine lacks the moral framework needed to fully account for issues of expression and their impacts on individuals and to therefore accurately distinguish

[9] By objectionable, I intentionally avoid the terms 'offensive' or 'illegal' that take on meaning within the doctrine. I use objectionable to instead refer generally to expression that some may object to as protected, without forming judgment about either the expression or any objections to it. Hate speech, for example, would be objectionable, but so too could a Pride flag in some instances.

between expressive acts.[10] With the near-absolute conception of expressive freedom and limits obscured, expression that falls short of what is deemed by precedent and existing law to be 'illegal' or violent can be trivialized as 'merely offensive', the wrongness of such acts downplayed, and existing marginalization and social inequalities deepened.

Troublingly, the doctrinal conception of expressive freedom misguides our social discourse by legitimizing the idea that freedom of expression means 'the right to say anything' and by advancing the incorrect assumption that all individuals can freely express themselves in 'normal' circumstances. It risks undermining the ideals of pluralism, equality, and inclusivity it purports to protect, and fails to deliver social justice.

Moreover, the existing doctrinal conception is ill-suited to guide the regulation and discourse of digital expressive freedom. In addition to its underlying problems, the doctrine is challenged by the unique nature of digital expression and its social effects, which call into question underlying assumptions of expressive freedom and constitutional protection against state non-interference. Without an adequate conception of the underlying *why* of freedom of expression, resolving issues and conflicts related to expressive freedom will remain difficult.

But it does not have to be this way. This thesis ultimately points towards a need to critically reimagine freedom of expression rights to centre around the lived experience of individuality. It aims to guide a future reimagination by demonstrating why it is needed and from what perspective it might arise, leaving the articulation of what exactly this reimagination looks like for that future project.[11]

---

[10] See: Chanakya Sethi, "Beyond Irwin Toy: A New Approach to Freedom of Expression Under The Charter" (2012) 17 Appeal 21 [Sethi].

[11] In part, this is because the conception of the individual at the centre of liberal constitutional doctrine may be flawed in itself, which requires deeper philosophical exploration than can be provided for here.

We can think of freedom of expression as based on the rich, emotional experience of individuality and difference, rather than on abstract ideals and principles of negative freedom, formal equality, and procedural justice. Freedom of expression can be based on the joy of being oneself in a social world and the need to protect this joy in law. Rather than being rooted in fear and distrust of the state, freedom of expression can be conceptualized as the absence of oppressive forces that arise from both the state and social actors. By thinking about freedom of expression as the protection from oppressive forces that impede our experience as different, expressive individuals, the contours of what expression ought to be tolerated (or not) can become clearer. Thinking this way can help guide social discourse about rights, embolden counterspeech, and progress the resolution of conflicting claims of expressive freedom in our day-to-day lives without an immediate need to involve the state. It can begin to help bridge polarized ideological views, making transparent moral disagreements rather than abstracting them away. Seeing and knowing more clearly our rights and their egalitarian and individualistic limits, we can then begin to more effectively hold our government to account. We can approach issues of digital regulation not with hostility to the state but with cautious optimism about its ability to deliver justice. Treating the state not as a wild animal but as a broken horse, we can use the reins of rights to carry us forward into the digital future.

1.2 Contribution & Roadmap

This thesis, then, seeks to contribute a critique of the abstract conception of freedom of expression in Canadian constitutional law, through a queer lens. It seeks to set the groundwork for 'rethinking' freedom of expression rights under the *Charter*. It does so in light of contemporary problems at both the constitutional and social level that touch on a multitude of tensions within the

literature. It ultimately suggests that the queer perspective may provide fertile ground to critically examine the constitutional doctrine and its relationships to our existence as expressive beings.

The value of this thesis comes not from its narrow contribution to a singular debate or issue, but in spanning across several by critiquing abstraction. The contribution it makes can be broken out into several angles. First, it contributes to a long, ongoing discussion about freedom of expression, its scope and limits, its values, and its consequences. It seeks to provide a theoretical assessment of freedom of expression doctrine rooted in the unique structure of the *Charter* and Canadian political and legal culture, apart from the American-centred thought that dominates the theoretical freedom of expression literature. On this note, second, it ties together existing Canadian freedom of expression literature, engaging with arguments about both the principles and practices of the *Charter* protection. Centrally, it extends Richard Moon's critique of abstraction, which highlights the social nature of freedom of expression rights, and argues against Jamie Cameron's normative account of 'freedom' used under section 2(b), which purports to avoid abstraction but instead doubles down on it. This philosophical engagement, which is deepened through critical political theory about liberal rights, is then tied to existing queer critiques of key *Charter* cases, particularly those of Brenda Cossman and Richard Jochelson. By connecting academic and legal debates to contemporary social issues like queer and digital expression, this thesis begins to contribute a way of rethinking freedom of expression rights in Canada.

In the remainder of Part 1, I explain my critical, queer methodological perspective and some of the aims and limitations of this thesis. In Part 2, I set out a web of social problems that connect to the abstract doctrine of freedom of expression under the *Charter*. Then, I briefly summarize the *Charter* framework and critiques that point us towards its abstractions. In Part 3, I turn to these abstractions, describing Iris Marion Young's critique of the 'ideal of impartiality' and

utilizing it to unpack the abstract conception of expression, expressive freedom, and harm within the section 2(b) doctrine.[12] Here, through the lens of queer and anti-queer expression I argue that abstraction risks individual protection while simultaneously flagging ways in which digital expression exposes and challenges the 'analog' understanding of freedom of expression under the *Charter*. In Part 4, I conclude with a summary and set out future paths for reimagining equal and robust freedom of expression for a digital future.

1.3 Methodology

In this legal-philosophical critique of the *Charter* freedom of expression doctrine, I employ political and legal theory and a queer, critical perspective to critique the existing doctrinal conception of freedom of expression and its methodological commitments.

1.3.1 Canadian Doctrinal Basis

I rely on leading Supreme Court of Canada ("SCC") decisions to set out the *Charter* conception of freedom of expression. I do not comprehensively describe, explain, nor detail this voluminous body of case law, but rather critique some of the broad underlying theoretical conceptions.[13] Similarly, I do not review nor address arguments made by parties or intervenors in such cases. Looking to these arguments may bolster future work aimed at law reform or legal history but doing so here distracts from the broader aims of this paper.

I focus on providing a particularly Canadian view of freedom of expression protection. I draw on Canadian commentary on these SCC *Charter* cases to flesh out this doctrinal conception.[14]

---

[12] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) [Young].
[13] Seana Valentine Shiffrin, "Methodology in Free Speech Theory" (2011) 97:3 Virginia L Rev 549 at 305-6.
[14] I also avoid discussion of how these cases are applied in lower courts, which, while helpful and gap-filling, pulls the discussion towards an interpretive or applicative critique, rather than one of underlying theory.

I avoid importing American[15] or European views of constitutional structure and theory to an analysis of Canadian constitutional law: discussions of the substance of *constitutional* rights ought not slip into debates divorced from their specific constitutional context.[16] That is, in line with my critique of abstraction, relying on universal notions of constitutional rights and freedoms may be standard in liberal philosophy and may assist with moral discourse. However, here I take the view that the political and social context of a particular constitutional jurisdiction informs what that constitutional doctrine is and ought to be. I take it as obvious that, in addition to differences in the language of the constitutional documents, the Canadian political and social context is different than the American, for example. Moreover, because few theoretical accounts of freedom of expression (particularly, of values) are rooted in Canadian doctrine, this thesis seeks to contribute to the small body of Canadian-made accounts. However, somewhat contradictorily, I cautiously engage with views from elsewhere to inform the more theoretical aspects of this paper and to illuminate issues of digital expression.

1.3.2 Critical Approach, Queer Perspective

The philosophical dimension of this thesis takes a generally critical approach with a queer perspective. I (partly) reject the universalist, rationalist, and empirical aims of liberal constitutionalism.[17] Taking this critical approach to constitutional and *Charter* theory, I consider

---

[15] Though it is beyond the scope of this paper, lingering in the background is a suspicion about the influence that First Amendment doctrine has had on the development of Charter doctrine. The SCC has drawn extensively on American jurisprudence and scholarship in formulating *Charter* freedom of expression principles (as shown by the importation of the three foundational values in *Ford* (see below) but also in reference to American jurisprudence: e.g. Irwin Toy, infra, at 970-1). The ready acceptance of US theory in section 2(b) doctrine is troubling, particularly when considering the protection of hate speech and, more broadly, the state of American constitutional doctrine in respect of other social issues like guns, abortion, and queer and transgender rights. Moreover, the individualism (and Christian religiosity) of the US is, in my view, different than that in Canada. I do not take up this issue here, leaving it to marinate for later work.

[16] Joseph Raz, "Free Expression and Personal Identification" (1991) 11 Oxford J Leg Stud 303 [Raz].

[17] See: Richard Delgado, "The Inward Turn in Outsider Jurisprudence" (1993) 34:3 William & Mary L Rev 741 [Delgado]; Roberto Mangabeira Unger "The Critical Legal Studies Movement" (1983) 96:3 Harvard L Rev 561.

law and constitutional law to be social phenomena that cannot be adequately understood or critiqued through logic and principles, no matter how coherent and cohesive those principles might be.[18] I accept that politics and ideology permeate law, especially constitutional law, and place considerations of power at the centre of my normative analysis.[19] I am suspicious and skeptical of the existing *Charter* doctrine of freedom of expression, and I reject that it is adequately settled.[20]

Iris Marion Young's critique of liberal rights provides theoretical grounding for my critique.[21] Young's critique focuses on the conception of sameness and impartiality at the core of liberal rights theory and its difficulties in delivering social justice. Her work emphasizes the importance of difference in understanding justice in a political and institutional context, and the idea of freedom as more than an abstract idea, but a social concept pertaining to oppression. Additionally, Joel Bakan uses Young's work in his critical account of section 2(b), tying it to the Canadian context.[22]

I depart from some critical legal theoretical approaches in two ways. First, rather than rejecting the basic notion of constitutional rights, I hold out hope that *Charter* rights can deliver social justice, despite problems with the existing doctrinal understanding. Second, I set aside socio-economic and material distributive concerns from my analysis. While these are relevant concerns for a full conception of freedom of expression, I do not discuss them here.

---

[18] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: Univ. of Toronto Press, 1997) [Bakan] at 5.

[19] See: Sarah Lamble, "Queer Theory and Socio-Legal Studies" in Mariana Valverde et al, eds, *Routledge Handbook of Law and Society* (Routledge, 2021) [Lamble]. See also: Andrew Altman "Legal Realism, Critical Legal Studies, and Dworkin" (1986) 15:3 Phil & Pub Affairs 205; Legal Information Institute, "Critical Legal Theory" Cornell Law School (Aug 2022) online: <law.cornell.edu/wex/critical_legal_theory - :~:text=Proponents of CLS believe that,and disadvantages the historically underprivileged>.

[20] Bakan, *supra* note 18 at 11: Skepticism implies hope for the framework, rather than outright cynicism towards.

[21] Young, *supra* note 12.

[22] Bakan, *supra* note 18.

My critique contains both internal and external criticism.[23] On the former, I take up existing arguments that the doctrinal conception of freedom of expression is itself structurally and conceptually problematic: it does not protect individual difference as it purports to do nor does it set out a coherent conception of the scope, limits, and values of freedom of expression. On the latter, I critique the doctrine in relationship to broader questions of justice, arguing that the abstract conception replaces a substantive analysis of expressive freedom with a procedural one. The constitutional protection of freedom of expression ought not be constrained to answering *if* state power is used, but *why* it is used: on what grounds it rests, and what ideals ought to guide it and our critical evaluation of it.

Supporting this critical angle, I take the view that constitutional law and justice are connected to morality.[24] Rather than exclude moral deliberation from constitutional law, I accept its inevitability. I seek to bring transparency and intentionality to these moral debates about constitutional rights so that law can guide parallel discussions in society and politics. This does not mean subjecting constitutional analysis to the moral whims of the community[25] or the unconstrained preferences of judges, but squarely recognizing and embracing the moral judgments required to protect expressive freedom.

Relatedly, the *Charter* ought to not only identify freedoms and the important interests that underlie them but also cultivate and promote them. The *Charter* ought not be seen solely to shield a bundle of interests from the state but to substantiate, legitimate, and define individual claims of injustice. If the *Charter* is interpreted to attend primarily to abstract principles, this role deflates

---

[23] *Ibid* at 5-7.

[24] This is connected to the discussion of Young, below.

[25] See, e.g.: Grégoire C N Webber, "What Oakes could have said (or how else to read a limitations clause)" (2023) 112:2d SCLR 61 (forthcoming), doi: <10.2139/ssrn.4214646>; Grégoire Webber, "Proportionality and Limitations on Freedom of Speech" in Adrienne Stone & Frederick Schauer, eds, *Oxford Handbook Of Freedom of Speech* (Oxford: Oxford University Press, 2021).

into a formality. If the *Charter* is not seen to provide some basis on which to resist injustice and oppression, why does it exist at all? Constitutional law, in my view, seeks to restrict ordinary law from impinging and oppressing certain aspects of individual life; where ordinary law alleviates this oppression, freeing individuals to be individuals, we ought to be concerned when constitutional law stands in its way. While we cannot expect law, much less constitutional law, to address every injustice, it is reasonable to expect constitutional law to avoid entrenching and shielding it. Where and when it does, such doctrine ought to be rethought.

1.3.2.1 Queer Perspective

I use queer theory not as an analytical framework but as an underlying perspective that informs my doctrinal critique. Queer theory is not used extensively in the Canadian freedom of expression commentary.[26] A queer perspective assists in critiquing and reimagining freedom of expression in at least two ways. First, it addresses a controversial dimension of the polarized social discourse about freedom of expression, as will be set out in Part 2, and may provide some insight for the place of tolerance and inclusivity in the regulation of expression (particularly discriminatory expression). Second, a queer perspective provides a foundation for rethinking constitutional protection of expression and expressive freedom beyond the liberal rights conception of justice and morality that is baked into the legal consciousness of the *Charter*, as discussed in Part 3. It provides a way of challenging the notions of individual identity and equal freedom within the constitutional doctrine by embracing individual differences and the subjective experience of selfhood. This perspective helps to both demonstrate why the doctrine is inadequate in protecting difference and to begin to suggest a radical yet intuitive way forward.

[26] That is not to say it is absent, see, e.g. the work of Brenda Cossman, Lara Karaian, Florence Ashley, referenced in this paper.

Queer is a slippery term, but I use it to refer generally to non-normativity in respect of sex and sexuality.[27] I use 'queer' to include a diversity of sexualities and gender identities that are not heteronormative, while simultaneously reclaiming a once-derogatory term.[28] While I include transgender identities under 'queer', doing so is overbroad: not all trans individuals necessarily self-identify as queer. Additionally, while 'queer' does not always encompass other non-mainstream sexual identities or proclivities such as kink, BDSM, or poly/non-monogamous relationships, aspects of my argument can extend to them. Finally, I do not intend to suggest that *all* queer people face the same impediments to freedom, nor that every queer individual experiences the type or intensity of oppression. For instance, trans-BIPOC individuals face oppression in a way that cis-white queer individuals may not. Oppression is intersectional, queer oppression is merely one aspect of it.

Like queer and queerness, queer theory is slippery to define and use.[29] A queer project embraces a plurality of sexual desires, preferences, identities, and orientations, in contrast to a 'gay identity project' which focuses on the oppositional binary of heterosexuality and queerness.[30] Queer theory helps emphasize the highly personal and subjective aspects of freedom of expression because the notion of queerness engages an important aspect of the self, personhood, and identity.[31]

---

[27] Ari Ezra Waldman, "Disorderly Content" (2022) 97 Wash L Rev 907 at 914.

[28] Francisco Valdes, "Afterword & Prologue: Queer Legal Theory" in Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society. (1995) 83:1 California L Rev 1 at 348.

[29] Brenda Cossman, "When Queer Theory Goes to Law School" in *The Oxford Handbook of Feminism And Law In The United States* (New York: Oxford University Press, 2023) [Cossman Law School] at 150; Lamble, *supra* note 19 at 53.

[30] See: Lara Karaian, "The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law" in Martha Albertson Fineman, Jack E Jackson & Adam P Romero, eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge, 2016) [Karaian, 2016] at 388 citing Janet Halley. See, also: Cossman Law School, *supra* note 29 at 152-3.

[31] Nick J Sciullo, "Queer Phenomenology in Law: A Critical Theory of Orientation" (2019) 39:2 Pace L Rev 667, doi: 1<0.58948/2331-3528.2000>; See, also: Florence Ashley, "Don't Be So Hateful: The Insufficiency of Anti-Discrimination And Hate Crime Laws In Improving Trans Well-Being" (2018) 68:1 UT L J 1, doi: <10.3138/utlj.2017-0057>.

The plurality of identities embraced by queer theory's broadly postmodern view of the individual demands that the complexities of individuality be taken seriously and repels the categorization of individuals and groups contained within the "hyperrationality" of the doctrine.[32] With this socially and politically situated view of the self, queer theory makes individual *differences* key considerations of justice.[33]

Moreover, queer identity is not about a particular sexual identity, but a "political positionality" of queerness against dominant norms and power.[34] Queer theory exposes issues of inequality, hegemony, and marginalization that are glossed over in liberal *Charter* jurisprudence.[35] As an "outsider perspective"[36], queer theory casts light on particular issues related to queer expression, draws attention to assumptions of 'normalcy' baked into the constitutional structure that can entrench inequality and discrimination, and disrupts, reveals, and dissects blind spots of the standard doctrine.[37] Using a "first person" perspective, [38] queer theory helps direct a critique of constitutional law towards understanding freedom of expression because it attends to the ways in which meaning arises through our whole selves, inclusive of our bodies, emotions, morality, and relationships to and with other individuals.[39] Expressive freedom and justice thus become

---

[32] Stephen M Feldman, "Postmodern Free Expression: A Philosophical Rationale for the Digital Age" (2017) 100:4 Marquette L Rev 1123; Brenda Cossman, "Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)" (2019) 6:1 Critical Analysis L 23 [Cossman Queering] at 29. I take this up through Young's feminist critique of liberal rights.

[33] Lamble, *supra* note 19.

[34] *Ibid*; Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler" (2003) 36 UBC L Rev 77 [Cossman Discipline] at 98.

[35] Sophie Loidolt, "Order, Experience, and Critique: The Phenomenological Method in Political and Legal Theory" (2021) 54:2 Cont Philos Rev 153 [Loidolt] at 155.

[36] Damir Banovic, "Queer Legal Theory" in Dragica Vujadinović, Antonio Álvarez Del Cuvillo & Susanne Strand, eds, *Feminist Approaches to Law: Theoretical and Historical Insights* Gender Perspectives in Law (Springer International Publishing, 2023) at 6; Delgado, *supra* note 17 at 741.

[37] Scullio, *supra* note 31; Cossman Law School, *supra* note 29 at 154.

[38] Suzanne Whitten, "Recognition, Authority Relations, and Rejecting Hate Speech" (2019) 22 Ethical Theory & Moral Practice 555, doi: </10.1007/s10677-019-10003-z> [Whitten]. Queer theory, I assume for this paper, is phenomenological.

[39] Loidolt, *supra* note 35 at 153.

lived, exercisable ideas rather than abstract concepts. Queer theory is particularly helpful for the digital age, within which the anonymity and separation of the digital self from the physical body raise questions about individuality and personhood.[40] Moreover, a queer perspective provides an avenue for future research to explore the ways in which our experiences of meaning-making, flourishing, morality, and time have shifted in the digital age.[41]

1.3.2.2 Positionality

I bring my own experiences to this thesis. In one sense, I bring my experience of freedom and oppression through my identity as a queer/bisexual man. However, as a cisgender white male settler, significant privilege creates blind spots within my worldview. I also bring my own ideology. In my young adult life, I aligned myself with libertarian political ideology. However, for a host of reasons, my politics and values have shifted dramatically. The motivation for the central move in this thesis—away from a notion of libertarian expressive freedom—tracks along the evolution of my own thought. My privilege allowed me to experience how a universal, abstract standard of equality is plausible and appealing; my queerness shows me how that standard is inadequate.

1.4 Parameters and Definitions

The thesis has four important parameters. First, this thesis does not seek to provide solutions. It also does not look at how this framework operates in exhaustive detail. It aims to begin to untangle the web of problems, tracing some of the tendrils of abstraction and its consequences.

---

[40] Feldman, *supra* note 32; Alexander Brown, "What is so Special About Online (as Compared to Offline) Hate Speech?" (2018) 18:3 Ethnicities 297, doi: <10.1177/1468796817709846> [Brown].

[41] Loidolt, *supra* note 35 at 153; Lara Karaian & Katherine Van Meyl, "Reframing Risqué/Risky: Queer Temporalities, Teenage Sexting, and Freedom of Expression" (2015) 4:1 Laws 18, doi: <10.3390/laws4010018> [Karaian & Van Meyl]. In this paper, I do not investigate these shifts deeply, nor dive into the question of identity and experience, but rather critique how the doctrinal conceptions miss it. In my PhD work, I aim to more closely take on the experience of identity and meaning in the digital world and its implications for *Charter* law.

Detailing what this entails for freedom of expression and how it could operate in practice will be examined in more detail in my doctoral work.

Second, relatedly, although I engage with section 1 at a conceptual level (as it bears on the conception of expressive freedom), I am not concerned with the mechanics or applications of balancing or proportionality. I aim to understand what it is that legislation might violate, not whether a violation is justified. Similarly, I explore when and why the state *could* intervene and set aside consideration of what such an intervention might look like.[42] Two further aspects of freedom of expression law are thus set aside: punishment and conflict of rights. One, punishment (and with it, proportionality) raises important concerns that are particularly complicated in the digital age and require deeper and more direct consideration that I can offer here. Two, while the conflict of section 2(b) protection with other rights and interests is a vital consideration for a complete understanding of the application of freedom of expression, this thesis looks at freedom of expression prior to considerations of its weight or strength against these other interests or rights. On this note, I do not discuss equality as a distinct or conflicting right but assume it to be a relevant consideration underlying all *Charter* guarantees.[43]

As the third parameter, I do not directly address or defend positive rights. The SCC has rejected positive rights interpretations.[44] Beyond this doctrinal fact, I am concerned with freedom of expression as it concerns actions the state *could* take or has already decided to take rather than obligating such actions. The conception of constitutional rights I advance teeters close to positive rights because it can and ought to ground public demand for state action. However, this demand is

---

[42] In some ways, this has a bearing on the "pressing and substantial" objective aspect of the test, but my focus is on the idea of expressive *freedom* rather than constitutional protection.

[43] Nor dignity, but see, e.g.: Jacob Weinrib, "What is the Purpose of Freedom of Expression?" (2009) 67:1 UT Fac L Rev 165.

[44] See, e.g.: *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

a political and moral demand rather than a positive constitutional obligation. It works to impel, rather than compel, state actions and constraints. For example, my argument is not that the government must take steps to address cyberbullying to protect individual expression; rather, *if* the government enacted legislation to address cyberbullying, how we ought to think about freedom of expression in relation to that legislation.

Fourth, I engage with issues related to expression in the digital age broadly, but I do not directly engage with digital or internet law theory nor with specific legislation.[45] Rather, the internet is a key and predominant venue for expression (and for a host of expression-related conflicts) and its presence in the future, prompts a need to revise the 'analog' principles of the doctrine.

1.4.1 Definitions

Several definitions may help clarify what follows. First, I use 'expression' rather than 'speech' to distinguish the *Charter* conception of freedom of expression from the 'free speech' of the US First Amendment.[46] I also use 'expression' because it is a richer and more accurate description of this aspect of the human experience, while 'speech' evokes the narrower use of language.[47]

Second, I use 'freedom of expression' and 'expressive freedom' to refer to distinct ideas. 'Freedom of expression' refers to the constitutional protection arising from section 2(b) of the *Charter*; 'expressive freedom' refers to the object of this constitutional protection, the seed within

[45] Notably, the jurisdictional issues posed by digital issues is absent.
[46] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
[47] Note: the two terms are taken as similar by some and may in essence refer to the same thing if one takes the First Amendment and section 2(b) to be referring to the same 'thing'. References to speech or free speech by other authors will be left as they appear and discussed using their terminology.

the shell of freedom of expression. Expressive freedom, put simply, is the ability of the individual to express freely.[48] This separation of the terms is blurry but important, as the doctrine and its commentary treat the two terms largely synonymously. The thrust of this paper is that the doctrine does not adequately address this seed in conceptualizing the shell.

Third, 'queer' (as defined above) and 'anti-queer' play key roles in this paper. 'Anti-queer' expression refers generally to expression that projects disdain and contempt for queer people or queer expression. Anti-queer is closely related to 'queerphobic' (as an evolution of the term 'homophobic')[49] but implies expression that is more barbed, and, perhaps but not necessarily, intentional.[50] Anti-queer expression is more than your grandfather's dinner table homophobia.[51] Anti-queer speech may draw on stereotypes that limit an individual's ability to define and express themselves.[52] It has significant negative effects on individuals' flourishing and risks exacerbating the marginalization and social inequalities that queer people experience.[53]

---

[48] I do not engage with what goes into an "ability" or capacity directly in this thesis, but my idea has been inspired by capacity and relational autonomy theorists, see: Catriona Mackenzie & Denise Meyerson, "Autonomy and Free Speech" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 61 [Mackenzie & Meyerson].

[49] In contrast to Florence Ashley, *supra* note 31 at 3-4, I am concerned here with expression that "connotes…strong negative emotions such as fear and hatred". Certainly, more mundane routine expression that is queerphobic (or to co-opt Ashley's language, 'queerantagonist') ought to be part of the question of what it tolerable and intolerable. But here I narrow the conception to repel some objections and avoid diverting the discussion about the constitutional conception into one about the role of intent.

[50] For example, queerphobic: 'I don't like all these queer rainbow flags in June!' vs anti-queer "I want these queer [slur] to stop being sissies with their gay flags' (or, of course, much worse).

[51] Consider it a *de minimis* limitation, of sorts. This definition does some of the work of this paper: the degree of 'wrong' in anti-queer compared to queerphobic expression strikes at a distinction between extreme and routine hate speech, for example.

[52] Conor McCormick, "Freedom of Speech: A Pernicious Shroud for Homophobia" (2014) 5:1 King's Student L Rev 30 [McCormick] at 38, discussing UK law and a homophobic tweet directed at Tom Daley, a gay Olympic diver.

[53] Waldman, *supra* note 27; McCormick, *supra* note 52 at 38.

2 The Web of Social and Doctrinal Problems

2.1 Queer & Anti-queer Expression in the Digital Age

A web of social issues prompts this examination of the doctrinal conception of freedom of expression under the *Charter*. These problems form a messy loop of sorts. Conceptual issues in the doctrine lead to the overprotection of anti-queer expression and the underprotection of queer expression, while also contributing to social and political confusion about freedom of expression rights. Digital expression challenges key assumptions within the abstract doctrinal framework, reflecting and further troubling underlying doctrinal conceptions. Issues of digital expression raise polarizing claims of rights infringement and inflame political tension and confusion about a range of policies. Because the abstract doctrine only subsidiarily considers social concerns and disconnects constitutional principles and social reality, polarization and confusion continue, under and overprotection remain, conflicts about digital expression deepen, and the loop rolls on. While it may be possible to tease out narrower social problems for examination, this thesis confronts their doctrinal common denominator: an abstract conception of freedom of expression.

In this Part, I will discuss the issues that direct us to consider the doctrine. A broad point is to illustrate how our political and social experience of freedom of expression does not match the utopic ideals of the doctrinal conception. These issues reflect the koan and draw attention to the consequences of the abstract *Charter* doctrine of freedom of expression. In Part 3, I will dig deeper into the abstraction.

2.1.1 The Role of Constitutional Law in Remedying Discursive Confusion

Freedom of expression is a fundamental freedom enshrined in the *Charter of Rights and Freedoms* and buried deep in the Canadian political psyche. Unfortunately, our social and political

understandings are seemingly confused about what freedom of expression is, what it entails, and what to demand of our government in respect of our constitutional rights. Some may claim freedom of expression requires legislative action, while others abhor such action; similarly, claims of infringement on freedom of expression rights may arise in response to actions of the state, such as claims in response to recent online harms legislation.[54] Other claims may arise in response to actions (or inaction) of non-state actors, such as private social media companies[55] or by 'cancelling' or other so-called 'woke' acts.[56] The *Charter* is often implicated in these claims of rights violations, signalling that the public understanding is tied to the doctrinal understanding, even if distantly.

Constitutional law has a role to play in both creating and addressing this confusion. Certainly, some of the problems of social and political understanding can and ought to be mitigated by advocacy and public education efforts[57] and initiatives by legal institutions to make constitutional law less opaque.[58] But the *Charter* sets the bounds for law and law ultimately sets the bounds for tolerance and symbolically guides social discourse of what we and our governments ought (and ought not) to do.[59]

---

[54] Canadian Heritage, *Proposed Bill to address Online Harms,* (04 April 2024), online: <canada.ca/en/canadian-heritage/services/online-harms.html>; The Canadian Constitutional Foundation, "CCF concerned by Online Harms Act" CCF (27 Feb 2024), online: <theccf.ca/ccf-concerned-by-online-harms-act - :~:text=The Bill would require social media companies to report on,companies to censor speech that>; Marie Woolf, "Online harms bill's proposed changes risk silencing free speech, experts warn" *The Globe and Mail* (23 Feb 2024), online: <theglobeandmail.com/politics/article-online-harms-bills-proposed-changes-risk-silencing-free-speech-experts/>.

[55] See, e.g.: Dean Bennett "Alberta premier accuses Facebook of censorship over temporary site restriction" *CBC News* (15 June 2023), online: <cbc.ca/news/canada/calgary/danielle-smith-alberta-premier-1.6878438>

[56] See, e.g.: Leonid Sirota, "The Woke Dissent" (2 November 2021), *Double Aspect*, online (blog): <doubleaspect.blog/2021/11/02/the-woke-dissent> [Sirota].

[57] See, e.g.: Corey Brettschneider, "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion" (2010) 8:4 Perspectives Pol 1005, doi: <10.1017/S1537592710003154>.

[58] E.g. Chief Justice Wagner's 'Case in Brief' initiative aimed to improve public comprehension of SCC decisions.

[59] Danielle Keats Citron & Jonathon W Penney, "When Law Frees Us to Speak" (2019) 87:6 Fordham L Rev 2317 [Citron & Penney]. But see, e.g.: Florence Ashley, *supra* note 31. Ashley argues that the law as a system of punishment may be ineffective in addressing hate and point to more effective avenues of state action to address hate

The idea that something is illegal guides and shapes human behaviour. Law acts as an arbiter of what is worthy of social attention.[60] In Brenda Cossman's words, harm and wrongs are "only real if not legal."[61] When a harmful or wrongful act is dismissed by law, the perceived wrongfulness of that act is diminished. Claims of wrongness can become trivialized, and the act may be more easily seen as acceptable and tolerable. Conversely, legal condemnation of an act may legitimize claims of its wrongfulness and reduce its acceptability and tolerability.[62] For example, law's condemnation has assisted in reducing sexual harassment and domestic violence and the perceived wrongfulness of these acts.[63] The influence of law is evident in the weight that the word 'alleged' has in sexual assaults: the label applies only to whether the legal standard was met, not necessarily whether the assault occurred, or the victim was wronged nor harmed. [64] Once the law intervenes, the victims of these wrongs become valid subjects in the eyes of the law and the public.

Constitutional law adds a dimension to this symbolic and behaviour-guiding function. Constitutional law controls, in part, what is considered lawful: ordinary law defines what is lawful, but constitutional law and constitutional rights can limit ordinary law. Claiming that something is *unconstitutional* reflects a view that something was wrongly[65] made legal or illegal. The *Charter*

(i.e. knowledge, empowerment, and healing) (33). I do not doubt that in their current form, their claim is accurate. My view is that i) such legislation can be better designed, if it looks to the societal forces that oppress and ii) there remains a concern even indirect measures may draw ire in the freedom of expression discourse (e.g. complaints from the political right that kids are being indoctrinated.)

[60] Cossman Queering, *supra* note 32 at 19, 27, 33.

[61] *Ibid* at 34.

[62] Danielle Keats Citron, "Law's Expressive Value in Combating Cyber Gender Harassment" (2009) 108 Mich L Rev 373 [Citron Expressive] at 375.

[63] *Ibid* at 407-9. See, also: Brenda Cossman, "#MeToo, Sex Wars 2.0 and the Power of Law" (2019) 3 Asian YB Human Rights & Humanitarian L 18, doi:<10.1163%2F9789004401716_003> [Cossman MeToo]. This is not to say that these issues are settled. There is significant complexity requiring far more exhaustive attention than can be provided here.

[64] Cossman Me Too, *supra* note 63 at 33-5. Cossman notes that in the context of sexual violence, law defines harm and thus directly results in the dismissal and acquittals of sexual violence against women: that is, what harm is worthy of legal sanction.

[65] Perhaps more precisely, legitimately or illegitimately.

has a symbolic role to "embody and hence to declare … the values that the people consider to be truly fundamental to the way in which they are to be governed."[66] Moreover, constitutional judgment, in Peter Hogg's estimation, precedes public acceptance of progressive views and policy, cueing societal progress on issues of social justice and guiding individual and legislative behaviour.[67] As we confront challenging expressive issues stemming from digital expression and a global wave of bigotry and intolerance, the *Charter* has a vital role to play in shaping the law's response.

Unfortunately, the existing constitutional conception of what freedom of expression is, and what it is not, is inadequate: it cannot address this social and legal confusion.[68] As underlies Part 3, the harms and wrongs of freedom of expression are downplayed by the existing legal-constitutional framework, creating an artificially binary between *free* and *unfree* expression and between lawful and unlawful expression which distorts considerations of the more ambivalent acts that exist in reality.[69] Moreover, like the public, the SCC appears to be divided and confused about freedom of expression.[70] For example, in *Ward v Quebec*, which dealt with an appeal of a human rights judgment against a comedian for objectionable comments made about a disabled child (JG)

---

[66] Robin Elliot, "Back To Basics: A Critical Look at the Irwin Toy Framework for Freedom of Expression" (2011) 15:2 Rev Const Stud 205 at 224.

[67] Andreas Kalogiannides, "What I'd Do Differently: Peter Hogg" *Juste* (1 April 2015) online: <oba.org/JUST/Features_List/2015/What-Id-do-Differently-Peter-Hogg?lang=fr-ca>.

[68] See: Sethi, *supra* note 10.

[69] Cossman Me Too, *supra* note 63 at 35. Cossman notes that the law creates a binaries problem, dividing acts between the illegal & harmful and the legal & not harmful. Like sex and its potential harms, I suggest expression does not exist along binaries but as a spectrum. If we acknowledge that harms and wrongs may extend beyond the scope of the law (and rights) then a conversation about such *ambivalent* actions can occur. For Cossman, the #MeToo movement represented a conversation about harm and wrongdoing broader than (and perhaps despite of the failings of) the law. The law repeatedly failed, in her view, to recognize harms through dismissing and acquitting sexual assault, and the #MeToo conversation was needed. What I suggest in this paper is that issues of digital expression and difficulties with queer and anti-queer expression also prompts a need for conversation within the interpretive walls of the Charter.

[70] See, recently: *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse),* 2021 SCC 43 [*Ward*] (5-4 decision); Toronto, *supra* note 44 (5-4 decision). This divide could be described along various planes: for example, conservative/liberal appointees, deontologists/consequentialists, proponents of judicial deference/activism.

during a recorded stand-up routine, the majority and dissenting opinions agreed on the fundamentality of freedom of expression, but were sharply divided on how to understand this freedom, particularly in light of alleged discrimination, offence, and harm related to that expression.[71]

This judicial confusion and division may create tension and uncertainty within judicial precedent, but it may also contribute to an existing divide between the legal-constitutional and public understanding of *Charter* freedom of expression protection.[72] With a conception of freedom of expression as absolute, except in specific circumstances, attempts to regulate expression (as a limit of freedom of expression) can be perceived as inherently unjust, even when they seek to address grave injustices. For example, even hate speech legislation can be seen as unjust by some.[73] Even if one accepts that freedom of expression is not an unlimited guarantee, the division of the Court, like that in *Ward*, does not clarify when it can be limited. Moreover, this confusion extends into and influences how we approach social conflict about freedom of expression. Without constitutional guidance, it is not clear *what* expression we ought to tolerate: ought we tolerate hate speech? What about bullying? Explicit pornography? This lack of clarity is particularly problematic because as will be discussed below, the doctrine looks to 'social sanctioning' to address expression-related conflicts: without clear guidance, our responses to expression we deem objectionable may themselves prompt claims of infringement, as exemplified by the objections to

---

[71] *Ward*, *supra* note 70. The majority of the Court found that Ward's comments did not constitute discrimination, and dismissed the appeal, overturning the ruling of the Human Rights Tribunal against Ward. Note: in addition to being complicated by the discrimination claim, *Ward* contemplated expression and discrimination under the Quebec *Charter* (*Charter of human rights and freedoms*, CQLR, c. C-12), and so is not directly contemplative of section 2(b). However, the Court engages extensively with section 2(b) purposes, and I follow their lead extensively, in this regard.

[72] Bakan, *supra* note 18 at 65, 76, argued in the late 1990s that freedom of expression was divorced from reality. For Bakan, the abstract conception in the doctrine created a "huge gap" between what the doctrine said and what people's experiences were.

[73] Sirota, *supra* note 56; Camden Hutchison, "Freedom of Expression: Values and Harms" (2023) 60:3 Alta L Rev 687 [Hutchison].

political correctness. In the digital age, this concern about guidance from the Court is particularly salient, if for no other reason than social media companies, whose actions have profound effects on online expression, look to the government to define freedom of expression to guide their policy.[74]

More sinisterly, the lack of a clear understanding of what freedom of expression entails appears to have contributed to its weaponization and misuse against marginalized or vulnerable people, visible in the rhetorical skirmishes about freedom of expression and gender pronouns, discussed below.[75] In *Ward*, freedom of expression was used as a shield to protect derogatory and demeaning comments about and towards a disabled child. The majority decision protected these comments because they did not rise to the legal threshold of discrimination or hate speech.[76] With cases like *Ward* entrenched in the doctrine, such expression gains legitimacy as something individuals have the constitutional right to express; the wrongness of such expression is diminished, despite negative effects on already marginalized individuals.[77]

The disconnect stemming from the confused doctrine has obvious impacts on social discourse, but it also has democratic implications.[78] It leaves unanswered what citizens should demand of their government: what is an acceptable use of state power? Ought the state enact legislation to address bullying, for example? Can it do so constitutionally? Of further concern, the

---

[74] See: Emily B Laidlaw, "Private Power, Public Interest: An Examination of Search Engine Accountability" (2009) 17:1 Intl JL & IT 113: doi: <10.1093/ijlit/ean018> at 133 [Laidlaw Private Power]. So too do universities, for example.

[75] See: Brenda Cossman, "Gender Identity, Gender Pronouns, And Freedom Of Expression: Bill C-16 And The Traction Of Specious Legal Claims" (2018) 68:1 UTLJ 37 [Cossman C-16]; See also, Carissima Mathen, "Regulating Expression on Social Media" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 91 [Mathen] at 99.

[76] This is not to say the bullying is grounds alone to restrict expression, nor that this phenomenon is grounds to regulate expression without deeper attention, but rather to point out that freedom has its issues.

[77] In *Ward*, both the majority and dissent drew attention to the fact that that other kids bullied JG using lines from Ward's routine, though interpreted it differently, as discussed below.

[78] Directly addressing these democratic dimensions is beyond the scope of this paper's legal-philosophical focus, but a key background concern.

doctrine supports a belief that *everything* the state does to regulate expression is a wrongful infringement. When the Court's articulation of freedom of expression excludes only violence and threats of violence from the understanding of 'expressive freedom', as the doctrine does, then rhetoric decrying the violation of freedom in all instances where expression is affected by the state has (at least presumptive) constitutional support as part of freedom. This leaves protections against hate speech, for example, vulnerable to arguments that such legislation is a rights violation.[79] This is particularly problematic in the digital age, where we face existential threats to democracy and equality and often call on the state for assistance.[80] If the state is presumptively treated as a threat to freedom, discussing what the state can do in the face of other threats is a weighted battle.[81] Indeed, the doctrine sets limits to this treatment but as will be set out below, it leaves intact this presumption and bases such limits on problematic and risky ground.

While public discourse may be polarized and divided on issues of freedom of expression, the idea that expression is important to us as individuals seems to flow through them all. In this way, *why* freedom of expression is important is clear to the public, it is the *how* that is divisive. The doctrine, however, does not conceptualize this why adequately: the how, as doctrinal structure and subsequent legislation and public discourse, thus becomes confused. If the people believe that the *Charter* protects expression that undermines the rights of others, constitutional theory ought to look at those principles. This is explored below through the protection of anti-queer expression.

---

[79] See, e.g.: Sirota, *supra* note 56.

[80] For example, in restraining social media companies or implementing regulatory frameworks like recent online harms legislation.

[81] This is not to say that the state is not a major threat, but that the perception that it is the only threat of concern.

2.1.2 The Koan of Queer & Anti-queer Expression

Queer and anti-queer expression demonstrate the conceptual problems within the doctrine and in debates about queer and anti-queer expression, the confusion about freedom of expression rears its head. Queerness and queer expression help demonstrate the *Charter*'s struggle to deliver on its progressive goals.[82] Queer people have been attacked, unprotected, diminished, and ignored by legislation and constitutional law.[83] "Queerness" has often been on the fringe of the *Charter*'s protection against discrimination.[84] In *Egan v Canada,* La Forest J, writing for the majority, found that while discriminating on the basis of sexual orientation would constitute discrimination, old age security legislation that excluded same-sex partners from the definition of 'spouse' under the legislation was not discriminatory because marriage was "firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate."[85] Similarly, the SCC has been reticent to protect queer expression or to regulate anti-queer expression. While recent cases suggest that this may be changing,[86] past decisions of the Court hesitate to restrict anti-queer expression. In *Saskatchewan (Human Rights Commission) v Whatcott,* for example, the Court deemed two homophobic pamphlets to be hate speech, while two others were 'merely offensive'.[87] In *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, both the majority and

---

[82] Bakan, *supra* note 18 at 48.

[83] Waldman, *supra* note 27 at 960-2. Gay marriage has only been legal since 2005. Until 2019, anal intercourse attracted an older age of consent than other sexual acts. Queer Events, "Protests, riots, raids timeline" online: <queerevents.ca/classification-tags/protest-riots-raids>.

[84] Only in 2017, over 20 years after *Egan*, was gender expression and identity added as a protected ground to the Criminal Code and CHRA.

[85] *Egan v Canada*, 1995 CanLII 98 (SCC), [1995] 2 SCR 513 at 536.

[86] See: *Hansman v Neufeld*, 2023 SCC 14 [*Hansman*], discussed below.

[87] 2013 SCC 11 [*Whatcott*] at paras 193, 202. *Whatcott* dealt with section 14 of the Saskatchewan Human Rights Code which addressed hate speech. William Whatcott was publicly distributed four flyers that "targeted homosexuals" and homosexuality. (para 3) The Sask. Human Rights Commission found that the flyers contravened s14 and ordered Whatcott to stop distribution and to pay a fine. The SCC found that two of the flyers constituted hate speech, while two did not. (para 7).

dissent downplayed discriminatory actions of Customs officials as issues of administration and implementation rather than an issue of the legislation with which they discriminated.[88]

Queerness and queer expression are at the forefront of social and political consciousness. The growing queerphobic public sentiment in Canada and abroad is concerningly obvious.[89] The conservative[90] uproar about drag performances, for example, demonstrates the controversy of queerness in freedom of expression discourse.[91] Moreover, queerness is increasingly drawing the censorious eye of governments across Canada and abroad. Close to home, the Alberta provincial government announced plans to introduce legislation related to transgender children, intervening in the children's choice of pronouns, their medical care, and their participation in sports, with each aspect threatening their safety and well-being.[92] The town of Westlock, Alberta prohibited the display of Pride flags in the name of 'political neutrality.'[93] Such attempts draw on spurious conceptions of 'rights' and 'freedom of expression' as both shields and swords.[94] Attempts to

---

[88] 2000 SCC 69 [*Little Sisters*] at para 44, discussed below.

[89] Christopher Dietzel et al, "Queerphobic hate is on the rise, and LGBTQ+ communities in Canada need more support" *News@York* (27 Oct 2023), online: <yorku.ca/news/2023/10/27/queerphobic-hate-is-on-the-rise-and-lgbtq-communities-in-canada-need-more-support;>; Egale Canada, "Brief on Statistics Canada Hate Crimes Report" (2022), online: <egale.ca/wp-content/uploads/2022/04/Brief-on-Statistics-Canada-Hate-Crimes-Report-2.pdf>

[90] This uproar comes from, generally stated, the political conservative right. My aim is not to single out or demonize the political right, but rather to point out that this is an ideological issue.

[91] See, e.g.: Rosanna Hempel "Winnipeg drag queens, cafe face alleged online harassment, threats ahead of drag story time" *Global News* (23 Oct 2022), online: <globalnews.ca/news/9220283/drag-story-time-cafe-protest>; Dave McGinn "Anti-gay activists target children's libraries and drag queen story hours" *The Globe and Mail* (11 Mar 2023), online: <http://theglobeandmail.com/canada/article-anti-gay-activists-target-childrens-libraries-and-drag-queen-story>. See, for a lower court decision: *Rainbow Alliance Dryden et al v Webster*, 2023 ONSC 7050.

[92] Janet French, "Alberta premier says legislation on gender policies for children, youth coming this fall", *CBC News* (1 February 2024), online: <cbc.ca/news/canada/edmonton/danielle-smith-1.7101595> A decade ago, similar efforts were made to punish Gay Straight Alliances (GSAs). Both attempts were made based on 'rights' (of parents, not of kids).

[93] Lisa Johnson "Westlock bans Pride flags, rainbow crosswalks after plebiscite" *Edmonton Journal*, 23 Feb 2024, online: <https://edmontonjournal.com/news/politics/westlock-alberta-citizens-vote-to-banish-rainbow-sidewalk>. Note: The display of other flags that may represent political positions (i.e. Ukrainian flags, Israeli flags, Canadian flags, American flags, Trump election flags, etc.) remain untouched. The SCC has not commented on such measures (yet).

[94] Additionally, the notion of freedom of expression contained in the doctrine has not prevented governments from proposing such legislation (nor their willingness to invoke the notwithstanding clause in section 33). Thus, while

protect queer expression and/or remedy historical inequalities and oppression are framed as *threats* to freedom of expression.[95] The claim of the violation of 'freedom of speech' may shield queerphobic or anti-queer speech,[96] and those claiming to be silenced wield freedom of expression against attempts to address their intolerance (paradoxically justifying their own attempts at censorship).[97] For example, freedom of expression is used as a "rhetorical weapon" to legitimate attacks on the rights of transgendered individuals.[98] Freedom of expression is used not as a defence against discrimination and inequality, but to facilitate the deprivation of the freedom of queer individuals.[99] 'Me and not thee', in drag.

While opinions about freedom of expression strike at the koan, queer expression itself exists within a koan or paradox. Queer expression needs protection from state overreach but also needs the state to address expression that undermines queer freedom.[100] As is set out in greater detail below, state regulation (driven by heteronormative beliefs about sexuality and gender) risks undermining queer expression, individuality, and identity, and an absence of state regulation of *anti-queer* speech risks exposing queer people to vitriol and derision.[101] This paradox is glossed over in law because the doctrine abstracts from the realities of freedom of expression. Despite the promises of "equality, neutrality, and justice" of freedom of expression, anti-queer expression often continues to be protected while queer expression is left to societal, heteronormative forces and framed as bad or abnormal.[102] The paradox of queer expression shows that freedom of expression

---

freedom of expression doctrine is based on the protection of *all* expression, so to prevent prejudice, such prejudice still drives government behaviour.

[95] Cossman C-16, *supra* note 75 at 38.

[96] Mary Anne Franks, "The Lost Cause of Free Speech" (2022) 2 J Free Speech L 337 [Franks Lost Cause] at 338. McCormick, *supra* note 52. See, also: *Whatcott, supra* note 87.

[97] Franks Lost Cause, *supra* note 96 at 337-9. See: *Hansman*, *supra* note 86.

[98] Cossman C-16, *supra* note 75 at 38, 57, 66.

[99] *Ibid* at 66.

[100] Waldman, *supra* note 27 at 964.

[101] *Ibid* at 964

[102] *Ibid* at 954; McCormick, *supra* note 52 at 32.

is not simply a question of *if* freedom of expression requires regulation, but what regulation, how much regulation, and vitally, *why* (or why not) regulation is needed.

In the context of arguments about freedom of expression that lack legal merit, yet gain traction in social discourse, Cossman asks, "Why, then, has this argument [that regulations about gender pronouns constitute violations of freedom of expression] become so powerful? What makes the claim so deceptively attractive? Why does [it] have so much traction?"[103] In my view, the current lack of *why* in the doctrine gives space for these problematic legal and social understandings of tolerance and freedom. The prevalence and power of such arguments reflect the doctrine's inability to distinguish between expressive acts like queer and anti-queer expression and the underlying value and/or wrongness of them. That is, the doctrine cannot answer the koan of freedom of expression: the abstract doctrine struggles to articulate why anti-queer expression ought to be regulated while queer expression remains protected. The doctrine's avoidance of this koan, through abstracting expressive freedom exposes the fragility of the abstract conception of freedom of expression under the *Charter.*

2.1.3 Challenges of Digital Expression

Digital expression challenges the abstract conception of freedom of expression in the *Charter* doctrine and exposes its inadequate protection of individual expressive freedom. Digital expression provides a 'quasi-experiment' in the libertarian undertones of expressive freedom under section 2(b).[104] The once-common ideal of an unregulated internet[105] has fallen away as the internet

---

[103] Cossman C-16, *supra* note 75 at 65. Cossman partly answers her question by referring to political attacks by conservatives on the idea of 'political correctness' and diversity initiatives, and a variety of other elements of social discourse, particularly referring to Canadian examples at 68.

[104] Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) [Moon Book] at 30. Moon would likely argue that this possibility never existed.

[105] John Perry Barlow, "A Declaration of the Independence of Cyberspace" (1996) (published 20 January 2016), online: *Electronic Frontier Foundation* <eff.org/cyberspace-independence>.

permeates our lives and blurs the distinction between the real and the virtual.[106] While the digital age has minimized some of the traditional concerns about freedom of expression (notably, access to expressive platforms) it has exacerbated problems and created new ones such as deepfakes, sexual exploitation, revenge porn, online harms, widespread disinformation, and doxing.[107]

The digital age casts doubt on the doctrinal conception of expressive freedom as the absence of regulation, as will be argued below.[108] The negative consequences of these problems have raised calls for regulation by both private actors and the state to address issues and prevent harm. Debates about digital expression regulation draw on the existing constitutional principles,[109] and regulators must work within the established framework.

Unfortunately, the nature and context of digital expression make the transposition of analog principles particularly difficult. For one, the impact of the internet on expression is ambiguous.[110] Digital expressive platforms, broadly defined, have opened up expressive audiences, decreased impediments to access, and diminished traditional freedom of expression concerns about media concentration.[111] And yet, the things that have made possible the idealistic form of liberty have also enabled discrimination and harms to proliferate, reduced editorial or quality control, and made

---

[106] Danielle Keats Citron & Neil M Richards, "Four Principles for Digital Expression (you Won't Believe #3!)" (2018) 95 Wash U L Rev 1353 at 1354. Mary Anne Franks, "How the Internet Unmakes Law" (2020) 16:1 Ohio St Tech L J 10.

[107] Mathen, *supra* note 75 at 97; Mary Anne Franks & Ari Ezra Waldman, "Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions" (2019) 78:4 Maryland L Rev 892 [Franks & Waldman].

[108] See: Mary Anne Franks, "Beyond the Public Square: Imagining Digital Democracy" (2021) 131 Yale LJ Forum 427 [Franks Public Square]; Danielle Keats Citron & Neil M Richards, "Four Principles for Digital Expression (you Won't Believe #3!)" (2018) 95 Wash U L Rev 1353 [Citron & Richards]; Richard Delgado & Jean Stefancic, "Hate Speech in Cyberspace" (2014) 49:2 Wake Forest L Rev 319 [Delgado & Stefancic].

[109] Such as the "public square" metaphor: Centre for Free Expression "How Can the Charter Protect Freedom of Expression when Digital Platforms Control the Public Square?" *Centre for Free Expression* Panel (23 Jan 2024) Panellists: Emily Laidlaw, Jamie Cameron, Sujit Choudhry, Moderator: Kristopher Kinsinger, online:<cfe.torontomu.ca/events/how-can-charter-protect-freedom-expression-when-digital-platforms-control-public-square>.

[110] Laidlaw Private Power, *supra* note 74.

[111] Richard Moon, "What Happens When the Assumptions Underlying Our Commitment to Free Speech No Longer Hold?" (2019) 28:1 Const Forum 1, doi: <10.21991/cf29373> [Moon Assumptions] at 3.

available not only credible information but wildly misleading information that appears authoritative.[112] The ambiguity of the online world complicates the constitutional doctrine's approach to digital expression regulation.

The internet has also changed the nature of expression and its harms, while our understanding of them remains rooted in the analog world.[113] The speed and reach of the digital world magnifies hate and makes avoiding it more difficult.[114] Hateful beliefs face fewer challenges online than in the analog world, with fewer social rules and consequences for repugnant beliefs.[115] Anonymity and insularity make countering such beliefs more difficult and arguably less effective than it may be in the analog world.[116] The legal checks that prevent expressive acts from crossing certain boundaries in the analog world (i.e. assault and intimidation law) do not necessarily apply easily online.[117] This structure of the online world has also raised deeper concerns of equality,[118] evident in the context of queer expression.

The digital age poses specific threats to queer expression. Queer Canadians experience violence and threatening behaviour online at a significantly higher rate than heterosexual Canadians.[119] The online world has made queerness more visible. It has made it easier to connect

---

[112] Mary Anne Franks, "Unwilling Avatars: Idealism and Discrimination in Cyberspace" (2011) 20:2 Columbia J Gender & L 224 at 228 [Franks Avatars] at 226. Laidlaw Private Power, *supra* note 74. Whitten, *supra* note 38.

[113] Franks Public Square, *supra* note 108 at 429, 438, 446; Cossman C-16, *supra* note 75 at 75; Delgado & Stefancic, *supra* note 108; Mathen, *supra* note 75 at 101.

[114] Mary Anne Franks, "Freedom of Speech, Power, and Democracy: Freedom From Speech" (2022) 20 Geo J L & Pub Pol'y 865 [Franks Freedom From] at 865.

[115] Johnny Hartz Søraker, "Virtual Worlds and their Challenge to Philosophy: Understanding the 'Intravirtual' and the "Extravirtual'" (2012) 43:4 Metaphilosophy 499; Delgado & Stefancic, *supra* note 108 at 337.

[116] Delgado & Stefancic, *supra* note 108 at 339.

[117] At least, not yet. But see: Danielle Keats Citron, "Cyber Civil Rights" (2009) 89:1 Boston U L Rev 61; Laidlaw Private Power, *supra* note 74.

[118] Moon Book, *supra* note 104 at 1354.

[119] Brianna Jaffray, "Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018" *Canadian Centre for Justice and Community Safety Statistics* (9 Sept 2020), online: <150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00009-eng.html>.

with other queer individuals, consume and produce queer content, and ultimately, discover and shape one's queer identity. But digital platforms and social media also make it easier for anti-queer expression to proliferate. Moreover, the heightened visibility may contribute to the rise in attempts to restrict queer expression because this visibility itself is demonized, like the idea that drag shows somehow indoctrinate kids into becoming queer.

Queer expression demonstrates how the structure of the internet itself can be problematic for expressive freedom, as queer expression is disproportionately censored and moderated.[120] TikTok, for example, has restricted certain queer hashtags,[121] and inexplicably removed some trans content.[122] Similarly, Instagram has been accused of 'shadowbanning' users.[123] In these instances, the platforms defer to local law and/or their terms of service to justify the restrictions. But these restrictions go deeper. Stemming in part from the heteronormativity embedded in content moderation and AI technologies, discussions of queerness, which often involve references to sexuality, sexual practices, and sexual health,[124] are filtered out by social media algorithms aimed at ridding online spaces of 'offensive' sexual content.[125] Censorship of queer expression has thus been described as the "natural consequence of sexual content moderation doing exactly what it

[120] Waldman, *supra* note 27 at 960-2, 953.
[121] See, e.g.: Chris Fox, "TikTok admits restricting some LGBT hashtags" *BBC News* (10 Sept 2020) online: <bbc.co.uk/news/technology-54102575>.
[122] See, e.g.: Cristina Criddle, "Transgender users accuse TikTok of censorship" *BBC News* (12 Feb 2020) online: < bbc.co.uk/news/technology-51474114>.
[123] Anna Iovine, "Is Instagram shadowbanning LGBTQ and sex ed accounts?" *Mashable*, (1 Sept 2023) online: <mashable.com/article/instagram-shadowbanning-lgbtq-sex-educator-accounts>
[124] This is not to say that queerness is necessarily more inherently sexual than heterosexuality, but that queerness may i) be presumed offensive or outside 'acceptability' in a way that heterosexuality is not, and/or ii) may require overt references to the sexual dimensions of relationships that are simply presumed or conveyed by less overt references (i.e. through sexual education in schools, ideas of the 'normal' family structure as beginning with a cis mother and father). That is, queerness often requires discussion of things about selfhood and sex that may be presumed or implied in the routine goings-on of heteronormative society.
[125] Waldman, *supra* note 27. Angel Diaz & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation* (New York: Brennan Center for Justice at NYU School of Law, 2021).

was designed to do."[126] This regulation controls and directs queer expression and queer identity.[127] Because queer expression is censored, it becomes difficult for queer individuals to counteract the "sanitized" and hetero-centric idea of what it means to be queer and self-define queerness; more troublingly, it becomes difficult to counteract hateful and misinformed ideas.[128] The perpetuation of a skewed conception of queerness fuels and "animat[es] hate and discrimination,"[129] and the censoring of queer content contributes to the 'othering' of queer individuals.[130] Exacerbating the issue, social media companies, whether by will or inability, may not remove anti-queer posts.[131] In short, queer people are denied full self-definition and self-flourishing. Like the paradox of state regulation set out above, queer people similarly face two hurdles in respect of online content moderation: too much moderation (of sexual conduct specifically) censors 'others' as nonnormative expression, but too little subjects queer individuals to harassment and harm. Because the conception of 'freedom of expression', particularly online, assumes that everyone is equal, such concerns are diminished and the inequalities entrenched.

Some concerns about regulation arise on the fear that restrictions will be "clumsy and overbroad", resulting in the overregulation of expression.[132] But such concerns about the overregulation of digital expression fail to adequately attend to the *underregulation* of expression that may impede expressive freedom. Digital expression appears to have shifted freedom of

---

[126] *Ibid* at 910.
[127] *Ibid* at 953-4, 959.
[128] *Ibid* at 955.
[129] *Ibid* at 956.
[130] *Ibid*.
[131] GLAAD, "Unsafe: Meta Fails to Moderate Extreme Anti-trans Hate Across Facebook, Instagram, and Threads" *GLAAD* (2024), online: < glaad.org/smsi/report-meta-fails-to-moderate-extreme-anti-trans-hate-across-facebook-instagram-and-threads/>, accessed from Taylor Lorenz, "Meta is failing to curb anti-trans hate, new report says" *The Washington Post*, (27 Mar 2024) online: <washingtonpost.com/technology/2024/03/27/meta-glaad-report-released >.
[132] Jamie Cameron, "Resetting the Foundations: Renewing Freedom of Expression Under Section 2(b) of the Charter" (2022) 105:2d SCLR 120 [Cameron Resetting] at 122, 149.

expression discourse from *whether* or *if* the state can regulate expression, as exceptions to the rule, to *how* the state must regulate to ensure people can freely express themselves.[133] But getting to this *how* is difficult without a solid conception of *why* freedom of expression is to be protected or limited. The *why* is unclear in the doctrine because it lacks a conception of the good being protected or the wrong being guarded against.

Without more adequate guidance from the constitutional doctrine in answering this *why,* our legal and societal discourse about freedom of expression rights also struggles. This failure to answer the *why* risks exacerbating existing social polarization and inequalities, setting an inadequately articulated boundary for what expression ought to be addressed by the state and social actors, and what expression we must accept and tolerate. Queer and anti-queer expression will continue to abound in the digital age. To protect queerness, in the absence of help from law, queer individuals and communities will continue to entrench their resistance to heteronormative and anti-queer individuals and institutions. In turn, those individuals and institutions will entrench themselves against queer individuals. If queer people reciprocally continue to resist, anti-queer people, bolstered by constitutional law and societally-dominant heteronormativity, will continue to claim victim and wield freedom of expression rights as swords and shields of discrimination.[134] Because the assumptions in the doctrine can be challenged by the social circumstances of the digital world, digital expression opens the doctrine up for a reimagination of freedom of expression

[133] If only to reach the same level as in the analog world, which I contend still remains unfree for many.

[134] An overcorrection becomes a risk when the freedom of queerphobes become unjustly infringed by law and social regulation (to the extent that they are marginalized and excluded for reasons beyond their own exclusion of others). That overcorrection would rightly draw the 'me not thee' claim.

to fit the digital domain. To address issues of queer and digital expression, constitutional law must go beyond abstract principles.[135] [136]

2.2 The Two-Stage *Charter* Framework of Freedom of Expression

This web of social problems converges on the abstract doctrinal conception of freedom of expression under the *Charter*. Here, I overview the doctrinal framework and key critiques that point to the abstraction that underlies it.

The *Charter*'s freedom of expression framework, which has remained largely unchanged in concept since its inception,[137] consists of two stages: section 2(b) provides constitutional protection to all expressive acts, except for violence and threats of violence. Section 1 allows for limits to this protection if the state can establish that its interference with expression is justified in a free and democratic society.

2.2.1 Broad Protection - Section 2(b)

Section 2(b) of the *Charter* reads:

> 2. Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[138]

Discussion about the section 2(b) framework has been minimal since *Irwin Toy.* [139] The Supreme Court of Canada has interpreted section 2(b) protection broadly, guarding nearly all expressive

---

[135] Franks Avatars, *supra* note 112 at 228.

[136] While it lies outside the scope of this thesis (which, as set out above, is focused on the problems of abstraction) these changing circumstances may provide a window for the SCC to reconsider its existing precedent. See, e.g.: *Canada (Attorney General) v Bedford*, 2013 SCC 72.

[137] Cameron Resetting, *supra* note 132 at 124.

[138] Determining whether freedom of expression applies is a three-step test, set out in *Irwin Toy*, *infra:* 1) does the activity in question have expressive content, thereby bringing it within section 2(b) protection? 2) does the method or location of this expression remove that protection? 3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect?

[139] *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC) [*Irwin Toy*] at 968-9, which was cited recently as the framework in *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34. In *Irwin Toy*, the 3-2 majority upheld

acts from state interference.[140] Expressive acts are defined as "any activity or communication that conveys or attempts to convey meaning"[141] and protection is afforded to both speakers and listeners.[142] Under the principle of content neutrality, the content or meaning of an expressive act is protected "no matter how offensive, unpopular or disturbing," "repugnant," or "distasteful or contrary to the mainstream" it might be. [143] Importantly, this broad protection purports to protect expression that is outside a prevailing, majority viewpoint.[144]

While section 2(b) ostensibly protects individuals, the SCC has given both individual and social reasons for protection. In *Irwin Toy*, Dickson CJ stated that freedom of expression is "fundamental" because in a free, pluralistic and democratic society, we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."[145] Broad protection is afforded so that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind."[146] For Dickson, "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure."[147] Recently, Wagner CJ and Côté J, writing for the majority in *Ward*, stated that content-neutral protection under section

---

a ban on commercial advertising aimed at children. Referencing the vulnerability of children and the potential for advertising to be manipulative of them, the majority (Dickson CJ) found that the ban violated section 2(b) but was saved under section 1.

[140] *Thomson Newspapers Co v Canada (Attorney General)*, 1998 CanLII 829 (SCC) [*Thomson*].

[141] A wide range of expressive acts are protected including hateful (see e.g..: *R v Keegstra*, 1990 CanLII 24 (SCC) [*Keegstra*], *Whatcott, supra* note 87), false (*R v Zundel*, 1992 CanLII 75 (SCC) [*Zundel*]; *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 (CanLII) [*JTI*]) pornographic (*R v Sharpe*, 2001 SCC 2 (CanLII)), defamatory (*Grant v Torstar Corp*, 2009 SCC 61 (CanLII) [*Torstar*]), commercial (Irwin Toy, *supra* note 140); *Rocket v Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC) [*Rocket*]), picketing (*RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC) [*Dolphin Delivery*]) art, political advertising, (*Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31) campaign spending and election results (*Harper v Canada (Attorney General)*, 2004 SCC 33), and choice of language (*Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC)).

[142] *Edmonton Journal v Alberta (Attorney General*),1989 CanLII 20 (SCC) [*Edm Journal*].

[143] *Keegstra,* supra note 141 at 730-2; *Irwin Toy*, *supra* note 139 at 968.

[144] *Irwin Toy*, *supra* note 139 at 927, 968. See also: *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC) [*Committee*] at 173-5, 185.

[145] *Irwin Toy*, *supra* note 139 at 968. Emphasis added

[146] *Ibid* at 968. Recently cited approvingly in *Ward*, *supra* note 70 at para 59.

[147] *Ibid* at 970. Cited in *Keegstra* and *Butler*.

2(b) "flows from the concept of human dignity" which individuals equally possess.[148] In the majority's view "equality would be hollow if some people were silenced for their opinions."[149] However, the majority in *Ward* went on to state that freedom of expression is protected not for the individual but for a social good.[150] As Robin Elliot points out, while it is clear that expression plays a social role, this role is not clearly spelled out elsewhere in the doctrine.[151] Ultimately, for Elliot, section 2(b) lacks a solid justificatory basis,[152] a view shared by others (including myself) as discussed below.

Within this content-neutral approach, the Court has at times suggested that objectionable expression is best addressed not by regulation but by 'more speech' or counterspeech, echoing a theme from deep within freedom of expression theory and the SCC's own jurisprudence.[153] In *R v Keegstra,* Dickson CJ noted that "it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive."[154] In *R v Zundel*, McLachlin J (as she then was) referred to the interactive process of the pursuit of truth, and restricting deliberately false expression limited this process.[155] McLachlin reiterated this idea in a later case, stating that

---

[148] *Ward*, *supra* note 70 at 59.
[149] *Ibid.*
[150] *Ibid* at 60, citing Raz, *supra* note 16.
[151] Robin Elliot, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I - Taking Stock" (2012) 59 Sup Ct Rev 435 [Elliot Taking Stock] at 447. Particularly in reference to the 'self-fulfilment' value.
[152] Robin Elliot, "Back To Basics: A Critical Look at the Irwin Toy Framework for Freedom of Expression" (2011) 15:2 Rev Const Stud 205 [Elliot Basics] at 205.
[153] See, e.g.: Maxime Charles Lepoutre, "Can 'More Speech' Counter Ignorant Speech?: Tackling the Stickiness of Verbal Ignorance" (2019) 16:3 J Ethics & Soc Phil 155 [Lepoutre More Speech]. The idea of counter-speech overlaps significantly with the concept of the 'marketplace of ideas'. See, also: Katharine Gelber, "Speaking Back" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech*, (Oxford: Oxford University Press, 2021) 249 at 250.
[154] *Keegstra,* supra note 141 at 766. See also, 763. *Keegstra*, which was decided by a 4-3 margin, dealt with an Alberta high school teacher who was charged under s 319(2) of the *Criminal Code*, for "wilfully promoting hatred against an identifiable group by communicating antisemitic [sic] statements to his students." (698). The majority found that Keegstra's actions constituted hate speech and the provision was constitutional.
[155] *Zundel*, *supra* note 141 at 755-756. In *Zundel,* which was decided by a 4-3 margin, Zundel was charged under section 181 of the *Criminal Code* for spreading false news, stemming from his publication of Holocaust denial materials. The majority (McLachlin J, as she then was) found that section 181 infringed the Charter guarantee and was not saved under section 1.

"in the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth."[156] Similarly, in *Committee for the Commonwealth of Canada*, L'Heureux-Dubé J echoed a line of precedent suggesting that freedom of expression as an open debate "will proliferate an abundance of varied perceptions which will expose the weaknesses of certain ideas and the strengths of others.".[157] Recently, in *Hansman v Neufeld,* Karakatsanis J, writing for the majority noted that "[w]hile counterspeech is not necessarily a complete solution to harmful expression, its close proximity to the values at the core of s. 2(b) is beyond doubt."[158]

However, as will be discussed in greater depth below, counterspeech is not always an effective remedy. In *Hansman,* for example, the difficulties of counterspeech were at the centre of the case: Neufeld's underlying defamation claim rested on Hansman's counterspeech against Neufeld's derogatory comments.[159] The majority noted that marginalized groups may not be able to effectively counterspeak, from which "discourse can then take on an uneven quality" which may necessitate protection of that counterspeech.[160] To be sure, the Court has recognized the limits of counterspeech. In *Keegstra*, Dickson CJ also cautioned that "neither should we overplay the view that rationality will overcome all falsehood in the marketplace of ideas."[161] He noted the damage that hate propaganda can have on democracy and dignity, and ultimately found the hate speech

---

[156] *Torstar*, *supra* note 141 at paras 49-51, in the defamation context.
[157] *Committee*, *supra* note 144 at 173-4.
[158] *Hansman*, *supra* note 86 at para 82. In *Hansman*, Neufeld, a BC teacher, made derogatory statements about "SOGI" legislation. Hansman responded to Neufeld's comments, calling them "bigoted, transphobic and hateful." (4) Neufeld sued Hansman for defamation and Hansman subsequently applied to dismiss Neufeld's action under BC's anti-SLAPP strategic lawsuits against public participation) legislation. (5) The majority restored the order dismissing the defamation action, with Côté J. (unsurprisingly) dissenting. See, for commentary: Hilary Young, "*Hansman v Neufeld*: The Supreme Court of Canada protects counterspeech under anti-SLAPP law, but is it even defamatory?" (2023) 15:2 J Media L 125, doi: <10.1080/17577632.2023.2288395>.
[159] *Hansman*, *supra* note 86 at para 83.
[160] *Ibid* at 954. at para 82 citing Lepoutre More Speech, *supra* note 153 at 157. See also: *Whatcott, supra* note 87 at para 75.
[161] *Keegstra,* supra note 141 at 762-3. See: Emmett Macfarlane, "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 35 [Macfarlane] at 46.

provisions to be justified under section 1 to address this damage.[162] However, it is worth noting that for the purposes of section 2(b), such considerations are not taken into account: for regulation of expression that falls short of section 1 justification, the Court thus defers the resolution of the targeted issues to social regulation. This preference for counterspeech and the determination of *what* is sufficiently harmful to necessitate state intervention leaves marginalized expression (like queer expression) inadequately protected and vulnerable.

The Court is also hesitant to exclude expressive acts from constitutional protection for fear that doing so will have a "chilling effect" on expression:[163] that is, imposing restrictions on expression will lead to individuals self-censoring for fear of legal repercussions.[164] In some instances, the Court can infer this chilling effect while in others it will require evidence.[165] In her *Keegstra* dissent, McLachlin expressed concern about the overbreadth of legislation creating a chilling effect on the expression of individuals.[166]

However, the notion of a 'chilling effect' is not without its own issues. Some note that the chilling effect may lack empirical support and may be less of a concern than is generally feared.[167] Particularly for this thesis, the 'chilling effect' of state regulation as justifying non-interference does not question *whose* expression is being chilled nor does it consider whether expression is chilled already.[168] As Mary Anne Franks has suggested, albeit in the US context, little attention has

---

[162] *Keegstra,* supra note 141 at 765-7. See also, *Whatcott, supra* note 87 at 104-6.
[163] The term is used in the US context more obviously, but the idea remains prominent in Canada.
[164] see, e.g., *Whatcott, supra* note 87 at para 32; *R v Khawaja*, 2012 SCC 69 at para 79 [*Khawaja*]; *R v Sharpe*, 2001 SCC 2 [*Sharpe*] at para 104. It arises extensively in the defamation context. See: *Hansman*, *supra* note 86 at para 75, 155, 175 (Côté dissent); *Torstar*, *supra* note 140.
[165] *Khawaja*, *supra* note 164 at paras 79-80.
[166] *Keegstra, supra* note 141 at 850.
[167] Mary Anne Franks, "Fearless Speech" (2018) 17 First Amendment L Rev 294 [Franks Fearless] at 306; Jonathon W Penney, "Understanding Chilling Effects" (2022) 106 Minn L Rev 1451. See also, Citron & Penney, *supra* note 59.
[168] Franks, *supra* note 167 at 306.

been paid to the "chilling of women and non-white men's speech."[169] Like counterspeech, the presumptive fear evidenced in the doctrine sets aside considerations of social equality in helping justify broad protection.

2.2.2 Violence as an Internal Limit to Broad Protection

Violence and threats of violence are exceptions to the broad, content-neutral protection of expressive freedom under section 2(b).[170] The Court has made clear that protection will be removed if an act is violent, regardless of how expressive that act may be.[171] As will also be discussed below, why this exclusion applies is less clear. A government action that infringes on a non-violent expressive act will, in most instances, be found to have violated freedom of expression.[172] The analysis then shifts to section 1, where most analytical work is done, and where most controversy arises.[173]

---

[169] *Ibid* at 306-7. She goes on to say: "Harassment, threats, genocidal rhetoric, hate speech, "doxing," and revenge porn all have silencing effects, and their primary targets are women, non-white men, and sexual minorities."

[170] Elliot Basics, *supra* note 152 at 210. See: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] at para 107; *Dolphin Delivery Ltd*, *supra* note 141 at 588. Precisely, the method or location of the expressive act can remove this protection, but the Court rarely excludes expression on either basis: only violence is consistently excluded. No SCC case excludes an expressive act from protection because of its location. The analysis for the removal of protection based on location is a complex analysis, involving a host of factors including the function, history, and use of the place in question (including whether the space is private or public). (See: *Montréal (City of) v 2952-1366 Québec Inc* 2005 SCC 827 at para 74) Additionally, this exclusion is premised on the method or location conflicting with the values of expression which, as will be discussed below, are controversial and therefore raises a multitude of other complicating questions. Moreover, the method or location of expression may bear heavily on the content of the expressive act (see: *Committee*, *supra* note 144, as noted in Brian Slattery, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51:10 SCLR 245), arguably rendering the distinction moot. While the 'place' of the internet may have bearing on this test, such an argument is more solution-focused than this thesis covers. A detailed discussion of the method/location exclusion is also largely outside the scope of this thesis (which attends more to content-based restrictions), demanding more focused attention in future work than can be offered here.

[171] *Keegstra,* supra note 141; *Irwin Toy*, *supra* note 139 at 970; *Suresh* at para 107-8. *Khawaja*, *supra* note 164.

[172] Note: If the *purpose* of the government action was to restrict the content, then the restriction is generally found to constitute a violation. If an *effect* of the government action restricts the content, the individual claiming infringement must demonstrate that the infringed expression advances the values of freedom of expression for a violation to be found. A discussion of this is beyond the scope of this paper. But see: Jamie Cameron, "Freedom of Expression and the Charter: 1982-2022" (2023) Centre for Free Expression. Blog: <cfe.torontomu.ca/blog> [Cameron Blog] at 9: no infringement found in 25% of cases.

[173] Elliot Basics, *supra* note 152 at 210.

It is important to note that the violence exception serves as an 'internal' limit on what is included in the doctrine's conception of *expressive freedom*, where the characteristics of the expressive act itself remove the act from under *Charter* protection. Under section 1, as will be discussed, external concerns, such as the harm or negative social effects of the expressive acts, can limit this protection; this thus leaves lingering the notion of expressive freedom in a near-absolute sense, subjected only to the reasons given and the proportionality of the restriction. The exception of violence will be discussed in section 3.4, as it represents an inkling for reform of the doctrine.

2.2.3 Justified Limits - Section 1

This near-absolute conception of expressive freedom under section 2(b) leads to the constitutional protection of a wide variety of expressive content, some of which are objectionable and harmful. However, maintaining this protection is untenable in any functional democratic society.[174] Thus, the *Charter* includes a limitation clause under section 1 to mitigate some of these issues and allow the regulation of some objectional expression.[175] It reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[176]

---

[174] See, i.e.: Grégoire C N Webber, "What Oakes could have said (or how else to read a limitations clause)" (2023) 112:2d SCLR 61 (forthcoming), doi: <10.2139/ssrn.4214646> [Webber Oakes] at 17-18, who despite taking issue with the Oakes test, recognizes that limits are necessary to freedom of expression protection. See also: Sethi, *supra* note 10.

[175] One could 'shrink' the definition of expression, or the scope of the rights protection to avoid these consequences. See, e.g. Webber, Grégoire "Proportionality and Limitations on Freedom of Speech" in Adrienne Stone & Frederick Schauer, eds, *Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021). The First Amendment, for example, does not have a limitations clause and thus more emphasis is placed on such definitions.

[176] *Charter*, *supra* note 3, s 1.

Under section 1, the government bears the burden of demonstrating that the restriction is "reasonable" and "demonstrably justified".[177] This analysis takes a "contextual approach" and therefore is to be applied within the "factual and social context of each case."[178]

Generally, section 1 limits are justified on the grounds of harm.[179] The justifications for hate speech and obscenity provisions, for example, draw heavily on the notion of harm;[180] conversely, falsehoods in *Zundel* and bullying-like comments in *Ward* were found to be insufficiently harmful to justify the government restriction.[181]

Importantly, as set out above, section 1 operates to justify limits of freedom of expression *protection*; it does not address limits to the scope of *expressive freedom*. Limits under section 1 leave untouched the conception of expressive freedom, despite the doctrine's often synonymous treatment of the two, as will be teased out below. This thesis does not address the nuances within the numerous elements of the section 1 analysis. However, it does confront section 1 as it relates to harm and the abstract conception of expressive freedom.[182]

---

[177] *JTI*, *supra* note 141 at para 77, Irwin. It also must demonstrate that the restriction was "prescribed by law" through the enactment of a statute or regulation, and that it is sufficiently precise and intelligible (though the threshold for vagueness is low).

[178] *R v Oakes*, 1986 CanLII 46 (SCC). See, e.g.: *Edm Journal*, *supra* note 142. Discussions of proportionality are largely outside the scope of this paper, though it is engaged indirectly. However, for clarity, the *Oakes* test has two branches. (1) the government must establish whether the objective of the legislation is sufficiently important to justify limiting the Charter right; (2) the government must establish that the means used to achieve that objective were proportional, for which three things must be met: (i) there must be a rational 'rational connection' between the restriction and the objective, (ii) the chosen means must minimally impair the right, restricting it only to the extent necessary to accomplish the objective. Here, the government must only prove that the chosen means were reasonable, not necessarily that they were the least restrictive. The government is also not required to select less effective means, even if doing so would further minimize the impairment (iii) the benefits of the restriction must outweigh its 'deleterious effects' in a final balancing of the practical consequences of the legislation. (SEE: *Alberta v. Alberta Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian*] at paras 55, 76, *JTI*, *supra* note 141 at para 45; *RJR-MacDonald Inc v Canada (AG),* 1995 CanLII 64 (SCC) [*RJR*] at paras 63, 160; *Keegstra,* supra note 141; *Butler*, *infra*; *Thomson*, *supra* note 140 at para 87.

[179] Moon Book, *supra* note 104 at 35; *Ward*, *supra* note 70 at para 61, though a range of concerns and objectives may be raised depending on the contextual circumstances See, e.g.: *Hutterian*. These are not without controversy.

[180] *R v Butler*, 1992 CanLII 124 (SCC) [*Butler*] at 493-97, 501-2; *Keegstra,* supra note 141 at 746-48; *Whatcott, supra* note 87 at para 74.

[181] *Zundel*, *supra* note 155 at 769-75.

[182] See: Sethi, *supra* note 10.

2.2.4 Underlying Values

The Court has accepted three foundational values of freedom of expression,[183] labelled generally as truth, democracy, and autonomy (or self-fulfilment).[184] The Court first imported these values in *Ford* from American First Amendment theorist Thomas Emerson.[185] These values play numerous roles in the framework, including justifying constitutional protection under section 2(b), excluding violence from section 2(b), and limiting this protection under section 1. This varied use of the values has prompted criticism, some of which are discussed below.[186] These criticisms track along two similar lines: one, that the values create contradiction and tension by both justifying protection *and* limits and similarly, two, that these values are used to rank the value of expressive acts, or to determine how far from the 'core' of the guarantee an act is based on how it serves these values despite protection being justified on the basis of broad, content-neutral protection.[187] This ranking is then used in the proportionality analysis of the *Oakes* test. I do not wade into the problem of ranking or weighing directly. However, the difficulties in conceptualizing freedom of expression as a constitutional right are key.

It is the vague and varied meaning of these abstract values (and the abstract conception of freedom that emerges) that lies at the heart of the inadequacies of the doctrine. The Court has not provided in-depth consideration of these values themselves but has rather baldly accepted their

---

[183] See: Elliot Taking Stock, *supra* note 151 at 450. Values are also described as purposes, justifications, or rationales. This terminological difference within the literature is worthy of exploration itself, but beyond the scope of this paper.
[184] More precisely, the pursuit of truth. See: *Zundel*, *supra* note 155.
[185] *Ford*, *supra* note 141 at 765-767. Though *Irwin Toy*, *supra* note 139 cites *Ford* at 976, it does not invoke these values in section 2(b) but in testing for an infringement. (See: Elliot Taking Stock, *supra* note 151 at 445-6). This is interesting, as *Irwin Toy* serves as such a foundational case for the doctrinal conception.
[186] Elliot Taking Stock, *supra* note 151 at 436, 450-64.
[187] *Rocket*, supra note 141 at 247, McLachlin writing for unanimous court. For the "core" see, e.g.: *Whatcott, supra* note 87 at para 112; *Butler*, *supra* note 180 at 500, *RJR, supra* note 141 at para 75; *Sharpe, supra* note 164 at para 23. See also: *Edmonton Journal*, *supra* note 141 ;Elliot Taking Stock, *supra* note 151 at 459-61; Sethi, *supra* note 10.

validity.[188] According to Elliot, the Court's jurisprudence has referred to these values with only "perfunctory" consideration,[189] despite the range of meanings and interpretations each provokes and the extensive debate about them, particularly in the context of the American First Amendment.[190] In *Ford*, where the values first appeared, the Court offered no additional substantive discussion of these values.[191] In *Irwin Toy,* Dickson CJ merely referenced these three values in assessing the effects of the government action infringed on freedom of expression, having already ascribed protection on broader liberal principles.[192] Only has McLachlin's *Keegstra* dissent critically examined the values in any depth.[193]

While these values are all plausible and appear to capture the value of freedom of expression, their meanings vary and their shape upon implementation suggests they are problematic. While democracy may be an obvious value, as the maintenance of democratic discourse and governance, what 'democracy' entails or demands is subject to a wide variety of interpretations.[194] For example, it may simply mean that individuals can voice their opinions on

---

[188] Elliot Taking Stock, *supra* note 151 at 437-8; 445.

[189] *Ibid* at 438.

[190] *Ibid* at 438-9; 444; 447; Richard Moon, "The Scope of Freedom of Expression" (1985) 23:2 Osgoode Hall Law Journal 331, online: < digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss2/5> [Moon Scope] at 332-46. For controversy see, e.g.: Jacob Weinrib, "What is the Purpose of Freedom of Expression?" (2009) 67:1 UT Fac L Rev 165. In the US: Martin H Redish, "The Value of Free Speech" (1981) 130:3 U Pa L Rev 59; Robert Post, "Participatory Democracy and Free Speech" (2011) 97:3 Va L Rev 477. James Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine" (2011) 97:3 Va L Rev 491; Eugene Volokh, "In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection" 97:3 Va L Rev. Note: I do not engage with this debate, avoiding the debate about which value is superior or central. It is possible that all of these values are engaged, to varying extents and at various points in time, by freedom of expression rights which would seemingly renders answers to such debates of limited use, without more context. To understand protection, referencing democracy, truth, and autonomy as abstract concepts that exist to justify abstract, broad protection of non-interference inaccurately represents the value and the good of expression and its constitutional protection, as will be argued below.

[191] *Ford, supra* note 141 at 765-6. The Court did fuse two of Emerson's values into one singular democratic value and noted that these values are subject to the two-step analysis and governed by purposive interpretation. Notably, the Court also declined to "delineate the boundaries of the broad range of expression"

[192] *Irwin Toy*, *supra* note 139at 976, 967-71.

[193] Elliot Taking Stock, *supra* note 151 at 448; *Keegstra,* supra note 141 at 802-3: the Dickson majority opinion merely references the values (at 727-8).

[194] Moon Book, *supra* note 104 at 14; Elliot Taking Stock, *supra* note 151 at 438-9.

political matters, whereas others may conceptualize democracy as requiring meaningful engagement and responsiveness to minority views. The democratic rationale also struggles to explain why other forms of expression like artistic expression receive protection. While truth, or the pursuit of truth, may be more obvious, difficulties describing what *truth* actually is may prove problematic, as too will determining the conditions required for a successful pursuit of it.[195] The autonomy rationale may also be interpreted in a variety of ways, for example, as *self-fulfilment,* not just respecting individual action.[196] It may demand that individual capacities be supported or the individual choice simply respected.[197]

Furthermore, a tension exists between the intrinsic and instrumental aspects of these values.[198] Expression may be protected "for its own intrinsic value"[199] to the individual. The autonomy value hints at this intrinsic value of expression protection. However, if autonomy justifies protection, such protection could become near limitless with any restrictions potentially infringing on autonomy and disrespecting the presumptively autonomous individual.[200] As noted by McLachlin in *Keegstra*, this value itself is "arguably too broad and amorphous to found constitutional principle".[201] Yet if autonomy is not a justifying notion, the intrinsic value of freedom of expression is not clear. Moreover, both truth and democracy are instrumental values that account for the role freedom of expression plays in facilitating democratic processes and social discourse which ultimately serves the individual.[202] While such accounts make the instrumental

---

[195] Moon Book, *supra* note 104 at 11.
[196] *Ibid* at 14.
[197] See: Mackenzie & Meyerson, *supra* note 48.
[198] Moon Book, *supra* note 104 at 9-24.
[199] *Keegstra,* supra note 141, dissent, at 804.
[200] Moon Book, *supra* note 104 at 19. We see this occurring in the doctrinal conception and the respect for the individual under section 2(b).
[201] *Keegstra,* supra note 141 at 805.
[202] Richard Moon, "The Social Character of Freedom of Expression" (2009) 2:1 Amsterdam L Forum 43 [Moon Social Character] at 46.

value of expression clear and the need to sometimes limit protection plausible, relying too heavily on them risks losing the "fundamental character" and intrinsic value of constitutional protection of freedom of expression. [203]

In my view, these values do not necessarily explain the value of expression itself because these values rest on abstract conceptions of expression and expressive freedom. They touch on important things that expression *can* do, and indeed that open, robust expressive dialogue can achieve. But instead, the values are used loosely to justify broad protection of all expression and then to explain why that protection goes too far. Since the values permeate each stage of the framework, the conception of freedom of expression that emerges is shaky. As I will argue, it inadequately protects individual difference, which for rights built on individualism, would presumably be important.

2.3 Pointing to Abstraction

The framework of freedom of expression contributes to a shaky conception of the value of expression and expressive freedom, and subsequently, to the doctrine's inability to adequately answer the koan and to adequately protect individuality.[204] Sethi argues that the doctrine lacks a framework to address the normative question of what expression is worthy of protection.[205]

As alluded to above, problems immediately arise from the recursive language of the *Charter*: *freedom* of expression is protected under section 2(b), but this freedom can be limited for a *free* society. How is a society free if it is limiting freedom? It would seem that limits to the freedom being protected in supreme law should be justified on a basis of something other than

[203] *Ibid* at 45. That is, it loses non-consequentialist value. While democracy and truth may have some intrinsic value, their importance largely lies with the structure or conditions that facilitate, instrumentally, autonomy and individual flourishing.
[204] See: Sethi, *supra* note 10 at 23, who states that it creates confusion in the legal community.
[205] Sethi, *supra* note 10 at 22.

freedom.[206] If we bracket these issues as terminological difficulties, the framework makes (some) sense: individual freedom requires a notion of a free society—at least a rights-respecting society.[207] We can alleviate some of the problems of overprotection with limits by referring to ideals of democracy, the rule of law, and proportionality. The values, in a way, do this. However, this simply shifts one problem into another: the vague conception of freedom of expression gets shifted into unclear conceptions of truth, democracy, and autonomy. While it may be argued that this structure strikes a balance between individual and social interests, some are more skeptical.[208] Ultimately, the issue lies with the abstract conception of expression and expressive freedom baked into the doctrinal structure.

Richard Moon and Jamie Cameron offer persuasive critiques of the doctrinal structure, both pointing towards the abstract doctrinal structure as jeopardizing individuality, but each prescribing different solutions. Moon argues that expression has a social character that is ignored by the doctrinal structure's dichotomization of the individual under section 2(b) and the social aspects of expression under section 1:[209] this structure positions individual protection against state interference.[210] He questions why expression is valued under section 2(b) as a distinctly important activity that ought to be protected by the state, but under section 1, the state can override it with other interests that are not enshrined in the *Charter*.[211] For Moon, the two-stage structure is based on an individualistic conception of expression and expressive freedom that is divorced from the realities of expression as a communicative act.[212] The individualistic basis of section 2(b) looks

---

[206] Indeed, democracy helps this.
[207] Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985) 187 [Taylor Atomism].
[208] Sethi, *supra* note 10, who argues about balance, but suggests it is misguided.
[209] Moon Book, *supra* note 104 at 25-6. thereby obscures the value of expression as a social, communicative act
[210] *Ibid* at 37.
[211] *Ibid* at 54-5.
[212] *Ibid* at 75, and rationalistic assumptions about the individual.

past important considerations that impact expressive freedom. For instance, in *Little Sisters*, the majority acknowledged that the bookstore had been discriminated against by Customs officials but held that the legislation that enabled that discrimination was not itself discriminatory.[213] More recently, in *Ward*, the majority diminished the effects of Ward's comments on JG, despite evidence to the contrary, prioritizing abstract social values like democratic tolerance of offensive expression for abstract purposes.[214] Understandably, this individualistic basis then makes limits to freedom of expression obscure and difficult to conceptualize as a matter both of theory and justice.[215] For example, deceitful or manipulative expression engages both harm to the listener and their freedom, and the speaker's 'freedom': how ought they be reconciled?

For Moon, such considerations are part of the communicative relationship and social nature of expression but are neglected in the individual doctrinal framework. The doctrine ignores the social and relational character of expression, and social circumstances that develop individuality itself and on which the individualistic conception of protection is rooted.[216] The value of freedom of expression lies in the protection of discourse and thus supports individual agency and identity that emerge from it.[217] Relying heavily on individualism leaves little room for social conditions or forces that impede expression (like the manipulative or dominating effects of some individuals' expression on another's opportunity to express themselves[218]) and is, he argues, therefore of little use for conceptualizing freedom of expression.[219] However, leaning too heavily on social

---

[213] *Little Sisters*, *supra* note 88 at para 125. nor was special protection for queer expression needed to prevent discrimination)
[214] *Ward*, *supra* note 70 at para 60, para 111.
[215] Moon Book, *supra* note 104 at 39, 54.
[216] *Ibid* at 9, 25 41; Moon Character, *supra* note 202 at 4, 46, 49. Elliot disagrees (Elliot Basics, *supra* note 152 at 214): Moon's conception risks exclusion not only of violence but of a wide range of activities, which Elliot disapproves of. Elliot instead suggests that violence specifically is excluded because it is a *premise* of constitutional rights.)
[217] Moon Book, *supra* note 104 at 4.
[218] See: Moon Book, *supra* note 104 at 50.
[219] *Ibid* at 75.

consequences risks the idea of individual protection of expression itself.[220] Moreover, he argues that the values and rationales complicate the analysis, dichotomizing the individual and the social nature and value of expression (when they are in fact entwined) and cannot explain why expression should be protected.[221] He notes that this discourse is a *premise* of the traditional values of freedom of expression, yet these values remain incomplete on a purely individualistic model.[222] His solution is to point towards the social character of expression, as will be discussed below.

Cameron, like Moon, critiques the doctrine's two-stage structure as contradictory and unprincipled because it rests on an abstract conception of expressive freedom, which, in turn, risks individual protection by balancing it against abstract social values (like equality) and moral judgments of expressive acts.[223] For Cameron, protection of freedom is thus "ephemeral": it is provided under section 2(b) and then balanced and (potentially) removed under section 1.[224] In her view, broad protection of expression is egalitarian and appropriate and content-neutrality is a sound principle for protecting any and all meaning.[225] However, the contextual approach to limits under section 1 contradicts this content-neutral protection with limited explanation from the Court.[226]

---

[220] *Ibid*.

[221] Moon Book, *supra* note 104 at 9-25, 30; Moon Character, *supra* note 202 at 45-6. He argues that the three values of freedom of expression ingrained in the doctrine are inaccurately conceptualized because of the individualist conception of freedom of expression.

Moon Book, *supra* note 104 at 75: The doctrine assigns broad protection on the premise that individuals can eventually sort out truth from falsehoods, for example, in the pursuit of truth, which justifies limiting intervention by the state. (See: *Zundel*, *supra* note 155) Yet, under section 1, the Court acknowledges that in some instances that rationality might be manipulated. (See: *JTI*, *Keegstra,* supra note 141) For Moon, however, leaning too far away from this presumption of rationality so far as to require that rationality must be proven before protection arises, then individual freedom of expression is of limited use and meaning.

[222] *Ibid* at 4.

[223] Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on R v Butler" (1992) 37 McGill LJ 1135 [Cameron Abstract] at 1139, 1152; "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58:1 SCLR 163, doi: <10.60082/2563-8505.1252> [Cameron Quixotic] note 132 at 123-7; Cameron Blog, *supra* note 172 at 16. See also: Sethi, *supra* note 10; Peter W Hogg, Constitutional Law of Canada, student ed (Toronto: Carswell, 2009) at 987 n 55.

[224] Cameron Abstract, *supra* note 223 at 1154; Cameron Resetting, *supra* note 132 at 128-9.

[225] Cameron Quixotic, *supra* note 223 at 170.

[226] Cameron Abstract, *supra* note 223 at 1146.

Instead of treating all expression as equal, the doctrinal framework legitimizes expression only after the section 1 review.[227] In doing so, it errantly validates some views and invalidates others, violating the principle of content neutrality.[228] In addition to an abstract conception of freedom, the Court's use of abstract values and abstract harms risks undermining the very freedom the framework purports to protect.[229] Like Moon, Cameron contests the contradiction that emerges from the use of the three values to indiscriminately protect expression under section 2(b) but then to rank expressive acts under section 1.[230]

Cameron, in contrast to Moon's social character view, argues that to better guard content neutrality and broad protection, expressive freedom ought to be conceptualized as the absence of coercion and constraint from the state.[231] In essence, expression ought not be evaluated under section 2(b) but rather the severity of the violation. Subsequently, the analysis under section 1 can more soundly weigh the violation against a measure of objective harm.[232] In her view, this conception avoids moral judgment and instead relies on an evidentiary basis against which limits based on objective harm can be determined, thereby protecting the individual in ascribing necessary limits.[233]

Moon's critique offers key insight into conceptualizing freedom of expression that starts to move away from the abstraction of expression itself. Cameron's solution is convincing at first

---

[227] Jamie Cameron, "The First Amendment and Section 1 of the Charter" (1990) 1 Media & Comm L Rev 59 at 64.
[228] Cameron Quixotic, *supra* note 223 at 172.
[229] Cameron Resetting, *supra* note 132 at 127. Cameron Abstract, *supra* note 222 at 1138.
[230] Cameron Abstract, *supra* note 222 at 1139. Cameron Resetting, *supra* note 132 at 125. Cameron Quixotic, *supra* note 223 at 128-9, 169-171, 191. Cameron Blog, *supra* note 172 at 9, 15-16. Contesting Wilson J in *Edm Journal*. See also Jamie Cameron, "Big M's Forgotten Legacy of Freedom" (2020) Osgoode Leg Stud Research Paper, doi: <10.2139/ssrn.3659471> [Cameron Big M] at 25, 38; Cameron, in essence, wants to set aside values entirely because they are counterproductive to freedom
[231] Cameron Big M, *supra* note 230 at 17; Cameron Quixotic, *supra* note 223 at 131. Cameron Resetting, *supra* note 132 at 143.
[232] Cameron Resetting, *supra* note 132 at 124, 143. Cameron Big M, *supra* note 230 at 20.
[233] Cameron Quixotic, *supra* note 223 at 169, 173.

glance because it roots freedom of expression on the individual. Instead of rooting constitutional protection in social goods,[234] she seeks to emphasize that it is *freedom*, as a lack of constraint by the state, that ought to drive the analysis. Moreover, it offers conceptual clarity of principles: as she states, the conception of freedom she favours is "straightforward and compelling".[235]

Both Moon's and Cameron's critiques of the doctrine point to the inadequate protection of the individual under the framework; both suggest that the issue begins with the abstract conception of freedom under section 2(b). However, despite its logical clarity, Cameron's critique doubles down on the abstraction of expression and expressive freedom present in the doctrine. Cameron's critique will be used to contrast my argument in Part 3, which draws on the strengths of Moon's critique. Specifically, Cameron's critique does not offer a view of what expression is nor its value to the individual. In doing so, it relies on concepts that risk protecting individual difference in reality, as it leaves the vital social dimensions of expression aside in favour of abstract conceptions.

It is to the abstraction that I now turn.

3 Abstraction of *Charter* Freedom of Expression

3.1 Overview

The abstract conception of freedom of expression emerging from the doctrine inadequately answers the koan and inadequately protects individual difference. This Part traces the abstraction and how it contributes to both inadequacies.

By abstraction, I generally mean that the doctrine sets aside the social conditions and realities of individual difference and expression. More specifically, I mean two things. First, I mean

[234] See, e.g.: Weinstein, Post, *supra* note 189; Raz, *supra* note 16.
[235] Cameron Big M, *supra* note 230 at 23.

that freedom of expression rests on an abstract notion of expression itself. The doctrine divorces expression from its social (or dialogical) nature and its value as a lived human experience connected to our emotions. Second, fed by the first, the concept of expressive freedom is abstract. By this, I mean that freedom is conceived of as the non-interference of the state, excluding important social circumstances that impact individuals' abilities to express themselves.

The abstract doctrine risks individual difference, explored through queerness, on two fronts: one, under section 2(b) it overprotects anti-queer expression, and two, it underprotects queer expression in ascribing objective, harm-based limits. Resolving these issues within the existing conception is difficult. The doctrinal abstraction, like the ideal of impartiality critiqued by Iris Marion Young, does not provide an adequate conception of justice nor moral guidance for the underlying moral judgments required to give shape to a meaningful conception of freedom of expression. [236] The lack of moral grounding obscures the understanding of the scope and limits of protection and underscores the doctrine's inability to answer the koan of me not thee. This lack of moral guidance also contributes to social and political confusion about freedom of expression, which furthers the risk of individuals expressing themselves in a way that undermines others and diminishes the ability of queer individuals to advance their own claims of injustice. The risks of oppression thus cycle through.

I suggest that rooting the conception of freedom in the experience of individual expression and considerations of oppression provides a better grounding for conceptualizing constitutional protection of expressive freedom and individual difference. First, I set out aspects of Young's critique. Then, I look to the social and emotional elements of expression neglected by the doctrine

[236] The lack of a moral framework also *creates* these issues, but this chicken/egg problem is approached here from the perspective of *reforming* existing principles rather than identifying their causes.

and the abstract conception of expressive freedom that emerges (including the exclusion of violence). Finally, I look to the problematic idea of harm used to address issues emerging from the broad conception of freedom.

3.1.1 The Ideal of Impartiality, Difference, & Social Justice

Iris Marion Young's critique of the "ideal of impartiality" highlights key dimensions and implications of the abstract conceptions of justice that permeate liberal thinking about freedom and rights. Importantly, her view argues that abstract conceptions of justice and rights set aside individual differences and the oppressive forces that undermine the exercise of individual freedom. This thesis argues that a similar dynamic takes place with s 2(b) doctrine.

Young's critique of the ideal of impartiality is helpful for this thesis along two similar lines. First, it helps identify the features of the *Charter* doctrine's conception of freedom of expression that abstracts from individual difference and neglects important realities of oppression that affect conceptions of justice and freedom. Second, it helps expose how the ideal of impartiality (and within it, objectivity and neutrality) that pervades freedom of expression methodology imposes its own ideological dimensions, entrenches the status quo, detaches moral judgment from the social context within which morality arises, and therefore inadequately conceptualizes justice within the political skirmishes that are constitutional rights. Both lines help demonstrate how the doctrine fails to answer the koan and inadequately protects difference. Importantly, in Young's view, the ideal of impartiality "serves ideological functions" by masking how social forces exert influence and oppress individuals and different perspectives.[237] Within this conception, others have noted that questions of justice are severed from normative debates, highlighting that justice becomes a

[237] Young, *supra* note 12 at 97.

'thin' concept of impartial reasoning divorced from the 'thick' complexity of reality.[238] This "ideological form of rights" aims to be neutral and objective in its protection, but in reality, advances a view of justice that inadequately protects the individual.[239]

For Young, the ideal of impartiality "expresses a logic of identity that seeks to reduce differences to unity."[240] This 'logic of identity' imports a singular, universal construction of meaning which reduces the human experience to a common "essence."[241] Difference, for Young, is not the absence of "relationship or shared attributes", nor is it antithetical to similarity; rather difference is about pluralism and heterogeneity in the collective group of individuals that is a particular society.[242] Young argues that "justice requires us to make a political space for such difference."[243] setting aside difference paradoxically "turns the merely different into the absolute other."[244] Through the logic of identity's quest for universality and uniformity of principle, certainty, and predictability, it abstracts from the "sensuous particularities of experience, with its ambiguities"[245] that underpin individual difference. Impartiality thus forms the basis for "expelling those aspects of different things that do not fit into the category."[246] The individual 'other' is not only *different* but oppositional to the idea of the normal or universal individual.

The ideal of impartiality as a conception of justice is, for Young, itself a myth. [247] Four aspects are key. First, it purports to be an ideal for reasoning about justice and rights, but it mistakes

---

[238] Nimer Sultany, "What Good is Abstraction? From Liberal Legitimacy to Social Justice" (2019) 67 Buff L Rev 823 [Sultany] at 884.
[239] Bakan, *supra* note 18 at 45
[240] Young, *supra* note 12 at 97.
[241] *Ibid* at 98.
[242] *Ibid* at 98.
[243] Bakan, *supra* note 18 at 61.
[244] Young, *supra* note 12 at 99, 102.
[245] *Ibid* at 98.
[246] *Ibid* at 102.
[247] Young, *supra* note 12 at 97, 103.

questions of justice for questions of science and observation, rather than from moral reflection.[248] This ideal of impartiality aims towards reasoning about morality and justice from an "impartial and impersonal point of view."[249] In aiming towards universal principles of justice, it treats "all moral situations…according to the same rules" detached from particular circumstances, and thereby "denies the difference between subjects".[250] But in doing so, the ideal of impartiality ignores that individuals are nestled within "situation, feeling, affiliation, and point of view," which ground individual differences.[251] Morality does not arise when the individual is disconnected from the social experience but *because* one is situated in it;[252] morality arises within "concrete encounter[s] with other" individuals.[253] Moreover, feelings are excluded from impartial, liberal reasoning about rights, but are vitally important aspects of our lived experience that influence our encounters with others, and therefore our conceptions of justice.[254] That is, moral reflection about justice exists within an individual's situation within the social world as an emotional being.[255] Removing consideration of justice from these encounters thus makes the ideal "too abstract to be useful in evaluating actual institutions and practices."[256] By abstracting from the human experience, the approach of liberal rights does not consider important social relations which jettison meaningful consideration of oppression,[257] and therefore is unhelpful for reasoning about justice.[258]

---

[248] Young, *supra* note 12 at 4.
[249] *Ibid* at 96-7.
[250] *Ibid* at 10. 96. See also: Sultany, *supra* note 238 at 854, referring to Rawls's veil of ignorance, for example.
[251] *Ibid* at 97.
[252] *Ibid* at 6, 106.
[253] *Ibid* at 4, 106, citing Emmanual Levinas and Jacques Derrida.
[254] *Ibid* at 103.
[255] *Ibid* at 96.
[256] *Ibid* at 4. See also: Sultany, *supra* note 238 at 856: "too abstract to inform citizens' judgments regarding the regime's overall legitimacy."
[257] *Ibid* at 16, 24-5
[258] *Ibid* at 96.

Second, the abstraction merely sets moral disagreement aside for its own ideological principles:[259] rather than avoiding controversy about issues of justice, the liberal conception abstracts political debates into abstract concepts of freedom, harm, and equality, as ideals rather than as they manifest in society. [260] Rather than avoiding ideology and morality with an impartial view of justice, these ideals entrench a particular point of view.[261] That is, the ideal of impartiality masks "the inevitable partiality of perspective from which moral deliberation actually takes place"[262] and still requires moral and ideological judgments to operationalize.[263] For example, while a 'neutral' approach might be interpreted by some to require a ban of school prayer, but non-interference by others.[264] While impartiality may purport to avoid normative moral judgments, normativity is unavoidable in political debates (as I take debates about rights to be).[265] Abstracting away from social circumstances which inevitably bear on political outcomes, merely disguises moral disagreement, it does not eliminate it.[266] Rather, it "conceals the depth of value conflicts by presenting them as no more than conceptual confusions or interpretive mistakes."[267]

Third, despite its claims of universality, inclusion, and justice, conceptualizing a society as a universal and unified works to exclude some from the public discourse.[268] Only those individuals and their concerns, she says, which "rise above passion and desire" are included in the public sphere; all others are pushed to the private.[269] The ideal of impartiality creates a fictional dichotomy between the public and private domains, separating the "general will and particular

---

[259] *Ibid* at 112. Sultany, *supra* note 238 at 866, 868-70
[260] Sultany, *supra* note 238 at 878.
[261] Young, *supra* note 12 at 107. See also: Sultany, *supra* note 238 at 870-3.
[262] Young, *supra* note 12 at 115.
[263] *Ibid* at 111-4. See also: Sultany, *supra* note 238 at 881.
[264] Sultany, *supra* note 238 at 870.
[265] *Ibid* at 867.
[266] See in contrast, Hutchinson, *supra* note 73.
[267] Sultany, *supra* note 238 at 878.
[268] Young, *supra* note 12 at 10, 105.
[269] *Ibid* at 111.

interests."[270] The public domain is constructed as impartial, universal, and objective for the sake of unity, feelings and subjectivity are confined to the private domain.[271] Because the ideal of impartiality defines what is public through the universal and impartial, and seeks to maintain that definition, the notion of the public excludes concerns that pertain to differences.[272] Thus, 'others' whose concerns may relate to the body or emotion are excluded from the public sphere, including women and homosexuals.[273]

Fourth, the ideal of impartiality helps uphold the idea that the existing state of social justice is the necessary or natural outcome of impartiality. Because it prioritizes abstract principles and excludes scrutiny about justice, the ideal of impartiality justifies existing political authority, rather than challenging it towards progress.[274] The separation between public and private considerations solidifies existing power structures in the public realm.[275] Impartiality is thus unhelpful for understanding or progressing social justice and social change because it obscures individual difference and therefore detaches the necessary moral reflection about existing injustices from the social context in which they arise.[276]

3.1.1.1 Oppression as the consideration of justice

Abstraction from the social conditions then makes justice difficult to comprehend. Justice, for Young, is not just about morality as a conception of "the good life" but also the social and

---

[270] *Ibid* at 103.
[271] *Ibid* at 97, 103, 120.
[272] *Ibid* at 97, 108-9, 111, as including "the specificity of women's bodies and desire, differences of race and culture, the variability and heterogeneity of needs, the goals and desires of individuals, the ambiguity and changeability of feeling." And at 120: "Ours is still a society that forces persons or aspects of persons into privacy. Repression of homosexuality is perhaps the most striking example."
[273] *Ibid* at 97, 108-9, 117, 120
[274] Sultany, *supra* note 238 at 868.
[275] Bakan, *supra* note 18 at 61.
[276] Young, *supra* note 12 at 97, 103.

institutional conditions that support the individual realization of the good life.[277] This so-called "enabling conception of justice" includes consideration of the conditions for individuals to develop and exercise their capacities, and for the collective to communicate and cooperate.[278] Justice, then, pertains not only to an individualistic or distributive state of existence but also to the collective society and the institutional and social factors that affect individuals.

Oppression is a key threat to freedom and justice because it affects individual capacities to develop and pursue their own ends.[279] Together, oppression and domination act as "disabling constraints" on justice but domination alone is an incomplete account of injustice.[280] Oppression focuses on the systemic impediments on individuals from exercising their capacities in social life.[281] Oppression involves domination but domination does not necessarily produce oppression.[282] Oppression can occur not only "because a tyrannical power coerces them, but because of the everyday practices of a well-intentioned liberal society."[283] Thus, oppression can be reproduced in the institutional structure of a society, not only by state acts.[284] This includes considerations of power and powerlessness, marginalization, the entrenchment of dominant norms, and importantly, violence, which Young terms the five faces of oppression.[285] Oppression includes considerations of social dynamics that impede individuals from developing and exercising their

---

[277] *Ibid* at 37.
[278] *Ibid* at 39.
[279] *Ibid* see Ch 1, 2.
[280] *Ibid* at 33.
[281] *Ibid* at 38. Oppression "consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognized settings, or institutionalized social processes which inhibit people's ability to play and communicate with others or to express their feelings and perspective on social life in contexts where others can listen".
[282] *Ibid* at 38. Domination as the "institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions".
[283] *Ibid* at 37, 41.
[284] *Ibid* at 112.
[285] Young, *supra* note 12 at 48-63. Young sets out oppression as having five faces: exploitation, marginalization, powerlessness, cultural imperialism, violence. Exploitation is centrally concerned with class structures and economic relations, and while important, direct consideration of social and economic structures beyond constitutional rights is beyond the scope of this paper.

capacities. Attending to social conditions of oppression, then, is imperative for understanding freedom and justice.

Yet, domination is the focus of liberal rights:[286] oppression is not considered on an abstract, reductionist, and exclusionary conception of "oppressed people" or groups.[287] It is *oppression*, not distributive concerns nor domination alone, that affects individual capacities and therefore justice.[288]

Because the ideal of impartiality abstracts from the social circumstances that precipitate notions of justice, it misconceives rights themselves. The conception of rights within the ideal of impartiality conceptualizes each individual as possessing rights equally, independent of the collective society, which shields them against external forces.[289] Rights discourse shifts from moral debate into a 'procedural' conception of the good that attempts to respect everyone's own conception of the good.[290] While this abstraction allows for formal equality and negative liberty, it bars consideration of the social conditions that may support or affect such rights.[291]

However, rights, in Young's view, are about being and doing, not having.[292] Rights are not possessive entitlements of the individual, but relational, "institutionally defined rules specifying

---

[286] *Ibid* at 38.
[287] *Ibid* at 40.
[288] *Ibid* at 33, 37. In Young's view, 'distributive concerns' relate to the conceptions of justice that "restrict the meaning of social justice to the morally proper distribution of benefits and burdens among society's members." (15) In her view, this emphasizes the "allocation of material goods" and ignores the surrounding social structure. It extends this allocative focus to non-material goods like "rights, power, opportunity, or self-respect" and tends to treat them as "static things, instead of a function of social relations and processes." (15-16). Justice, as social justice, is broader than this. See generally, Chapter 1 "The Distributive Paradigm".
[289] See: Bakan 47 referencing Young, *supra* note 12 at 30-1. Atomistic rights are thus "dyadic", conceiving of a relationship between the "rights-bearer" and others, as "duty-holders", who have a duty not to violate these rights; this dyadic structure renders power and social dynamics outside the scope of concern. See also, Taylor Atomism, *supra* note 206.
[290] Sultany, *supra* note 238 at 863.
[291] *Ibid* at 825.
[292] Young, *supra* note 12 at 25.

what people can do in relation to one another."[293] Claims of rights arise from individuals who are situated in their own circumstances, not disconnected from them.[294] Discussing rights in an abstract sense, then, precludes a discussion of justice and injustice as it relates to them.

Young's ideal of impartiality exists with the conception of freedom of expression under the *Charter*. In particular, the ideal of impartiality identifies aspects of the abstract conception that are disconnected from reality and therefore preclude consideration of oppression and morality. Removing the "particular circumstances of social life that give rise to concrete claims of justice"[295] leads to a conception of freedom of expression rights in social and political life that is confused. This, I suggest, parallels the section 2(b) doctrine.

3.2 Abstract Expression Under Section 2(b)

The first element of abstraction is of expression itself from its social and emotional dimensions. Under section 2(b), expression itself is treated abstractly.[296] The doctrinal conception of protection arises in order for individuals to "manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind."[297] Yet it does not attend to how these expressions arise, nor the individual for whom they matter.[298] Under the principle of content neutrality, the doctrine embraces an objective and rational approach to expression, treating all expressive acts as the same and foregoing consideration of differences between expressive acts.[299] In explaining the broad protection of falsehoods in *Zundel*, McLachlin J indicated that the evidentiary issues with falsity

[293] *Ibid*. See, also: Mackenzie & Meyerson, *supra* note 48.
[294] *Ibid* at 107.
[295] *Ibid* at 4.
[296] Moon Book, *supra* note 104 at 41.
[297] *Irwin Toy*, *supra* note 139138 at 968
[298] Moon Book, *supra* note 104 at 14.
[299] Bakan, *supra* note 18 at 47

justified broad, content-neutral protection: because falsehoods and their meaning could not be rationally (and objectively) determined, McLachlin's response was to protect all expression. [300]

The abstraction does not address the role of expression in the individual human experience and inadequately captures the value of expression that precipitates the need for constitutional protection in the first place. That is, the doctrine provides protection based on the "inherent value" of freedom of expression without investigating what expression actually is or whether that value is served.[301] In *Keegstra*, even though hatred was ultimately found to not serve the values of freedom of expression well, it still attracted protection under section 2(b).[302] In *R v Khawaja,* even though threats of violence were excluded from protection based on their undermining of the rule of law and social conditions for expression, neither were investigated in detail and the role of the 'inherent value' that threats might have to the individual was similarly disregarded.[303]

Expression is treated by the doctrine as a "good to be traded" but this treatment does not match its role in the human experience.[304] As Moon notes, it conceptualizes expression as the conveyance of a message, without considering the practicalities of what expression is or what expressive freedom entails beyond broad constitutional protection.[305] For example, in *Keegstra,* the relevant consideration for section 2(b) protection was the conveyance of meaning, separate from the value of the meaning or its impact.[306] In *Zundel*, McLachlin J noted that protection *permits* free expression (in service of the three values), without discussing the shape of 'free' or what

[300] *Zundel*, *supra* note 155 at 756.
[301] *Irwin Toy*, *supra* note 139 at 968.
[302] *Keegstra,* supra note 141 at 734.
[303] *Khawaja*, *supra* note 163 at 585-6. Violence discussed in greater detail below. *Khawaja* dealt with the constitutionality of terrorism provisions under the *Criminal Code,*
[304] Moon Book, *supra* note 104 at 14.
[305] *Ibid* at 41. See, e.g.: *Zundel*, *supra* note 155 at 753, for the idea of expression as an object of communications.
[306] *Keegstra,* supra note 141 at 730.

expression itself looks like.[307] As a further example, queer expression and anti-queer expression are treated the same for the purposes of section 2(b) protection. Moon argues that expression is not simply a transactional conveyance of meaning but a dialogical, *communicative* act in which meaning and individuality develop. That is, freedom of expression has a social character that the doctrine neglects.[308]

3.2.1 Social, Dialogical Character of Expression

Our individuality as "rational and feeling persons" with identity and thought, develops through interactions within our social world: through expression as a communicative discourse, we develop our ideas, feelings, and selfhood as individuals.[309] We are social creatures, not separate from one another but connected by a dialogical interplay of social interaction.[310] We come to our individuality through our expression amongst others. Expression and its value are "realized by members of the community, individual and collectively."[311] We cannot be ourselves, let alone express ourselves, without dialogue with others.[312]

The abstract, individualist conception of expression sets aside this "relational … constitutive character of expression."[313] While the doctrine attends to both the listener and the speaker in conceptualizing the dynamics of expression, it neglects the relationship between them.[314] It treats expression as an individual act, foregoing consideration of the necessary social conditions required for expression itself to occur and for the individual to materialize. Moon points

---

[307] *Zundel*, *supra* note 155 at 753.
[308] Moon Book, *supra* note 104 at 9, 25 41. Moon Character, *supra* note 202 at 4, 46, 49.
[309] Moon Book, *supra* note 104 at 4, 8, 14, 20.
[310] Taylor Atomism, *supra* note 206. Taylor notes that while Our bodies may (theoretically) exist separately, but our identities as individuals do not form in the absence of others and we require others to live any semblance of a good life.
[311] *Ibid* at 25.
[312] Moon Book, *supra* note 104 at 22-4.
[313] *Ibid* at 41. Moon Character, *supra* note 202 at 4.
[314] *Ibid* at 40-1. *Ford, supra* note 185 at 767.

to *R v Butler*, where the author and the audience were treated as separate entities, between which meaning is conveyed.[315] Similarly, Dickson in *Irwin Toy* separated "those who convey a meaning" and "those to whom it is conveyed."[316] In *Zundel,* McLachlin J stated that meaning is an "interactive process, depending on the listener as well as the speaker" and that "freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader."[317] In *Irwin Toy,* Dickson also referenced the speech *environment* within which the values of freedom of expression are attained.[318] This environment, for Dickson, was "an essentially tolerant, indeed welcoming, environment."[319] Yet these instances of broader consideration remain limited and troubled by the individualistic conception. As a contrasting example, the majority treated Ward's expression separately from JG's, despite obvious connections between the two.[320]

For Moon, this conception relies on a pre-social conception of the individual agent that fails to recognize that individual agency and individuality *arise* through a social, dialogical relationship of meaning creation with others rather than as an individual possession.[321] Language is a simple example: we cannot express ourselves through language without others.[322] In *Irwin Toy*, Dickson, citing Emerson, notes that freedom of expression allows an individual\ to "realize

---

[315] Moon Book, *supra* note 104 at 41, *R v Butler*, 1992 CanLII 124 (SCC) [*Butler*] at 489-90. *Butler* and its facts are discussed below.
[316] *Irwin Toy*, *supra* note 139 at 976, cited in, e.g., *Torstar*, *supra* note 140 at para 50.
[317] *Zundel*, *supra* note 155 at 756.
[318] *Irwin Toy*, *supra* note 139 at 976.
[319] *Ibid* at 976.
[320] See: e.g. *Ward*, *supra* note 70. For example, the conflict was framed as between Ward's freedom of expression and JG's right to dignity. (at para 43)
[321] Moon Book, *supra* note 104 at 9, 14, 20. Moon Character, *supra* note 202 at 46.
[322] Moon Book, *supra* note 104 at 22. See: Charles Taylor, "What's Wrong with Negative Liberty" in *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985) 211 at 232.

his full potentialities" through "his own powers of reason,"[323] suggesting that these powers already exist.

Expression and our individuality are complex things, filled with varying subjective meanings that give rise to its value as an activity. The broad protection under section 2(b), in part, acknowledges this complexity by treating all expression as the same through the principle of content neutrality.[324] As shown by McLachlin's discussion about truth in *Zundel*, individuality and meaning are complex and difficult to articulate.[325] Resultingly, the doctrine recognizes the perils of attempting to determine which of the plural and complex meanings of expression ought to be protected in constitutional law. Because of this complexity, the court backs off trying.

However well-intentioned, this uniform treatment obscures the complexity. By abstracting away from the social dimension of expression, the doctrinal conception of freedom of expression inadequately captures the subject matter itself. The abstraction obscures the *difference* that makes expression a rich concept. Bakan states that "corporate advertising, racial hatred, legislative debates, and [queer] literature are thus united by their common form, and it is that form rather than the particular contents…that makes them presumptively worth of equal protection from state suppression."[326]

Difference, as noted by Young, does not separate us from one another, but defines us as individuals, amongst others. Difference, like expression, is constituted through others in a dialogical "communicative relationship" with others in the collective society.[327] It is through our differences that we meaningfully define ourselves as individuals. We do this through expression;

---

[323] *Irwin Toy*, *supra* note 139at 970.
[324] Ex. Search for truth in Zundel.
[325] *Zundel*, *supra* note 155 at 756.
[326] Bakan, *supra* note 18 at 64.
[327] Moon Book, *supra* note 104 at 22-3

expression, as an act, only exists only through others. Treating expression as an individual act, then, limits the value captured in that conception. It is through the *differences* between each of us and each of our expressive acts that value arises. The value of expression arises not because of some universal, common characteristic of our individuality, but our individuality as *each* of us, not all of us. It is in difference and its complexity where meaning arises and expression takes on value.[328]

Correspondingly, constitutional protection of the individual right to freedom of expression arises because we are *different* and we express *different* things, some of which may be unpopular or disliked by others, including the government. As McLachlin has stated, freedom of expression protection is not for the majority.[329] Expression would be of seemingly little value if it protected the repetition of the same idea: if we all said and heard the same things, there would be no reason to protect expression in supreme law. Meaning is a rich, complex concept, but it is only so if there are varied and different meanings. Expression is the communicative act through which that meaning is not only conveyed but built and substantiated.

Abstracting from the social aspects of expression thus severs expression from its nature and value which contributes to the inability of the doctrine to answer the koan. Without a full conception of meaning, expression, and socially rooted individuality, the *good* of expression cannot be seen. By incorporating the social dimension of expression into our understanding, the contours of expressive freedom (and particularly, its limits) begin to emerge more clearly.

---

[328] It could be argued that section 1 explores this difference. However, the conception of *expressive freedom*, prior to protection is left unconsidered. More deeply, section 1 does not necessarily consider *individual* difference but rather difference on a social level. For example, hate speech is not limited on the basis of an individual's characteristics being targeted, but rather a group (See: *Whatcott* at para 74, for example) This issue will be returned to in the discussion of harm, below.

[329] *Zundel*, *supra* note 155 at 753, cited in *Ward*, *supra* note 70 at para 60. See also *Keegstra,* supra note 141 at 828; *Butler*, *supra* note 315 at 488

However, the social nature is only one component abstracted in the doctrinal conception of expression. Acknowledging the social conception of freedom of expression does not alone deepen the understanding of the personal, subjective, and emotional dimensions that give expression its meaning. Moon's view, in this vein, still borrows from an abstract, impartial conception of expression's value that risks underrecognizing the individual.[330] If we take Moon's critique on board and look to the social, communicative nature of freedom of expression, it is still not fully clear why expression is so important for the individual. It may develop the individual, but this is merely an instrumental account: do we only value expression for the purposes of developing agency and rationality and in becoming feeling beings? Or is there something about expression, as the experience of expression, that makes it valuable? By pulling attention away from an individual act, the complexities of expression become more evident, but we are still left with little answer as to why *individual* expression and expressive freedom are important to cultivate.

3.2.2 Emotional Dimension of Expression

Expression contains an emotional dimension that plays a key role in making expression valuable for the individual. The doctrine's abstract approach, however, neglects this emotional dimension of expression (though more subtly than it neglects the social dimension).

This abstraction from the emotional dimension traces into the broader conception of liberal rights critiqued by Young: that is, the pursuit of universal rights separates the emotional, feeling aspects of the individual. For Young, the ideal of impartiality prioritizes reason and rationality over emotion and "stands opposed to desire and affectivity."[331] It sets aside passion and desire in considerations of justice in the public domain.[332] By taking a rational approach, the ideal aims to

[330] Moon Book, *supra* note 104 at 135.
[331] Young, *supra* note 12 at 111.
[332] *Ibid* at 109-12

calmly settle political disputes in line with universal, impartial principles of justice.[333] However, Young argues that it is with emotion that we develop the moral judgments necessary for assessments of justice.[334] The ideal of impartiality sets aside contextual moral discourse for the 'neutral' public sphere, and risks entrenching existing oppression (or allowing it to be entrenched).[335] Young's point works in two ways in the critique of freedom of expression: one, that the doctrine avoids emotion *in order to avoid moral judgments* and two, the inevitable moral judgments required for expression will be deficient *because emotion is neglected*.

The abstract doctrine neglects the reality that the act of expression itself is bound up in our feelings. Emotions are largely irrelevant within the doctrinal framework of freedom of expression protection. Although the Court has stated that ensuring the manifestation of "expressions of the heart" is a reason for content-neutral protection,[336] its sweeping conception of expression treats this subjective desire with the mallet of impartiality and sameness and undermines difference. In *Ward,* for example, the majority explicitly rejected emotional harm as a ground for limits.[337] Similarly, the 'lesser' emotions than extreme hate have been dismissed in favour of broad protection: the 'merely offensive' is dismissed as an insufficient basis for state regulation.[338] In *Whatcott*, Rothstein J, explicitly dismisses emotion.[339] He notes that "hurt feelings, humiliation or offensiveness" are insufficient for harm-based limits.[340] Emotions, for Rothstein, are too subjective[341] and outside the relevant purpose of reducing discriminatory expression.[342]

---

[333] Sultany, supra note 238 at 878.
[334] Young, *supra* note 12 at 103.
[335] *Ibid* at 116.
[336] *Irwin Toy*, *supra* note 139at 968. Recently cited approvingly in *Ward supra* note 70at para 59.
[337] *Ward*, *supra* note 70 at para 82.
[338] *Ibid* at para 48. Discussed in more detail below.
[339] *Whatcott, supra* note 87 at para 56 cited at fn 68 of Macfarlane, *supra* note 161.
[340] *Ibid* at para 47, 67-8, cited in *Ward supra* note 70at para 73.
[341] *Ibid* at para 56.
[342] *Ibid* para 82.

Moreover, the doctrinal approach further distances itself from emotion in providing protection on the basis of the rational and objective person, rather than the emotional individual.[343] Mill himself premises his view of freedom of expression on the rational individual.[344] In *Thomson Newspapers*, Bastarache J noted that "the presumption in this Court should be that the Canadian voter is a rational actor".[345] In *Irwin Toy,* restrictions on advertising directed at children were justified under section 1 because children may lack the ability to distinguish between reality and fiction;[346] That is, protection *assumes* rationality under section 2(b). Only because children are not rational, or their rationality is vulnerable, can protection be curtailed. In *Whatcott*, harm was only a relevant consideration for limits only if it could not have been avoided by critical, rational judgment.[347] The notion of the 'reasonable person' that runs through the doctrine attends to this aim of rationality and objectivity and will be discussed in more detail in section 3.5.

This dismissal of emotion severs from the analysis the value of expression and a key purpose of protecting it in supreme law. The emotional component of expression cannot be neglected if expressive freedom is to be adequately conceptualized and the scope and limits of protection adequately identified. Attending to emotion helps ground the need for protecting expression in constitutional rights.[348] If emotion is neglected, the grounds for protecting expression on non-consequentialist grounds becomes foggy.[349] That is, expression becomes an instrument for purposes other than the individual, or purposes that *serve* the individual, and thus judged on its

---

[343] Moon Book, *supra* note 104 at 70-1.
[344] Mill 1982 at 97, cited in Moon Book, *supra* note 104 at 12, 38.
[345] *Thomson*, *supra* note 140 at para 112, cited in Mathen, *supra* note 75 at 96.
[346] *Irwin Toy*, *supra* note 139 at 987. See also: *JTI, supra* note 140 at para 60-66 in reference to tobacco packaging regulations.
[347] *Whatcott, supra* note 87 at para 129-35, cited in *Ward*, *supra* note 70 at para 61. Albeit, under section 1, but evidencing that under section 2(b), rationality is presumed.
[348] Particularly, as a deontological right.
[349] See: Moon Book, *supra* note 104 at 135. He retains that freedom of expression is important as a non-consequentialist idea.

consequences. It treats expression as a tool by which we achieve the good life as universal, rights-bearers, and a democratic society.

Expression is not simply a tool for social or individual ends. Expression is a performative and emotional act, the value of which comes not through supporting our physical bodies but our broader idea of 'self'. By developing our individuality, expression connects us to meaning and flourishing.[350] That is, the significance and importance of expression are connected to our flourishing as individuals. If we are to flourish as individual, expressive beings, we are not talking about material conditions or physical attributes but about the emotional.[351] We do not need expression to survive, necessarily, but we certainly need it to exist and flourish as unique individuals. For example, while we could survive in a barren, clinical apartment, most of us (I assume) feel the need to have our own bedsheets, art, and dishes, as part of 'our stuff' and a conception of our selfhood that we put on display. This idea of flourishing (insofar as it pertains to the idea of self-expression, at least) relates to our emotions. Moreover, expression and the emotions it contains and evokes help us conceptualize choices about our lives: we determine the projects that we seek to pursue, and our ideals of the good life, whatever these may be for us. For example, we may determine our careers or where we live based on what others appear to feel in certain jobs or places, or how those places make us feel. I enjoy parts of cities that are quiet and cultural: others might like the bustle of corporate downtowns. In its abstract approach which accepts all meanings in conceptualizing freedom and does not consider why expression is valuable, the doctrine abstracts from the role in our realities that expression plays.

---

[350] Moon Character, *supra* note 202 at 47.

[351] Individual identity is subjective: it cannot be objectively ascertained. It is not simply about the individual as a person (or as belonging to a group with similar characteristics) but essentially, who we *perceive* ourselves to be. Thus, at its core, expression is a human act tied to identity, and subjectivity remains active.

As noted above, while Moon attends to emotion, noting that it "lets fellow citizens know the depth of a speaker's feelings about a particular issue"[352] his view does not fully attend to the emotions that arise from expression itself. In this way, the emotional dimension of expression is inseparable from expression's social dimension: through expression, we learn about each other's emotions in response to our own actions, others, and the broader world as seen in the examples in the previous paragraph. Certainly, this social role is an important aspect of emotion in expression. However, expression matters to us because it is tied to meaning, not as some universalized, abstract meaning but as valuable subjective meaning. Meaning, in this way, is inseparably linked to expression as a social act, within our social interactions, but it is ultimately meaning *for us.*[353] Expressing ourselves matters, inherently, because it makes us *feel* something. Crucially, the feeling of expressing *ourselves,* subjectively, is where expression's value exists; it is a key reason why we so strongly believe expression ought to be protected as an individual right. Expression makes us feel like our particular and different self, in a way that few other human acts do. It is through expression that give voice to our own feelings and can come to know the feelings of others. This feeling may not be necessarily pleasurable (we may have to express our negative emotions, too!) but it remains valuable, not as a thing or a state of being but as an experience among others.

Queer expression serves as a clear example of this individual experience of expression. Queer expression is not about conformity or information (though it can be): it does not take a singular, categorical form. Rather, it is about being oneself, in one's particular body. At its core,

[352] Moon Book, *supra* note 104 at 27. His argument that the irrationality under section 1 in the context of hate speech, for example, (ex 132) results in part because of emotion plays a similar role, treats emotion similarly.

[353] I imagine some see a 'higher meaning' served by the protection of rights, in a Lockean-liberal sense. But this, I suggest, imports a religious ideology that does not represent any more objective of a view than a humanistic one.

there is emotion. Not only the emotion of expression in light of a historical and existing inability to express openly within heteronormativity but also the pure emotion of expression as a *self*.

Because expression is tied to our emotions, it can be inhibited by them as well: if we fear retribution for our expression or the individuality that underlies it, we may not express (or at least, not freely). The doctrine acknowledges this dimension through its concern for the 'chilling effect'. The Court here recognizes that censorship by the state ought to be avoided because it could lead to individuals self-censoring.[354] While this concern is aimed at the state's role in expression, rather than expression itself,[355] it recognizes that emotions can affect individual expression. It acknowledges that expression is affected by emotional responses and that in pursuing freedom of expression, those responses ought to be avoided.[356] Ultimately, we need to *feel* free to express. The substance of the claims of freedom of expression (or perhaps more viscerally, the threat of violation of such rights) demonstrates that freedom of expression is a fundamental right because we want to be free to express ourselves. We want to feel like ourselves and express this self: we want to *feel* free to do so. Feeling free to express does not mean we have to eliminate stage fright, but we have to ask why stage fright exists. Are we nervous, in the normal course of the human experience or because audience members are holding signs telling us we're worthless?

It is through an emotion that judgment about tolerable or intolerable expression arises. For example, using the cliché example of yelling fire in a crowded theatre, we may think that such an expression is not what is contemplated by freedom of expression.[357] But alerting fellow theatregoers to fire through an automated voice-over does not arouse the same opposition. While

---

[354] See, e.g.: "fear of censure" Dickson in *Irwin Toy*.
[355] Though it does connect to the expressive power of the law itself, as alluded to above.
[356] The chilling effect idea is concerned only with overregulation of expression, not underregulation. This one-directional concern, however, illustrates the argument made in this thesis that emotion ought to be attended to, and therefore in service of expressive freedom, so too ought social impediments to expression.
[357] In reference to *Schenck v. United States*, 249 U.S. 47 (1919)

the manner in which the expression is communicated differs, it is the emotion of both the speaker (yelling) and the listeners (panic from hearing 'fire') that colours our view of the former expression. To be sure, if a fire does not actually exist, both instances are objectionable; yet the panic-inducing version remains more problematic and, arguably, morally objectionable. Similarly, the emotional aspect of expression, paired with its social dimension, plays a vital role in understanding expressive freedom (discussed in the next section) and, importantly, transgressions of it. For example, while one derogatory comment may not itself undermine anyone else's security or expressive capacities, the cyclical and societal repetition of such 'minor' transgressions or 'merely offensive' ideas can eventually have a negative effect on one's expressive capacities.[358] Emotion plays a key role in our understanding of expressive freedom and cannot be abstracted away.

3.3 Abstract Expressive Freedom

Within the doctrinal conception, expression is abstract: so too is expressive freedom. For Richard Moon, the doctrinal conception of expressive freedom is abstract because that freedom is disconnected from the social character of expression and the social circumstance.[359] For Joel Bakan, similarly, freedom of expression is abstracted from the "politics and practices of communications."[360] For Jamie Cameron, the doctrine is overly abstract and unprincipled, so its conception of freedom ought to be more staunchly and clearly conceptualized as negative freedom.[361]

---

[358] Young, *supra* note 12 at 29.
[359] Moon Book, *supra* note 104 at 37-8, 42.
[360] Bakan, *supra* note 18 at 76. See also, Moon.
[361] Cameron Abstract, *supra* note 222: Cameron's view largely aligns with the doctrinal conception of expressive freedom, even if she critiques the way in which this conception has been applied in the case law.

For this thesis, importantly, the Court's analysis of section 2(b) does not separate consideration of 'expressive freedom' or how it arises from the consideration of constitutional protection. Rather, expressive freedom and freedom of expression are treated synonymously: the conception of 'freedom' at the core of section 2(b) protection presumes that individuals can express equally, freely, and openly, in the absence of the state. This universal doctrinal conception of expressive freedom treats it as obvious and pre-existing. Only violence and threats of violence are (in reality) excluded from this conception. What emerges is a conception of *expressive freedom* as the near absolute right to say anything non-violent. Section 1 can limit the constitutional protection of this freedom, but such limits leave the notion of freedom itself largely untouched.

This doctrinal conception of freedom undermines individual difference. The inclusive definition of expression disregards social circumstances and emotional dimensions of expression, leading to a broad conception of expressive freedom which attracts near-absolute constitutional protection that shields objectionable speech that undermines the freedom of others (here, specifically, anti-queer speech). For some, protecting all expression as indiscriminately important, the conception of 'freedom' is thereby "trivialized."[362] The broad, content-neutral protection within the doctrinal framework may be appropriate for protecting a formal and abstract conception of freedom as openness, but it does not attend to the very idea of difference or the need for special protection for marginalized expression.

To adequately protect the individual and conceptualize freedom of expression for the digital age, expressive freedom cannot be abstracted from the social and emotional aspects of expression, nor its inevitable moral judgments required to assess freedom of expression in relation to justice, as will be discussed throughout the remainder of this thesis. Abstracting from the context of

[362] Elliot Basics, *supra* note 152 at 224.

expressive freedom prevents a meaningful conception of expression and its oppressive threats and therefore risks continuing such oppression.[363] In particular, the conception of expressive freedom that lends itself to broad protection creates problems for limits. As noted above, while section 1 admits limits to constitutional protection of some of these expressive acts, these limits are not on expressive freedom, but rather on constitutional protection. These limits are justifications for the violation of constitutional protection by the state, not limits on action. Moreover, these limits undermine individuality, as will be discussed in section 3.5. As Bakan critiques, section 2(b) fails to deliver on its progressive goals of equality and social justice.[364] He argues that freedom of expression ought to look at the dynamics of power to engage in social discourse to assess freedom of expression and its threats.[365] In abstracting from the background conditions that make freedom possible, abstract rights "cannot secure the conditions for its own existence ... let alone for the existence of liberal justice."[366]

This conception of freedom has several components that bear discussion: considerations of oppression as violence and limits as objective harm.

3.3.1 Freedom as non-interference

The doctrine conceptualizes expressive freedom as the absence of state interference.[367] At a broad level, the *Charter* itself only applies to acts of the state.[368] Section 2(b) considers the state the key threat to freedom,[369] treating the state as presumptively "antagonistic to freedom of

---

[363] Young, *supra* note 12 at 134.
[364] Bakan, *supra* note 18 at 48. See, Young, *supra* note 12 at 116.
[365] Bakan, *supra* note 18 at 66.
[366] Sultany, *supra* note 238 at 866.
[367] *Irwin Toy*, *supra* note 139 at 968-9, *Thomson*, *supra* note 140.
[368] See, e.g.: Emily Laidlaw, "Technology-Facilitated Mind Hacking: Protection of Inner Freedoms in Canadian Law" (2024) Policy Brief No. 5, Centre for International Governance Innovation, online: <cigionline.org/static/documents/FoT_PB_no.5.pdf> [Laidlaw Hacking] citing section 32(1) of the Charter
[369] Bakan, *supra* note 18 at 63-5.

expression."[370] The principle of content neutrality, for example, purports to ensure that specific meanings are not singled out or discriminated against by the state.[371] State action is not considered to facilitate expression and expressive freedom, but to violate it if it restricts expressive acts. Within this 'anti-statist' conception, freedom of expression claims are "framed in dyadic terms" with rights arising when expressive acts are restricted by the act of another; it sets aside consideration of the social conditions that affect communicative capacities.[372] That is, the motivating aspect of section 2(b) is to shield expressive acts from the state; if this aspect needs qualification, it is under section 1 that such analysis occurs.

On this account, expressive freedom is conceived as negative freedom. That is, freedom is the absence of action of the state, without obliging the state to act in any way. In general, this 'negative' conception of freedom is based on respect for the individual and their autonomy.[373] Importantly for this thesis, the conception of *freedom* that underlies the right or constitutional protection is negative.[374] Consideration of what constitutional protection demands, as a negative

---

[370] *Ibid* at 71.

[371] *Irwin Toy*, *supra* note 139 at 968.

[372] Bakan, *supra* note 18 at 65. This conception is 'atomistic'.

[373] Moon Book, *supra* note 104 at 19. See: Benjamin J. Oliphant "Positive Rights, Negative Freedoms, and the Margins of Expressive Freedom" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 130 [Oliphant] at 133. Negative freedom is the idea that individuals ought to be left alone as individuals. Each of us are free when we can make our own choices and decisions or without interference. This notion sets aside concepts of capacity to do such a thing; as a political concept, it is about freedom in the sense of legal and political restrictions on doing such a thing. For problems, see: Taylor Negative Liberty, *supra* note 321.

[374] The distinction between positive and negative *freedom* and positive and negative *rights* lingers in the *Charter* doctrine. (See: Cameron Blog, *supra* note 172 at 9 who states that freedom of expression never implies positive rights. While the Charter only applies to public acts of the state and private parties do not owe constitutional duties to one another, in some instances the right requires *some* action by the state. Moreover, *Charter* values can be applied to private litigation. See: Oliphant, *supra* note 373 at 137-8, 146, who argues this notion of negative rights may be fuzzy and not entirely accurate. See, also: Laidlaw Hacking, *supra* note 366, at 3-5, noting however that the right may demand action for the meaningful enjoyment of the right, or access to a statutory scheme, for example.

or positive right, is separated here: it may align with the understanding conception of freedom, but not necessarily.[375]

Cameron's critique of the doctrine argues that the doctrine ought to lean into this negative conception of freedom, as the absence of coercion and constraint from the state, to better support the principle of content neutrality and the broad scope of protection.[376] In her view, this conception of freedom can produce a more principled understanding of freedom of expression protection.[377] Negative freedom makes clear that freedom of expression constrains regulators and shields individual expression equally and neutrally from state censorship, which has jeopardized expressive freedom throughout history.[378] Freedom focuses on freedom of expression as a "process-oriented" conception of free exchange of ideas.[379]

One key problem with this negative conception of freedom is that it glosses over the *individual* aspects of expressive freedom.[380] Particularly, it glosses over the experience of expressive freedom. Just because one is not impeded from expressing does not mean that they are free to do so. One is not free, in any meaningful sense, to walk in the woods when they are surrounded by a pack of wolves, even if the state does not restrict walking in the woods. As suggested in the previous section, because expression is intimately tied to our emotions, to be free

---

[375] There is an important distinction between negative *liberty* and negative *rights* here, however it cannot be explored fully. For this essay, negative freedom is errantly conceived as under expressive freedom. What it demands of constitutional protection is correspondingly errant. For example, it may be that the conception of freedom is negative (absent constraint), but that constitutional protection imposes positive obligations. However, this engages larger questions of *Charter* application more generally and more complex constitutional and political theory than can be waded into here. See, for an example of the issues: Michael Da Silva, "Positive Charter Rights: When Can We Open the 'Door?'" (2021) 58:3 Osgoode Hall LJ 669, online: < digitalcommons.osgoode.yorku.ca/ohlj/vol58/iss3/4>.

[376] Cameron Big M, *supra* note 230 at 17. Cameron Quixotic, *supra* note 223 at 131.

[377] She looks to Big M Drug Mart, a case about religious freedom under section 2(a).

[378] Cameron Quixotic, *supra* note 223 at 124-7; Cameron Big M, *supra* note 230 at 21; Cameron Resetting, *supra* note 132 at 131.

[379] Cameron Resetting, *supra* note 132 at 134, 139.

[380] A similar criticism could be levied against accounts such as Susan Williams' systems-based approach, despite its strengths. See: Susan H Williams, "Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech" (2011) 27:2 Constitutional Commentary 399.

to express we must feel free to express. If we do not feel free, we may self-censor: such self-censorship is contrary to the goals of the doctrine itself (as shown through the fear of the chilling effect).

For Young, conceptualizing justice only in terms of domination of the state neglects oppression.[381] By failing to acknowledge the complexity of individuals' life conditions[382] and therefore the social power dynamics that "enable or constrain action;"[383] for expression, the doctrine does not adequately consider expressive freedom as the ability to express oneself. For Bakan, the abstract doctrine exaggerates the importance of the "traditionally framed struggles" for freedom of expression against state censorship.[384] Looking solely at state censorship "can distort issues of free speech" by ignoring social forces and private power that impair individual expressive capacities.[385] It does not address social forces that more seriously impede expressive capacities and individual freedom to participate in expression.[386] Framing the state as the enemy of free expression dismisses these other concerns as "nonsensical".[387] At one point, the power of the media in controlling access to information was a key concern of freedom of expression neglected by the doctrine; concerns about private power in the instance of social media companies are similar. In this way, construing issues of freedom of expression in the digital context as concerns solely about the state and the individual leaves little room for the role of internet providers, search engines, content moderation, and so on, in the conception of expressive freedom.

---

[381] Young, *supra* note 12 33-38.
[382] Bakan, *supra* note 18 at 51 citing Young, *supra* note 12 at 27.
[383] Young, *supra* note 12 at 25, 31
[384] Bakan, *supra* note 18 at 70-1.
[385] *Ibid* at 63; Citron & Richards, *supra* note 108 at 1367-1372.
[386] Bakan, *supra* note 18 at 69-71, pointing to the limited success of *Little Sisters* in addressing the freedom of queer expression See also, Moon Book, *supra* note 104 at 7. 32, 49.
[387] *Ibid* at 69.

The conception of freedom as non-interference makes "unintelligible the idea that outside support might be necessary to enable [individuals] to speak."[388] It sets aside the reality that, while the state may be a threat in some or many instances, state censorship itself may promote freedom.[389] That is, it ignores the possibility (under section 2(b)) that the state can assist in "silencing the silencers"[390]: censorship may *enable* those who are otherwise silenced to express themselves.[391] This may occur not only through its direct power but by empowering underpowered people to express and thus bolstering the social regulation and counterspeech relied on by the doctrinal conception.[392] The Court has noted that this silencing is a relevant consideration for limiting constitutional protection under section 1 because it marginalizes individuals and can affect participation.[393] However, such considerations follow the conception of expressive freedom itself.

Conceptualizing such limits becomes all that more difficult to assess when the foundational conception of freedom is ill-defined.[394] For Bakan, this conception of freedom makes the doctrinal framework both too broad and too narrow: it prohibits state measures which address expression that undermines others, such as anti-queer expression, and fails to confront key threats to expressive freedom,[395] such as access to expressive platforms, and more generally, "people's relative social and economic ability to communicate effectively."[396]

---

[388] *Ibid* at 64
[389] *Ibid* at 72.
[390] *Ibid* at 73. Citron & Penney, *supra* note 59 at 2317. See also Moon Book, *supra* note 104 at 125-30.
[391] Franks Lost Cause, *supra* note 96 at 872.
[392] Citron & Penney, *supra* note 59 at 2328, 2333.
[393] *Whatcott, supra* note 87 para 75, 104, *Keegstra,* supra note 141 at 763. See Cara Faith Zwibel, "Reconciling Rights: The Whatcott Case as Missed Opportunity" (2013) 63:1 SCLR: Osgoode's Annual Constitutional Cases Conference, doi: <10.60082/2563-8505.1272> at 333
[394] Moon Book, *supra* note 104 at 73.
[395] Bakan, *supra* note 18 at 76.
[396] *Ibid*. The parallels Young's notion of oppression, as will be discussed below.

Moreover, in this conception of expressive freedom, all expression is included as important and harmless.[397] Moon notes that the mental impact of expression, specifically, is treated as harmless.[398] He also notes that expression itself, not just its method (such as violence) can cause harm, such as when an individual is persuaded by a false idea or further harmful activity is encouraged by another.[399] The protection of falsehoods, for example, does not consider how such expression might deceive others: when it comes to limits, then, it is unclear *why* falsehoods can then be limited. The doctrine also sets aside the effects that one's expression may have on others' expressive freedom. In *Whatcott*, for example, the Court stated that relevant harm for hate speech extends beyond "emotional harm to individual group members".[400] In this way, the relevant harm of hate speech is not the individual but the group being targeted by hate.

Because of the conception of freedom as non-interference, the view in social or political discourse that *Charter* protection includes a broad right to express anything (or at least, anything non-violent) is, largely accurate. Anti-queer expression, for example, remains protected (along with all other objectionable speech), despite its aim of undermining queer expression and individuality. For example, in *Whatcott*, while two of four homophobic pamphlets were found to constitute hate speech, all four attracted section 2(b) protection. That is, the individual *is* protected, presumptively, to say such things under section 2(b). It is under section 1's consideration of limits that any exceptions are considered. The *koan* of expressive *freedom* remains, its solution pertaining only to constitutional protection and impeded by abstraction.

---

[397] Moon Book, *supra* note 104 at 19. Violence is subsequently removed from protection and will be discussed below.
[398] *Ibid.*
[399] *Ibid.*
[400] *Whatcott, supra* note 87 at para 74

3.3.2 Presumption of openness, equality

In conceptualizing freedom as the non-interference of the state, the doctrine prioritizes a conception of expressive freedom as 'openness' when state interference is absent, which relies on an ideal of formal equality. Closely related, it relies on an indiscriminate notion of tolerance. This conception leaves queer (and other marginalized) expression to be subjected to anti-queer expression that falls short of formal tests for hate speech and other forms of illegality. Moreover, it creates a shaky basis for limits, as will be discussed in section 3.5 in greater detail.

In *Irwin Toy,* Dickson CJ noted that these values of "protection of free expression in a society such as ours" rests on a view of freedom of expression wherein the environment is "essentially tolerant, indeed welcoming…not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."[401] Yet this environment is assumed by Dickson and the doctrine that largely relies on the conceptual basis of *Irwin Toy*. The doctrinal conception pays little attention to whether this "environment" of expression exists, or the need to promote diversity in fostering these values (rather than just assume it exists). The majority in *Ward*, for example stated that "freedom of expression would not benefit society as a whole if it prevented a person or class of persons from truly participating in the political process and the ordinary activities of society just like everyone else."[402] This statement evidences the notion that, so long as the *Charter* shields from the state, presumptively everyone can 'truly participate' like everyone else.

This presumption of openness is evident in views of expressive freedom like Cameron's which purports to protect "debate and open exchange of ideas".[403] Cameron's prioritization of an

[401] *Irwin Toy*, *supra* note 139at 976, see Elliot Taking Stock, *supra* note 151 at 447-50.
[402] *Ward*, *supra* note 70 at para 63
[403] Cameron Resetting, *supra* note 132 at 138-141, See also: Cameron Quixotic, *supra* note 223 at 191.

open exchange is grounded on the "modest aspirations" of "truth, enlightenment, and change" within society.[404] Freedom, in her view, "advances, promotes, enables, and even forces change."[405] However, views like Young's suggest that this abstract, impartial conception of freedom in fact *impedes* social progress by entrenching an existing conception of justice in the status quo.[406] In contrast to Cameron, Young argues that it is through the actual protection of difference and dissent that change arises.[407] Young's view suggests the difficulty in *assuming* that freedom brings about change when differences and the social consequences of expression are set outside of constitutional consideration. That is, presuming change while imposing a standard of sameness is counterproductive; if freedom is assumed, rather than examined, rights can be manipulated for non-egalitarian ends, as we see in the pronouns debate as just one example.[408]

The principle of content-neutrality rests on this assumption of openness,[409] as does the consequent use of counterspeech as an appropriate measure to counteract objectionable expression. Because individuals are presumed to equally possess expressive freedom absent the state, the doctrine embraces the notion that more expression generally facilitates expressive freedom and therefore all expression is presumptively protected. In this way, to support this assumption of openness, the doctrine relies on a conception of formal equality. If the state intervenes, this openness (and equality) is negatively affected. The doctrinal conception of freedom presumes that individual agents equally have expressive freedom and that the *Charter* thus guards this expressive

---

[404] Cameron Resetting, *supra* note 132 at 141. Rather than the more abstract and aspirational conceptions articulated by the three values. Note: Cameron's preferred view of freedom is articulated by Justice Ivan Rand. (at 137) Rand's view of enlightenment, she states, "suggests an open, process-oriented, at times combative, and content-neutral concept of free discussion and exchange." It is worth noting that this is the same Justice Rand who has allegedly been described by his biographer as "an intolerant bigot" despite his libertarianism as a judge. Enlightenment, indeed. See: William Kaplan, Canadian Maverick: The Life and Times of Ivan C. Rand (2009).

[405] Cameron Resetting, *supra* note 132 at 141.

[406] Sultany, *supra* note 238 at 868; Bakan, *supra* note 18 at 3, 5, 76.

[407] Young, *supra* note 12 at 133

[408] Sultany, *supra* note 238 at 884.

[409] Young, *supra* note 12 at 112. Bakan, *supra* note 18 at 64.

freedom from the state.[410] Equality matters insofar as the state's treatment of individuals: so long as the state treats everyone the same, equality exists. Hutchison, for example, embraces the abstract conception of freedom, emphasizing that without state interference individuals are free to express and counterspeech is preferable to regulation. Specifically commenting on anti-queer speech, he states: "in the face of bigoted expression, LGBT people, their allies, and other concerned Canadians remain free to criticize homophobia and to advocate inclusivity."[411] His concern, it seems, is with the equality of individuals.[412] This, in Young's view, is an errant understanding of expressive realities and works to undermine individual difference.

Relatedly, non-interference is premised in part on tolerance, particularly of expression that is unpopular or that we may morally oppose. As the argument goes, the institutions of the state (including the government and courts) ought to tolerate and not regulate expression because individuals are better placed to make such judgments: regulation is presumed to silence dissent and undermine equality.[413] In the doctrine, all manner of expression is supposed to be presumptively tolerated, subject to illegality, like hate speech or discrimination.[414] Should those legal thresholds not be met, and legislation addressing such expression not be constitutional, the expression ought then be tolerated. Cameron's embrace of non-interference and content-neutrality is premised on protecting all expression equally and neutrally so as to build a community of democratic tolerance that creates space for one another, in respect of rights and in humility of the value of such tolerance.[415]

---

[410] Bakan, *supra* note 18 at 71. See also, Cameron Blog, *supra* note 172 at 15. As noted above, this view errantly presumes that individual agency and autonomy precede expression and expressive freedom, when in fact agency and individuality emerge through it. See: Moon Book, *supra* note 104 at 128.
[411] Hutchinson, *supra* note 73 at 706.
[412] *Ibid*
[413] Franks & Waldman, *supra* note 107at 892.
[414] See: *Whatcott, supra* note 87, *Ward*, *supra* note 70.
[415] Cameron Big M, *supra* note 230 at 39. (without state intervention except to address harm)

However, this abstract doctrinal conception that social discourse is open to all, absent the state, is not necessarily the case in reality.[416] This view errantly assumes that absent state interference, individuals are 'free' to express. For example, to suggest that queer individuals are free to counter expression in the same way as heterosexual individuals ignores the social impediments (and different experiences) facing queer identity and the ability of queer individuals to express (or counter-express). In a plain example, even without overt bigotry or hate, heterosexual people do not have to proclaim their sexuality by 'coming out'. Moreover, when there *is* bigotry, queer individuals are not always free to express themselves against such expression: speaking out against sexist or antiqueer expression may (and does) attract vitriolic pushback and comments about being 'overly sensitive' or that it was 'just a joke', even if it falls short of violence. It is plausible that a queer person in small-town Alberta, like Westlock, curtails their self-expression to avoid appearing too queer, fearing ostracization, ridicule, or physical violence. It is not that they *would* get beat up, or even that it is objectively likely, but the mere fear leads the individual to self-censor. While one might contest the extent of these impediments,[417] that individuals are not inherently equally free to expression, and constrain their expression based on the expression of others, remain the central points.

Furthermore, in blindly asserting the virtues of tolerance and counterspeech, the doctrine passes over consideration of *who* bears the burden of this tolerance which challenges the notion of equality. Queer individuals, for example, are to tolerate antiqueer expression, even though it may reject the place of queer people in society. If the burdens of toleration were, in reality, equally borne by all, with each person tolerating others on different occasions, the doctrinal conception of

---

[416] It is not clear to me whether theorists such as Cameron actually believe that open discourse exists absent state interference, or whether they conceptualize restrictions by the state as worse than any restrictions by other social actors. Both, to me, seem errant and reflect an abstraction from social reality.

[417] See: Hutchinson, *supra* note 73.

expressive freedom would not be problematic. And yet, marginalized or 'different' individuals must tolerate dominant norms that simply exist as 'normal'. Ask a childless couple in their 30s whether social pressure to have children is met equally by the pressure to not; ask a cis-male lawyer with he/him pronouns whether he has had to explain why he uses those pronouns.

The regularity of this imbalanced demand for tolerance makes the unequal expectations of tolerance woefully obvious. The notion of counterspeech benefits the powerful, placing the labour of tolerance on the already oppressed groups. [418] Oppressed groups are expected to courageously accept lies, offensive or derogatory comments, and intolerable expression, in order to ensure that the "fallibilism and skepticism" of human judgment, and the "humility of democracy" are acknowledged and respected.[419] Cameron, for example, acknowledges that the prioritization of democratic tolerance has costs,[420] yet she accepts that the vulnerable and sensitive may be offended. [421] She praises the conception of expressive freedom articulated by the Court in *Ward*, which protected Ward's expression even though it deliberately ridiculed and demeaned JG, a disabled child.[422] But in this example, JG bore the burden of tolerance, not Ward: JG must tolerate Ward's comments in the name of democracy and freedom, despite harm, while Ward enjoyed judicial relief from censorship and human rights fines. While protecting such content may have indeed protected Ward's expressive freedom and his ability to challenge the 'sacred cows' within popular culture,[423] the majority paid little regard to the impacts on JG's expressive freedom (or, for that matter, other individuals with disabilities). Because the comments made by Ward openly

---

[418] Franks, *supra* note 167 at 300, 301-315. Franks Freedom From, *supra* note 96 at 871.
[419] Cameron Quixotic, *supra* note 223 at 164. See also, Cameron Big M, *supra* note 230 at 39; Cameron Resetting, *supra* note 132 at 122.
[420] Cameron Resetting, *supra* note 132 at 140.
[421] *Ibid* at 122; Cameron Quixotic, *supra* note 223 at 164; Cameron Big M, *supra* note 230 at 39.
[422] Cameron Blog, *supra* note 172 at 15.
[423] *Ward*, *supra* note 70 at para 12. The notion that JG was a prominent public celebrity was a key point in why the majority found discrimination was not met. Ward is discussed in greater detail in the harm section.

derided JG in expressing himself publicly, it is plausible that JG (or other disabled or marginalized individuals) would not feel free to put himself out in public for fear of similar derision. While it may be safe to assume that Ward suffered (or could suffer) social repercussions, the case casts doubt on the basic idea of tolerance underpinning a near-absolute conception of expressive freedom as equal. It is difficult to see how the inclusion of Ward's comments facilitates the ideal of a community of respect and humility, when the person making the comments finds them funny despite obvious problems befalling JG, whether directly because of the comments or not.

In this way, the abstract conception of expressive freedom risks dismissing claims of injustice stemming from concrete inequalities in service of certain ideals of democratic tolerance. For example, constitutional law falls short of addressing the claims of queer silencing, presuming that equality exists so long as the law is blind to difference.[424] For example, as discussed in greater detail below, *Little Sisters* demonstrates how the Court assumes that by treating all expression the same, no discrimination will arise.[425] Despite differences in actual expressive freedom, based on formal equality the doctrine assigns no "special protection" for marginalized expression like queer speech.[426] It assumes that expressive freedom is equal amongst all in the absence of the state. Conversely, in providing equal protection for expression, it protects queerphobic and anti-queer speech that may not face similar social impediments to expression. *Whatcott* was permitted to express queerphobic views that the Court determined did not rise to the level of hate speech.[427] Problematically, because of this protection, attempts by the state to address the existing inequalities to bring about a more robust social dialogue by regulating discriminatory or hateful expression are

[424] Waldman, *supra* note 27 at 962. For example, in *Little Sisters*, the majority ignored the differential treatment for queer pornography, asserting that protecting
[425] *Little Sisters*, *supra* note 88 at para 57
[426] *Ibid*; Young, *supra* note 12 at 120, 133, notes that formal equality, as equal treatment before the law and state in disregard for circumstances, furthers the blindness of rationality and impartiality.
[427] *Whatcott, supra* note 87 at para 7.

considered to be presumptive violations of expressive freedom (even though they can be justified).[428] The impact on the expressive freedom of others stemming from such expression is set aside in priority of abstract principle. While section 1 may address some imbalances of toleration, and while the Court has acknowledged some need to address the underlying imbalances, such as in *Hansman*, the presumption remains in the conception of freedom from section 2(b).

The digital age challenges this underlying conception of freedom within the doctrine. Concerns about digital expression make clear the difficulties with this conception of freedom as openness. For one, the internet is clearly not an open public space.[429] While digital expression has reduced some concerns about access, not everyone can engage freely in digital expression, even if some traditional barriers to access have been lowered.[430] Even if there were a common, 'public' forum for robust debate, the internet is not public like a town square, but controlled by private entities that exist outside the bounds of the *Charter*.[431] The *Charter* conception of expressive freedom was already challenged by private interests in the analog age and the shrinking of public space.[432] In the digital age, private interests have become even more predominant.

Further challenging the presumption of openness, the internet separates people from one another rather than uniting people in a common discourse with varying opinions; conversely, communities of discourse tend to form in fragmented, insular-minded groups.[433] Far from robust discourse in a public square that challenges individual beliefs, online discourse tends to fit

[428] This is the difficulty set out by Cossman.
[429] Franks Public Square, *supra* note 108 at 428.
[430] Citron & Richards, *supra* note 108 at 1365, see especially fn 75.
[431] *Ibid* at 1360; Richard Moon "Does Freedom of Expression Have a Future?" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 15 at 27.
[432] Bakan, *supra* note 18 at 66-7.
[433] Delgado & Stefancic, *supra* note 108 at 336; Moon Assumptions, *supra* note 111 at 4; Cossman C-16, *supra* note 75 at 75.

individuals' pre-existing beliefs, exposing individuals to a narrower range of opinions,[434] and entrenching polarized dichotomies of "us vs them".[435] Trust and social connection may be more difficult to build online,[436] so assuming that individuals can create a community of respectful engagement may be challenged with digital expression.

Moreover, even if online discourse was open, the filtering of queer expression demonstrates that some individuals are not equal participants despite the non-involvement of the state.[437] As evidenced in Part 2, shadowbanning and content regulation mean that individuals' expression is being constrained or restricted, even without their knowledge. Counterspeech appears less effective online,[438] adding to suspicions of its efficacy. In part, this is because many of the objectionable expressive acts are "unanswerable", such as nude photographs or doxing.[439] In summary, the idea that open expression exists organically, absent the state, is mythical in the analog world, but in the digital age it appears even more far-fetched.

Ultimately, the abstract conception of expressive freedom within the doctrine is inadequate. Conceptualizing freedom as non-interference, along with underlying notions of formal equality and the presumption of openness sets aside relevant social dynamics and treats the state with hostility. This abstraction thus substantively affects equality and individual freedom and repels offering moral guidance for understanding the scope and limits of expressive freedom and its constitutional protection as it pertains to the experience of expression as a lived experience of

---

[434] Moon Assumptions, *supra* note 111 at 4. Cossman C-16, *supra* note 75 at 75.
[435] Delgado & Stefancic, *supra* note 108 at 337; Citron & Richards, *supra* note 108 at 1366.
[436] Johnny Hartz Søraker, "How shall I compare thee? Comparing the prudential value of actual and virtual friendship" (2012) 14 Ethics Inf Technol 209 at 216); John Danaher, "Virtual Reality and the Meaning of Life" in Iddo Landau, ed, (final draft for Oxford Handbook of Meaning in Life) at 15.
[437] Waldman, *supra* note 27 at 960-2, 953.
[438] Alexander Brown, "What is so Special About Online (as Compared to Offline) Hate Speech?" (2018) 18:3 Ethnicities 297, doi: <10.1177/1468796817709846>.
[439] Franks Lost Cause, *supra* note 96 at 871.

different individual. Superficially, this conception protects individual difference. In Cameron's view, freedom as non-interference is a favourable conception of expressive freedom because it protects individual difference equally.[440] That is, it presumes that expressive freedom is something to be achieved primarily by preventing infringement of the state. However, in treating expressive freedom in this way, it is treated as a static ideal that protects difference and dissent.[441]

Violence and threats of violence are, however, excluded from protection. As an exception to broad protection and the Court's conception of freedom as openness, consideration of this exception demonstrates one small instance where abstraction does not take hold and oppression is considered.

3.4 Exclusion of Violence: Expressive Freedom & Oppression

Violence and threats of violence are excluded under section 2(b),[442] and are the only internal limit on the conception of expressive freedom.[443] Other limits construed under section 1, are external limits on freedom of expression protection, leaving expressive freedom conceptually untouched. Young sets out oppression as the key consideration of justice.[444] In conceptualizing expressive freedom, the abstract doctrine does not consider any of the oppressive faces Young references. The primary exception (and arguably, the only consistent exception) is violence.

---

[440] Cameron Quixotic, *supra* note 223 at 170.
[441] Young, *supra* note 12 at 16. See: e.g. *Zundel*, *supra* note 155 at 753.
[442] Moon Book, *supra* note 104 at 43-4. sees the violence exception as troubling the two-step process of scope and limits baked into the section 2(b) framework; In Moon's view at 37, critiques view like Cameron's about violence demonstrate the problems with the doctrine's individualist roots
[443] Technically, expressive freedom can be limited by the method/location of the expressive act, but violence is the only clear exception.
[444] Young, *supra* note 12, Ch 1, 2.

3.4.1 Blurry Basis for a Clear Exclusion

While violence has been resoundingly excluded from section 2(b) protection, its grounding is unclear, and it is not without controversy. It may be obvious that violence ought to be excluded from freedom of expression protection. While the Court has taken several different approaches to the exclusion, all of which rely in some way "on our general revulsion to violence",[445] it has not clearly explained *why* such expression is excluded under section 2(b).[446] In *Irwin Toy*, Dickson CJ stated simply that "while the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection," because "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure."[447] Dickson's view takes the violence exception as an obvious prerequisite to constitutional protection. In *Keegstra*, he echoed his earlier statement, adding that violence has "extreme repugnance" to free expression values, but he did not explain why this repugnance arises.[448] In subsequent decisions, the Court has more squarely stated that violent acts can be excluded because violence as a means of expression conflicts with these values.[449] In *Montréal (City of) v 2952-1366 Québec Inc*, McLachlin CJ and Deschamps J, writing for the majority, stated that "violent means and methods undermine the values that section 2(b) seeks to protect" and therefore can be excluded from section 2(b) protection.[450] While violent expression may indeed serve political purposes or the self-fulfillment of the speaker, violence is "not consonant with Charter protection" and generally impedes democratic dialogue, the search for truth, and the self-

---

[445] Moon Book, *supra* note 104 at 43.
[446] Elliot Basics, *supra* note 152 at 216; *Irwin Toy*, *supra* note 139 at 970.
[447] *Irwin Toy*, *supra* note 139 at 970. Seana Valentine Shiffrin, "A Thinker-Based Approach to Freedom of Speech" (2011) 27 Const Commentary 283.
[448] *Keegstra,* supra note 141 at 732; Elliot Basics, *supra* note 152 at 213.
[449] See: *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC) at 37; *Greater Vancouver*, *supra* note 141 at para 28.
[450] *Montréal (City of) v 2952-1366 Québec Inc*, 2005 SCC 827 [*Montreal*] at 37, 72-4, 167.

fulfilment of the victim.[451] Despite the plausibility of this 'non-consonance' argument, there are further issues with the exclusion of violence, elaborated below.

While violence has been excluded since the early days of the *Charter*, threats of violence were only excluded from protection later. Dissenting in *Keegstra*, McLachlin J, as she then was, referred to violence's coercive character as undermining the values and social conditions of freedom of expression.[452] In her view, the exclusion of violence ought to have extended to threats of violence.[453] In *Khawaja,* writing as Chief Justice for the majority, and referencing her *Keegstra* dissent, she stated "[i]t makes little sense to exclude acts of violence from the ambit of s. 2(*b*), but to confer protection on threats of violence. Neither are worthy of protection. Threats of violence, like violence, undermine the rule of law."[454] In her view, threats of violence also undermine free choice and freedom of action, and the "very values and social conditions that are necessary for the continued existence of freedom of expression."[455]

Even if we can accept that violence and threats of violence ought to be excluded from what is considered part of 'expressive freedom', the doctrine does not clearly answer the question of *why* it ought to be excluded, particularly within a doctrine that prioritizes broad protection of expressive acts? What are the social conditions (if we take McLachlin's reasoning in *Khawaja*) that become relevant so that violent acts do not receive protection? Robin Elliot argues that violence ought to be excluded from section 2(b) protection because under the *Charter* and within

---

[451] *Ibid* at 37
[452] Moon Book, *supra* note 104 at 45; *Keegstra,* supra note 141 at 732.
[453] *Keegstra,* supra note 141 at 732.
[454] *Khawaja*, *supra* note 164 at 70
[455] *Ibid* citing *Keegstra* at 830-1 McLachlin also relied on past SCC mentions of threats of violence in supporting her conclusion: *Greater Vancouver, supra* note 141 at para 28, *Suresh*, *supra* note 141 at para 107, *Dolphin Delivery, supra* note 141 at 588

any democratic, rule-of-law state, freedom of expression must be pursued in non-violent ways.[456] However, similar to a view expressed by Cameron in the early days of the *Charter*,[457] he argues that the value-based exclusion of violence is not appropriate. Elliot argues that in reality, violence will not always undermine the values of expression.[458] Violence does not necessarily stand in the way of truth, and political discourse may also be served by it: an assassination, for example, may "in fact spawn a great deal of dialogue amongst the general public."[459] While the self-fulfilment of the *victim* may be undermined, it may be balanced by the enhancement of the self-fulfilment of the *perpetrator*, rendering an exclusion on such grounds murky at best.[460] Elliot argues that because we categorically exclude violence from constitutional protection of freedom of expression, we ought to consider excluding *more* objectionable expressive acts to avoid watering down the notion of freedom itself.[461] In other words, Elliot proposes a narrower conception of what is included under section 2(b) protection, based on ensuring freedom remains a robust concept. Looking to oppression provides a basis for building on this idea.

3.4.2 Expression & Oppression

As noted earlier in this Part, oppression is a key threat to individual capacities and individual freedom.[462] While the doctrinal conception of expressive freedom as non-interference focuses on domination, oppression looks to the social dynamics and structures of society that affect

---

[456] Elliot Basics, *supra* note 152 at 215. In taking a view that violence is excluded as a 'precondition' to constitutional rights, similar to that in *Irwin Toy* and *Khawaja*, set out above.
[457] Moon notes that Cameron critiques the exclusion of violence as being premature, and that the exclusion ought to be done under section 1 (Moon at 36). However, Cameron's more recent work does not make clear reference to violence in this way, so I have omitted a critique of this view directly.
[458] Elliot Basics, *supra* note 152 at 213-14.
[459] *Ibid.*
[460] *Ibid.*
[461] *Ibid.*
[462] Young, *supra* note 12 at 39.

individuality.[463] As noted, Young sets out oppression as having 'five faces', of which four are relevant for this discussion: marginalization, powerlessness, cultural imperialism, and of course, violence.[464] Young, in defining violence, includes not only physical violence, but "severe incitements of harassment, intimidation, or ridicule simply for the purpose of being degrading, humiliating, or stigmatizing group members."[465] Violence, for Young, is particularly oppressive when it is systemic, lingering in daily life as a threat against individuals for mere membership in an 'othered' group.[466] That is, violence is particularly oppressive when it moves from an isolated act to a social one.[467] But the abstract theories of justice discount the injustice of systemic violence, even if recognizing its moral wrongness, because such theories disregard the social context that makes it possible.[468]

Because the doctrine excludes violence from the conception of expressive freedom, it in part acknowledges the injustice that it begets. While McLachlin's exclusion of threats of violence from protection in *Khawaja* extends this recognition beyond physical acts, it still discounts the social and systemic context of it.[469] The majority in *Montreal* acknowledged that violence ought to be excluded because it impedes the capacities of others.[470] Yet, impeded by the abstraction of social conditions, the analysis cannot extend much further: while the exclusion of violence and threats of violence from section 2(b) protection nudges towards considering oppression as it relates to expression, it still falls short.

---

[463] *Ibid.*
[464] Young sets out oppression as having five faces: exploitation, marginalization, powerlessness, cultural imperialism, violence. Exploitation is centrally concerned with class structures and economic relations, and while important, direct consideration of social and economic structures beyond constitutional rights is beyond the scope of this paper.
[465] Young, *supra* note 12 at 61.
[466] *Ibid.*
[467] *Ibid*.
[468] *Ibid.*
[469] *Ibid.*
[470] *Montreal*, *supra* note 450 at 375.

However, if we consider violence *systemically*, like Moon's view points to, and the oppression that occurs from its acceptance and normalization, then the exclusion from section 2(b) can plausibly extended to acts beyond violence and threats yet remained constrained from unduly subjecting expression to regulatory power. If we think about oppression in fuller form as being excluded in the same way violence currently is, it is not the ability to exclude acts willy-nilly, but how they impede the freedom that the guarantee aims to protect. In this way, the doctrine could avoid the values-based issue raised by Cameron, while still broadening the exclusion in line with Elliot. In considering the remaining faces of oppression, I consider how the abstract doctrinal conception neglects these important dimensions and offer preliminary conceptions of how considering oppression may look at and deliver justice.

First, abstracting from the context of social life and oppression ignores issues of marginalization.[471] For Young, construing rational autonomy and independence as preceding moral agency (and the institution of constitutionally protected freedom) contributes to marginalization.[472] Young notes that some groups, such as women, have historically been marginalized because they were seen to lack reason, as a requisite element for the impartial conception of public life.[473] Considering marginalization as an impediment to freedom and justice, enlightens such exclusion; the idea in the doctrine that we must tolerate objectionable expression becomes suspicious. Such a view marginalizes individual claims of injustice, setting aside their experiences in pursuit of more abstract principles. If we instead take these issues of marginalization as impacting expressive freedom forms of expression that aim to marginalize others, like sexist or anti-queer expression, may qualify freedom of some objectionable expression. This marginalization would, of course,

[471] Young, *supra* note 12 at 53. Marginalization refers to a social group being expelled from useful participation in social life,
[472] *Ibid* at 55.
[473] *Ibid* at 54-5.

have to be demonstrated with evidence, drying up the slope on which such analysis might slip towards including every complaint that might arise.

Similarly, second, with the negative conception of freedom as openness, the doctrine largely blinds itself to power and powerlessness. The abstraction in the doctrine fails to consider power in several ways. One, it considers the immense power of the *state* as relative to the individual. But it fails to recognize the power used by individuals against others, and how the power of the state could be used to address the oppression of others. Two, by ignoring power and prioritizing counterspeech it inadequately recognizes that some individuals do not have the same expressive autonomy within social discourse. Because the powerlessness must "prove their respectability" the difficulties in conceiving of openness as equal participation outlined above becomes clearer if power is openly considered.[474] Three, it fails to consider how power influences the meanings and impacts of expressive acts and therefore, how expression might be differentiated.[475] Considering power could identify when the powerful are exerting power over the less powerful. For example, in *Ward*, the wrongfulness of Ward's comments becomes clearer, as they were made by a powerful individual against a potentially less powerful individual.[476] In *Keegstra,* Keegstra used his position as a teacher to promote his antisemitic arguments to students.[477] If power became a concern for freedom, rather than just justified limits, Keegstra's comments might draw an exception from the notion of expressive *freedom* rather than a mere limit. The doctrine also does not centrally consider notions of 'respectability' that rely on power.[478]

---

[474] Young, *supra* note 12 at 57-8. Respectability is concerned with a particular way of being associated, generally, with power.

[475] This is related to ideas about vulnerability, which is visible in section 1 analyses. See, e.g. *Irwin Toy*.

[476] In *Ward*, importantly, considering power directly could also work in favour of protecting his comments, as JG himself may have had power as a public figure.

[477] *Keegstra,* supra note 141.

[478] *Ibid* at 57, in reference to the state of those who lack the "authority, status, and sense of self" that individuals have, often in comparison to others. She notes that the status and economic conditions of the powerful separates the community life of the powerful from the powerless: in her critique of class, the "professionals" compared to workers.

However well-meaning the doctrine is in deeming all expression to have similar respectability, ignoring the realities of this ignores the role that privilege and "respectability" (which creates authority and influence) may have within an institutional structure, and whether individuals have the autonomy to avoid disrespectful treatment by others and make their own decisions.[479] As we see emerging in anti-SLAPP cases like *Hansman,* considering power can also flesh out the injustices that may otherwise be underplayed in the doctrinal conception, and the role the law may play.[480]

Third, the abstraction fails to consider cultural imperialism. Cultural imperialism refers to the "values, experience, and perspective" of a dominant group being entrenched as universal and "normal", and conversely, non-dominant groups being marked as outsiders.[481] This experience of othering subjects such groups to the "paradoxical oppression" of being both invisible in the discourse and being stereotyped as outside the normal or acceptable domain of culture.[482] Othered individuals do not necessarily identify with their grouping, but the oppression of the dominant pulls them to it.[483] Contrastingly, the dominant group is generally unaware of their identity as the dominant because it represents a neutral or 'universal' conception.[484] Moreover, oppressed groups cannot necessarily challenge the universal position, by virtue of their othered and disempowered status. [485]

Freedom of expression doctrine itself exerts cultural imperialism to an extent. The doctrinal conception of freedom of expression imposes conceptions of universal expressive freedom in

---

[479] *Ibid* at 57-8. See also, 136. Young is primarily concerned with economic relations, the idea still applies.
[480] *Hansman*, *supra* note 86.
[481] Young, *supra* note 12 at 58-9.
[482] *Ibid* at 58-60.
[483] *Ibid* at 123
[484] *Ibid.*
[485] *Ibid* at 59, 123. Young notes that "differences of women from men, […] homosexuals from heterosexuals" for example, are "reconstructed largely as deviance and inferiority."

ascribing broad protection and ideas about the normal in the social world in ascribing limits (as seen below in section 3.5). Moreover, it is through the expression of dominant cultural views, entrenched as universal, that this form of oppression can silence the self-expression of difference.[486] Freedom of expression doctrine therefore perpetuates this other in itself through objective harm, but it also disengages from considering the potential that dominant (and oppressed) groupings exist in culture[487] and affect expressive freedom.

Importantly, the doctrinal conception that aims towards universality neglects the individual *experience* as the other with cultural imperialism.[488] Attending to the *experience* of individuals makes cultural imperialism visible: looking to the paradigm of 'legal/illegal' or 'normal/not-normal' simply perpetuates this dominance. In other words, deeper moral assessment than the doctrine currently allows is required to determine just understandings of wrongs and harms, because such wrongs exist in the experience of expression itself.

If we consider social dimensions and oppression in understanding expressive freedom, then we can begin to answer the *koan* of me not thee. That is, we can understand why dominant forms of expression may, at least in principle, be regulated while other expression might not be. This is not to say that dominant forms of expression could be excluded, per se, but rather when dominant forms seek to *oppress*.

More importantly, it would force an understanding of expressive freedom that takes seriously those making claims that their freedom is being infringed. Rather than allowing culturally dominant views to render some as deviants or outside the scope of respectable political discourse,

---

[486] *Ibid* at 23-4

[487] "symbols,…meanings,…stories, and so on through which people express their experience and communicate with one another,"

[488] *Ibid* at 58, in stark contrast to the idealism of abstraction.

it could treat seriously views of exclusion based on individuals' own perceptions. This is not to say that *all* claims would thus mean the impugned expression would fall outside the conception of freedom, but rather that they would legitimize claims of wrongfulness and lead to more robust deliberations about the bounds of tolerance. In this way, not only would claims that queer expression is undermined by antiqueer expression, but also claims by these same individuals that claim their expressive capacities are being infringed by dominant groups of a different political brand. For example, if we consider pro-life advocates to be 'marginalized' in some way, and their billboards defaced by pro-choice advocates, their claims of freedom of expression infringement would have a similar basis of complaint; protesting outside abortion clinics with demeaning or degrading signs, however, would not.

By considering expression and expressive freedom abstractly, the doctrine blinds itself to these faces of oppression. In doing so, it disconnects the doctrinal conception from the lived experience of expressive freedom. Moreover, it prevents itself from being able to address threats to expressive freedom. Instead, abstract principles are prioritized and calls for justice left confused and polarized. While section 1 has addressed some of these aspects, it leaves the conception of freedom as near absolute intact. This, as noted, distorts our understandings of what ought to be tolerated. Moreover, by leaving these considerations of oppression to section 1, it is not clear what in fact is a relevant consideration in the balance. The concern under section 1 will be with the *state* not the act itself. In other words, the emphasis will be on the justification for the *interference* with expressive freedom, less on what the underlying issue is that may justify that interference. In other words, so long as there is a 'pressing and substantial objective' the analysis moves away from any

consideration of actual individual freedom in ascribing limits.[489] Most of these issues point coalesce in issues of harm, as the basis of limits.

3.5 Justified Limits: Harm

From the abstract, near-limitless conception of freedom that emerges from section 2(b), limits are required. Violence, as discussed, is an external limit to this protection. Section 1 imposes external limits on freedom of expression, importing other interests to justify where constitutional protection can be justifiably abrogated. Under section 1, harm is often used to justify limits. However, because the abstract, individualistic conception of expressive freedom does not account for social dimensions and oppression, limits are conceptually difficult.[490] While freedom under section 2(b) is overprotective of objectionable expression, harm under section 1 risks being underprotective of marginalized expression. Digital expression adds challenge to this notion of limits, as it shifts the understanding of what society, let alone a 'free and democratic society' might be, as well as our understanding of harm.[491]

Harm is an attractive basis for limiting freedom of expression in part because it is seemingly intuitively wrong to harm someone and constitutional law ought not to prevent the state from addressing harm. Objective harm, in particular, is praised on the basis that it avoids imposing moral judgments and political preferences[492] and maintains the egalitarian basis of content-neutral protection.[493] For some, harm is a neutral basis for limiting freedom of expression in contrast to

---

[489] Full discussion of this point is outside the scope of this paper.
[490] Moon Book, *supra* note 104 at 39.
[491] See: Lara Karaian & Dillon Brady, "Revisiting the 'Private Use Exception' to Canada's Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age" (2019) 56:2 Osgoode Hall LJ 301, doi: <10.60082/2817-5069.3483> at 304, 322-2, 326-7, 340-1, who note the digital world has changed how the law approaches expressive issues, particularly the private use exemption to the possession of child pornography for self-created images. Specifically, digital expression has reshaped how and where teenagers develop relationships, and the ensuant harms.
[492] Hutchinson, *supra* note 73 at 689, 710.
[493] Cameron Abstract at 1138; Cameron Resetting, *supra* note 132 at 127; Hutchinson, *supra* note 73 at 700, 704, 710.

value-based assessments of limits that risk censorship of expression on subjective grounds.[494] Hutchison, for example, advocates for objective harm on the basis that without it, harm could be "expansively defined by the most sensitive members of society" and erode the section 2(b) guarantee.[495] Hate speech, without physical harms like violence or harassment that forcibly silences others, ought not be limited on his view: such restrictions run counter to individual protection.[496] Instead, the section 1 analysis ought to focus, for Hutchison, on "realistically probable harms" within which category includes only "violence, personal intimidation, and targeted infliction of emotional distress."[497] Unfortunately, harm is an inadequate limit, particularly because it risks marginalizing queer and marginalized expression, as I take up in the next two sections, respectively.[498]

3.5.1 Objective Harm as an Inadequate Limit for Expression

As appealing and plausible as objective harm may be, it runs into problems in the expressive context, particularly in its implementation to real issues of expressive freedom.[499] Objective harms in the expressive context are noted to be seen by some as "aberrations" in the otherwise functional and freely expressive world.[500] Stemming from the abstract conception of freedom of expression, such views rely on the notion that expression is otherwise free, except

---

[494] Hutchinson, *supra* note 73 at 689-710. Cameron Quixotic, *supra* note 223 at 172. See: *Butler*, *supra* note 315. For a critique: Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8:2 Soc & Leg Stud 181 [Valverde].

[495] Hutchinson, *supra* note 73 at 710. For someone concerned with realistic probabilities, this seems a bit hysterical.

[496] *Ibid* at 704-6, 710. At footnote 141, he expresses the belief that ostracization of queerphobic people is an unobjectionable consequence with this "proper operation of the marketplace of ideas." Moreover, he notes that such ostracization is more likely than the silencing of queer people at the hands of the queerphobic expression. (He notes at 716 that Whatcott himself was marginalized) The harms from bigoted speech are thus better defined on an objective, reasonable person standard that rises to sufficient levels of concerns only when it reaches an extreme level.

[497] *Ibid* at 709-710, fn 169. See also: Cameron Resetting, *supra* note 132 at 144.

[498] See: Valverde, *supra* note 494 at 185.

[499] See Macfarlane, *supra* note 161 at 49 citing McLachlin in *Keegstra* dissent.

[500] Franks Avatars, *supra* note 112 at 226, particularly in the digital context. As an example, see Hutchison. See also: Ashley, *supra* note 31 at 29 who suggests that under hate speech laws, the role of the state as a subjugator is cast off in favour of an image of a neutral state, and harassment and discrimination treated as exceptional, rather than routine.

when objective harm is proven. That is, harm-based limits to the conception of expressive freedom as openness implies the idea that expression is relatively harmless. However this view demonstrates how the abstract model of freedom of expression neglects the underlying social conditions, the social dimension of expression, and the impact of expression on the identity, agency, and expressive capacities of others.[501] Specifically, using harm does not necessarily account for the undermining of the expressive freedom of another person.[502]

Some of the difficulties with 'objective harm' may arise because the nature of expression is difficult to put into objective terms. Harm may be obvious in reference to physical acts, like assault or murder, but the nature of expression makes it less so.[503] As Moon notes, the problem with expression is that the harms often stem from systemic issues; defining harm objectively in the expressive context "may not be possible" and the line thin between harmful and merely offensive.[504] Expressive harm is often diffuse, which makes causation difficult to establish and measurement of harm difficult, and thus makes justifying limits on expression difficult.[505] In *Keegstra*, Dickson CJ attended to the societal harm of hate speech, but, as Macfarlane points out, did not cite evidence in support of these harms.[506] This is not to say the harms do not exist, but that proving them is difficult. Furthermore, Macfarlane notes that expressive harm may contribute to physical harms, as well as more direct, psychological harm.[507] On the latter, however, the impact on the individual is treated with less importance than broader, more diffuse harms. In *Keegstra,* Dickson acknowledged the "grave psychological consequences" of hate speech but also noted that

[501] Moon Book, *supra* note 104 at 4; 56.
[502] Bakan, *supra* note 18 at 73. "Silenc[ing] the silencers" is, for Bakan, a better way to approach restrictions that a harm-based justification
[503] Also, physical harm would seemingly be excluded from section 2(b) protection under the exclusion of violence.
[504] Moon Book, *supra* note 104 at 130, 134.
[505] Macfarlane, *supra* note 161 at 36-40
[506] *Ibid* at 46. *Keegstra,* supra note 141 at 356.
[507] Macfarlane, *supra* note 161 at 36.

individual harm was not the relevant concern of hate speech (but rather, broader group-based harms).[508] Because expression is diffuse, the *risk* of harm is what becomes relevant in the doctrinal analysis.[509]

Even if we accept the objective harm standard, the Court has demonstrated an unwillingness to limit freedom of expression even when there is demonstrated and accepted evidence of harm. In *Ward*, there was evidence that JG suffered harm as a result of the comments made by Ward in his comedy routine.[510] Yet, the majority deemed that such harm was not objectively "reasonable", and therefore downplayed its significance because it did not meet the formal standard of discrimination.[511] JG was targeted, according to Wagner CJ and Côté J, because he was a public personality, not because he has a visible disability, despite Ward's derogatory comments about the latter.[512] Moreover, because Ward was "known for this type of humour", his comments "were not likely to have a spillover effect that could lead to discriminatory treatment of Mr. Gabriel," even though classmates bullied him using comments from Ward's routine.[513] For the majority, the comments would not have led the reasonable person aware of the circumstances to think that Ward's comments were likely to incite vilification or detestation of individuals with disabilities, nor that the comments would have been likely to lead to discrimination against JG.[514] The majority noted that the concern about vilification pertains to third parties, not to the victim.[515] Abella and Karakatsanis took a different view: Ward's comments were *about* JG's disability, even

---

[508] See: *Keegstra,* supra note 141 at 746, cited in *Ward* dissent at para 191. For a stronger pronouncement on the 'group' harm, see: *Whatcott, supra* note 87 at para 74. Considerations of individual harm may be better suited for the torts context, but discussing the appropriateness is beyond the scope of this paper.
[509] Macfarlane, *supra* note 161 at 36.
[510] *Ward*, *supra* note 70 at para 125, 129,
[511] *Ibid* at para 110.
[512] *Ibid* paras 91, 7.
[513] *Ibid* at para 112.
[514] *Ibid* at paras 108, 110. This is the test from *Whatcott, supra* note 87 para 178, 191.
[515] *Ibid* at para 84; citing *Whatcott, supra* note 87 at para 54, 58, 82.

if his disability was not the primary motivation for making them.[516] The comments drew on harmful stereotypes that were abusive and unavoidable.[517] Abuse, in their view, is no basis for toleration.[518] Moreover, they drew attention to the harm to JG as an individual: the concern is not whether the comments met the test for hate speech and its emphasis on group-based harm but rather the fact that individual harm did arise.[519] JG experienced anguish as a result of the comments and came to question the value of his life.[520] Ward's celebrity status as a dark comic did not, in their view, immunize him from responsibility.[521]

Ward calls into question how the Court may approach the notion of harm, even when there is evidence for it:[522] objective harm may not be so objective. *Ward* demonstrates how the perception of harm will vary: for the majority, the comments made by the other kids "tormented" JG by repeating Ward's jokes.[523] For the majority, they "mocked" him, drawing mere inspiration from the jokes;[524] bullying was not legally relevant harm because it did not meet the standard of the reasonable person. For the dissent, the harm to JG was legally significant and abuse, thereby justifiably drawing a legal response. The majority's view considered the likely effect of the comments in an abstract, objective sense: the dissent with the actual consequences of Ward's actions.[525] It appears that the Court will impose its own views of what is sufficient harm, even in the face of judicially noted harm.

---

[516] *Ibid* at para 147.
[517] *Ibid* at para 116-7, 172.
[518] *Ibid* at para 116-17.
[519] *Ibid* at para 149, 157
[520] *Ibid*, at paras 129, 177.
[521] *Ibid* at paras 148.
[522] The facts of this case, including engaging the Quebec Charter, and the additional tests for discrimination admittedly confound some of the lessons that can be learned from this treatment of harm.
[523] *Ibid* at paras 124-5.
[524] *Ibid* at para 12.
[525] This is not to say there is a question of causation. My point is to illustrate the majority's embrace of abstraction.

Moreover, *Ward* calls into question the efficacy of an objective test: if we are to disregard harm to individuals, on the basis of a fictitious person, then what harm will be relevant other than that established in the judge's moral estimation? Alluded to above in discussing *Keegstra* and hate speech, in pursuing objective harm, real harm to individuals has gone unaddressed. In some instances, this may be justified, as certainly not *all* harms can or ought to be captured, nor can line drawing be avoided entirely. The point, however, is that pursuing objective harm does not necessarily protect individuality, nor does it rid the analysis of moral and ideological judgments. Discussing obscenity and queer expression, below, the inadequate protection of the individual becomes clear.

The diffuse and varied nature of expressive harm makes justifying legislation difficult and leaves most 'hate speech' unregulated.[526] For Macfarlane, this makes state regulation appear all the more arbitrary when it *does* try to regulate,[527] as will be discussed in the queer critique below. Moreover, harm-based views of limits exclude extreme acts from protection, but in doing so suggest that lesser, though perhaps more regular, acts of discrimination deserve tolerance.[528] For example, while hate speech is subjected to limits, it is only the extreme instances that rise to the level of vilification that justifies limits.

Moreover, despite its alleged potential for neutrality, harm as a limit remains a moral and ideological concept that risks entrenching and exacerbating existing inequalities.[529] As Bakan notes, harm is not neutral or apolitical.[530] It is influenced by presumptions of what is 'normal' and 'anti-social'.[531] Harm drives what is considered legitimate and illegitimate expression; that which

---

[526] Macfarlane, *supra* note 161 at 36.
[527] *Ibid*.
[528] Bakan, *supra* note 18 at 73.
[529] In part, the risks of entrenching inequalities arises because it purports to *not* be a moral and ideological concept.
[530] Bakan, *supra* note 18 at 75.
[531] *Ibid*

deserves protection or regulation and that which ought be tolerated or eliminated. This further obscures the koan, because it obscures the moral reasoning required. In the next section, I will attempt to demonstrate how harm, even objectively construed, does not maintain protection of individuality and dissent but rather risks imposing majoritarian and moral viewpoints on individuals, and risks undercutting the reason for broad protection in the first place. This is not to say that harm *ought not* be considered. However, because harm plays such a major role in whether or not issues of expression can be addressed by legislation, its deficiencies ought not be overlooked; it ought not be seen as a cure-all for the overbreadth of section 2(b). Ultimately, these problems with harm ought to suggest another look at the violence exception and the exclusion of some expressive acts under section 2(b), but detailing such an exclusion is outside the scope of this paper.[532]

3.5.2 Harm, obscenity, sex: through a queer lens

Queer expression is a helpful lens for developing a critique of harm: queer identity and expression is, by definition, outside what is considered normal. It draws specific attention to how, even with objective harm, separating the 'merely offensive' from the extremely offensive involves moral judgments. A queer perspective shows how focusing on objective harm and its ideal of objectivity provides a clumsy answer for these moral judgments and risks underprotecting difference despite the intentions of its champions.

I levy two entwined critiques against objective harm. First, in direct contrast to its advocates, objective harm does not dispel moral judgments from considerations of limits. Rather, it imposes its own and passes it off as a universal principle, in line with the ideal of impartiality

[532] But see section 3.4 of this thesis.

set out by Young.[533] By doing so, it obscures discussions of morality, rather than dispels it.[534] Second, led by the first, objective harm entrenches an ideological view of what is a relevant harm, the threshold for such relevance, and appropriate limits therefrom. Rather than protecting different and marginalized expression from majoritarian forces, objective harm subjects it to standards set by notions of normal which risks excluding and further marginalizing it.[535] Objective harm denies difference in part because it risks framing expression outside the norm as good and bad. This moral judgment is not itself the problem, but rather because it is made about abstract conceptions of harm and freedom divorced from reality and irremovable from ideology. Certainly, there is good and bad expression: but assessing this ought to be done in full view of moral and political judgments, not in ignorance of them; we ought to tend to the subjective claims of oppression and marginalization if we are to be concerned with the protection of individual difference.[536]

3.5.2.1 Little Sisters (and its sisters, Butler and Labaye)

The critique of harm in the context of obscenity and indecency in *Butler, Little Sisters,* and *R v Labaye* helps shed light on the difficulty of harm.[537] In *Butler,* the Court considered the constitutionality of section 163 of the *Criminal Code* which addresses obscenity, in relation to pornographic materials.[538] Ultimately, the majority found that it violated section 2(b) but was saved under section 1.[539] *Butler* merged the degrading or dehumanizing test that existed in obscenity law

---

[533] Young, *supra* note 12 at 98.
[534] *Ibid* at 10, 96.
[535] *Ibid* at 105.
[536] In some ways, this is a tort, but this discussion is outside the scope of this paper.
[537] 2005 SCC 80 [*Labaye*]; *Butler*, *supra* note 315; *Little Sisters*, *supra* note 88. Note: *Labaye* is not about expression itself nor does it discuss section 2(b). However, it engages with a harm-based test for criminal indecency from *Butler* (which deals with expression). It is used here to illustrate issues with a harm-based test and the notion of 'offence' in regard to sexual acts.
[538] *Butler*, *supra* note 315 at 461. Valverde, *supra* note 494 at 185 notes that obscenity itself is a gendered and heteronormative concept, wielded against sexual minorities by majorities.
[539] *Butler*, *supra* note 315 at 455-6.

with community standards to create a 'substantial risk of harm' test.[540] To determine what category would apply to specific types of pornographic materials, [541] Sopinka J, writing for the majority, deferred to the "community as a whole" and their tolerance for others being exposed to certain materials and the resulting harms.[542] This test "is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to."[543] His aim was to prevent sexually explicit materials from "predisposing"[544] people to "anti-social attitudes and beliefs", or "desensitizing" them to 'harmful or wrongful sexual views.'"[545] In this way, it imposed a purportedly objective test based on the morality of the community on an assessment of the 'risk of harm'.

Little Sisters used the *Butler* test in the context of gay and lesbian erotica. Little Sister's Book and Art Emporium was (and remains) a Vancouver queer bookstore. Canada Customs agents seized a number of cross-border shipments to the bookstore because such materials were considered obscene.[546] While Binnie J, writing for the majority, found that Customs agents had acted discriminatorily but that the obscenity provision violated section 2(b), the provision was saved under section 1.[547] While it was argued that the *Butler* test discriminated against gay and lesbians, Binnie denied that it did, despite the discriminatory action, stating that the *Butler* test itself was not discriminatory because it pertains to harm, not taste.[548] In doing so, he imposed a

---

[540] *Ibid* at 475-82. Moon Book, *supra* note 104 at 107-110.
[541] *Butler*, *supra* note 315 at 478: The Court implemented a standard of harm for obscenity that categorized sexually explicit materials into three categories: violent, non-violent but degrading, non-violent, not degrading, and not depicting children (at 484).
[542] *Ibid* at 478; Cossman Discipline, *supra* note 34 at 80.
[543] *Butler*, *supra* note 315 at 478.
[544] *Ibid* at 485; Cossman Discipline, *supra* note 34 at 80.
[545] *Butler*, *supra* note 315 at 479. Cossman Discipline, *supra* note 34 at 81.
[546] *Little Sisters*, *supra* note 88 at 1135-7. The Court considered the constitutionality of Code 9956(a) of Schedule VII of the *Customs Tariff* legislation which prohibited obscenity from being imported. (at 1121), under which 261 items had been detained in a 10-year period (at 1140).
[547] *Ibid* at para 39
[548] *Ibid* at para 58-59, citing *Butler*. See: Cossman Discipline, *supra* note 34 at 90.

view of universality and sameness: he stated, colourfully, that "portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing than if the victim happens to be of the same-sex…"[549] Notably, the party of concern for harm was the voyeur or viewer of the material, and whether the "attitudinal" harms that could result from potentially harmful materials could be tolerated by the public on the test.[550]

Labaye more recently employed the 'risk of harm' test set out in *Butler* and *Little Sisters* in the context of indecency, rather than obscenity.[551] Indecency laws, like obscenity laws, rest on the idea that the offensive can be criminalized to protect the public. Indecency, according to McLachlin CJ, writing for the majority, was criminalized "to protect the public from being confronted with acts and material that reduce their quality of life."[552] Based on the values of autonomy to "live within a zone that is free from conduct that deeply offends them" indecency purports to protect individuals from harm.[553] On these grounds, sexual displays are seen to be threats to security and autonomy on the grounds of their "deep offensive character".[554] Labaye was charged under section 210(1) of the *Criminal Code* for operating a private membership club in which people could consensually engage in sexual activity.[555] The majority set aside the conviction in *Labaye*, in part because the 'indecent acts' occurred in an establishment where observers would

---

[549] *Little Sisters*, *supra* note 88 at para 60

[550] *Ibid*

[551] *Labaye, supra* note 537 at para 24. Richard Jochelson, "After *Labaye*: The Harm Test of Obscenity, the New Judicial Vacuum, and the Relevance of Familiar Voices" (2009) 46:3 Alta L Rev 741, doi: <10.29173/alr224>. [Jochelson Vacuum] at 765; Richard Jochelson & Kirsten Kramar, "Governing through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada after R v Labaye 2005" (2011) 36:4 Can J Soc 283 [Jochelson & Kramar] at 299. See, also: at 284, fn 3, they note: "The legal category of indecency applies to sexual conduct (i.e., where bawdy houses were being run for the purposes of indecency or where indecent performances were being held) rather than pornography (sexually explicit print and electronic materials). Indecency law imports the definition of obscenity (pornographic materials are considered "obscene" when they are deemed to cause the undue exploitation of sex which is harmful to the proper functioning of society) into its adjudication rubric."

[552] *Labaye supra* note 537 at 40-1.

[553] Jochelson & Kramar, supra note 578 at 301, citing *Labaye* at paras 40-1.

[554] *Ibid* at 302.

[555] *Labaye supra* note 537 at 728.

have been disposed to such conduct, no coercion was present, and other risks of harm minimized.[556] That is, the harms from the perceived inappropriateness were minimized in the instance, but that left intact the notion that the potential for harm to the community from sexual acts was a legitimate limit to constitutional protection.

The standard of harm in all three cases was measured against the "proper functioning of society."[557] This idea parallels the notion of a 'common good' which Young notes arises from impartiality that does not result in justice, but rather can be used to create and entrench oppression.[558] This critique illustrates how harm risks individual protection, by subjecting expression to veiled moral judgments and majoritarian bias (even if implicit).[559]

3.5.2.2 Moral Judgments

The *Butler* test, used in all three cases, does not avoid judicial judgment in assessing limits.[560] Far from being disconnected from moral judgment, the idea of harm inevitably serves moral ends.[561] Young notes that despite attempts to make such judgments impartial, moral judgment is inevitably needed.[562] Moral judgment can seemingly arise in relation to what constitutes harm itself or what constitutes sufficient harm to meet the relevant legal test. This judgment arises in separating what is harmful from the 'merely offensive': that is, what expression is harmful or simply offensive, and similarly, how much offensiveness (and to whom it is offensive) constitutes harm, remain moral judgments.

---

[556] See, *R v Tremblay,* 1993 CanLII 115 (SCC). In contrast, see *R v Mara*, 1997 CanLII 363 (SCC), where the indecent act occurred in a public establishment. See, for commentary: Valverde, *supra* note 494.
[557] *Butler*, *supra* note 315 at 485, *Little Sisters*, *supra* note 88 at para 58; *Labaye supra* note 537 at para 51.
[558] Young, *supra* note 12 at 119. It provides a fiction against which deviance or difference can be compared and made to be 'wrong'.
[559] Jochelson Vacuum, *supra* note 551 at 762
[560] Moon Book, *supra* note 104 at 111-2. Judgment "dressed up in the objective garb of community standards.
[561] Jochelson & Kramar, supra note 578 at 285; Cossman Discipline, *supra* note 34 at 90.
[562] Young, *supra* note 12 at 111-4.

Moral judgments similarly appear in the expressive context in several further forms. First, as noted, harm, rather than dispelling moral judgments, still involves moral judgments: framing sex (particularly queer sex) as bad or shameful drives the conception of harm in these instances.[563] Cossman notes that the Court considers the harm test to be objective because it equally "prohibit[s] all bad sex" as "an equal opportunity censor."[564] And yet, it imposes its own views about what is good sex, and condemns the "marginal sexuality" and labels that act as "bad sex."[565] In particular, using the risk of harm to a voyeur leaves the possibility that such acts will be deemed wrongful and subjected to regulation not based on actual wrongs (i.e. non-consensual acts of sex), but the perceived wrongs. The *Butler* test, and the notion of anti-sociality that runs through it, retains a "conservative sexual morality that sees sex as bad, physical, shameful, dangerous, base, guilty until proven innocent, and redeemable only if it transcends its base nature."[566]

Good sex, in these cases, is not a public act but a private one. As seen with Young, this relegation of sex to the private is the relegation of a matter of the irrational body and feels to the private domain, out of the objective public realm.[567] Sex, on this view, becomes something not to discuss as a matter of constitutional law but left for individuals to sort out privately. In part because of this, queer sexualities (or other non-traditional sexual proclivities) outside of the heteronormative, monogamous domain of the family "remain outside of the sexual morality of legitimate sexual subjects set out in *Butler*."[568] Notably, this treatment of sexuality as a bad thing, or good only in narrow, sterile terms, is discordant with the reality of sex as something pleasurable and fun, and that the act of sex can be central to our individual identities, particularly queer

[563] Jochelson Vacuum, *supra* note 551 at 765, citing Cossman.
[564] Cossman Discipline, *supra* note 34 at 96.
[565] *Ibid* at 91, 93.
[566] Moon Book, *supra* note 104 at 110; Jochelson Vacuum, *supra* note 551 at 750.
[567] Young, *supra* note 12.
[568] Cossman Discipline, *supra* note 34 at 97.

identities.[569] In respect of portrayals of sadomasochistic sex with an element of violence, for example, Cossman argues that the Court ignores the possibility that consent is actually present or that the individual may be enjoying the act. [570] That is, even while participants are acting freely in engaging in violent sadomasochistic sex, the test for obscenity labels it 'bad' sex because of moral judgments. Because it is seen as bad it is seen as harmful, without harm being assessed specifically.

The difficulty here is that individual difference is obscured away: the Court does not hold in mind the individual, but the universal, normal, reasonable person. In taking this abstract view, the doctrine risks disregarding claims from marginalized individuals and communities that their expression is being infringed, or similarly, that the underlying 'bad' or wrong may not be present.[571] The notion of harm, particularly the *risk* of harm relates back to underlying value judgments rather than directly to harm to individuals.[572]

Second, relatedly, the basis of these harms is questionable. Sopinka relied on the "self-evident" harm stemming from the exposure to sexually explicit material that affects attitudes and beliefs,[573] suggesting that such harms are objective and obvious. However, such harms are *subjective* harms.[574] They arise not in relation to an actual injury to an individual, but to the perception that such materials create diffuse, largely moral, harm. Moon notes that the "self-evident" link between pornography and a predisposition to sexual violence is not clearly shown in empirical studies.[575] It is not necessarily a natural fact that depictions of sex are harmful or that

---

[569] *Ibid* at 83, For her, *Little Sisters* challenged "the idea that sexuality is a negative force to be harnessed and controlled, and to assert that it is a positive for to be affirmed and celebrated in all of its diversity."
[570] *Ibid* at 91.
[571] *Ibid* at 96. This may be an overstatement, given that the Court has demonstrated that obscenity might not be found in cases where everyone is a willing observer, see: *R v Tremblay.*
[572] Jochelson & Kramar, supra note 578 at 285.
[573] Moon Book, *supra* note 104 at 115, citing *Butler*, *supra* note 315 at 502.
[574] *Ibid*.
[575] *Ibid* The point for this paper is not to contest whether this link is shown, but rather that treating something 'self-evident' as objective is a fraught notion.

sex itself is harmful.[576] Certainly, it *can* be harmful but assessing what that harm is and how it arises is subject to moral beliefs. Meanings derived from porn (and all communications) differ.[577] For some, pornography and portrayals of sex and nudity represent sinfulness, whereas for others they can represent liberation and empowerment. Suggesting that such harms are 'self-evident' is an ideological assumption.[578] Particularly in contrast to hate speech, for example, where harms are more apparent (at least in my view), the Court has remained staunch in its protection.

Third, moral judgments become even more obvious in conceptualizing the *risk* of harm. Risk is imagined by the judge as a future, potential harm, not one that has manifested.[579] While 'risk of harm' may be perceived or intended to be objective, it still moralizes individual behaviour and imports ideological concerns.[580] In this way, the risk of harm is based on an abstract conception of freedom, autonomy and equality. [581] The judge takes on the role of protecting society from harm by limiting certain kinds of sexual materials.[582] Sex, in Binnie's view in *Little Sisters*, is fine, so long as it does not interfere with the "autonomy … of the unwitting passerby."[583] Determining what that autonomy is, however, enables a judge to relate harm back to vague principles, rather than tying it to harm to individuals.[584] Thus, the analysis comes right back to abstraction and values.

While *Little Sisters* broadened the vision of sexuality, slightly, the Court maintained the delineations between good and bad sex.[585] It kept the danger of committing an "anti-social" act,

---

[576] Here I have in mind consensual sex and its depiction.
[577] Moon Book, *supra* note 104at 121.
[578] That is not to say that this view is not widely shared, but in fact the opposite.
[579] Jochelson & Kramar, *supra* note 578 at 286.
[580] Karaian and Van Meyl, *supra* note 41 at 21, 26; Valverde, *supra* note 494 at 183-4, 194:
[581] Jochelson & Kramar, *supra* note 578 at 299.
[582] *Ibid* at 288.
[583] *Ibid* at 299.
[584] *Ibid* at 285.
[585] Cossman Discipline, *supra* note 34 at 88.

not just the actual act, as tied to harm as "attitudinal harm".[586] That is, witnessing the alleged obscenity may itself warp the psychology or predispositions of individuals, thus justifying regulation. Attitudinal harms, specifically, in relation to voyeurs, shift the analysis away from considerations of direct harm (i.e. to women through the production of pornography), to more "ephemeral kind[s] of harm."[587] The basis of obscenity laws confronted in *Labaye*, for example, was the protection of the public from "conduct that deeply offends them."[588] Because it is based on perceptions of dominant norms and community morality, this harm may be imaginary, existing only within the moral judgment of someone who believes sex is a private act or a reproductive act.[589]

But pause here.

This attitudinal, voyeuristic harm refers not to the harm to someone, directly or deliberately, but to a third-party observation that they (or the community, vaguely defined) might find the particular act offensive. Contrastingly, the Court is reticent to limit hate speech unless it goes well beyond mere offence. That is, the Court is readily willing to limit sexual expression on the basis that it might offend a passer-by, whereas hateful comments directed towards someone that may cause that individual offence (or more) remains protected except in extreme circumstances. The disconnect here, it seems, boils down to questions of the sexual other - the

---

[586] Jochelson & Kramar, *supra* note 578 at 203; Jochelson Vacuum, *supra* note 551 at 761. See, *R v Mara*, particularly para 35-44 for reference to attitudinal harm. There, Sopinka J, writing for a unanimous court, ruled that the performance of mutual masturbation and oral sex in a tavern constituted indecency because it was 'objectively' degrading to women. See: Valverde, *supra* note 494 for discussion.

[587] Cossman Discipline, *supra* note 34 at 92.

[588] *Labaye supra* note 537 at paras 40-1; Jochelson & Kramar, supra note 578 at 301.

[589] Echoes of *Egan* run through here.

notion of the community's tolerance becomes even more pronounced, and the moral judgment more obvious.[590]

Ultimately, it is not the value judgment that is the issue, but how it is arrived at. In *Labaye*, McLachlin noted that value judgment cannot be avoided in the judicial process, but objectivity can be reached by awareness of the dangers of biases, using evidence and context, and articulating and weighing various factors.[591] But this is misleading: a moral judgment is inevitably baked in. Problematically, objectivity cloaks value judgments, rather than making them clear and the reasoning about them open. The idea of harm to the community in the expressive context is just as subjective as other notions of community morality in injecting a majoritarian bias into the analysis.[592]

3.5.2.3 Majoritarian Bias

The idea of "anti-social" conduct constituting a limit on expression is not objective but rather institutes a certain moral conception of normalcy assumed to be universal and, therefore, objective.[593] Harm, defined as "a manner which society formally recognizes as incompatible with its proper functioning",[594] can undermine individual difference and exclude the individual by subjecting one to community morality.[595] Jochelson and Kramar note that the Court seems to believe that "criteria based in harm are firmly connected to "societal norms" and are therefore "objective""[596] They contend that under the guise of objectivity, the risk of harm and the notion

[590] Cossman Discipline, *supra* note 34 at 92-3. Jochelson & Kramar, *supra* note 578 at 289; Jochelson Vacuum, *supra* note 551 at 765.
[591] *Labaye supra* note 537 at para 54.
[592] Valverde, *supra* note 494 at 194.
[593] Jochelson Vacuum, *supra* note 551 at 760-1.
[594] *Butler*, *supra* note 315 at 485.
[595] Young, *supra* note 12 at 98, 105.
[596] Jochelson & Kramar, *supra* note 578 at 299.

of the "proper functioning of society" presumes a certain moral order.[597] The notion of 'community harm' in this way attempted to point to some element of truth or moral safety that exists in the community at large.[598] While such a view is suspicious, even if it were true, deferring to such a method represents a moral view in and of itself.[599] That the majority knows best requires an ideological conception of what politics and law are and ought to be.

At another level, objectivity itself is also a moral viewpoint. That is, that feeling and emotion ought not factor into consideration. Hutchison, for example, argues that the hate ruling in *Whatcott* would be different with a more objective standard that set aside offensiveness and exposed the political nature of Whatcott's claims.[600] Indeed, because Whatcott's statements were political, perhaps limiting them would be detrimental: but this is not an objective analysis. Setting aside the offensiveness of hate speech removes a key part of the debate: because hate speech is offensive, others are negatively impacted. The view that offensiveness ought to be set aside entirely as unworthy of limits is itself a political, ideological view, whether or not one agrees with it.[601] Similarly, relying on the 'illegality' of an act or its harm as "legally recognizable" as the basis for limits[602] also accepts an ideological viewpoint that, among other things, accepts that established law represents just limits. More problematically, it ignores the role of constitutional law in determining what is and is not considered legal.

In *Little Sisters,* the Court referred to the community standard test as being concerned with "harm that rises to the level of being incompatible with the proper functioning of Canadian

---

[597] *Ibid* at 285, 289.
[598] Cossman Discipline, *supra* note 34 at 89 notes that Binnie finds greater safety and tolerance in numbers, thereby upholding a national community standard.".
[599] The marketplace of ideas is a similar metaphor in the context of expressive freedom itself.
[600] Hutchinson, *supra* note 73 at 715.
[601] Simply setting aside the offensiveness is also methodologically problematic as it sets aside a key issue motivating hate speech regulation.
[602] See: e.g. Hutchinson, *supra* note 73 at 710.

society."[603] But what, in fact, is the proper functioning of Canadian society? Bill Whatcott, for example, might consider the proper functioning of Canadian society to not include queer expression. Who determines that his view is not one shared by the community?

The idea of the normal thus represents a "dominant ideological discourse" that risks 'othering' difference.[604] The notion of community standards risks further marginalizing unpopular individuals, not just the queer individual, by importing this majority notion of 'community'. It sets aside the perspective of the victim, as well as the expressor, in favour of some impossibly detached, objective adjudicator.[605] For example, the notion of the risk of harm itself contains heteronormative bias. In the context of the private use exemption and teenage sexting, Karaian and Van Meyl note that risk may be perceived differently by individuals outside the norm. Queer temporalities may differ from heteronormative ones based on the experiences of queer people.[606] These temporalities may be less linear or future-facing than the doctrine assumes, which affects the perception of risk.[607] What is reasonable and unreasonable risk, then, depends on an underlying heteronormative conception of time and meaning.[608] Risk involves judgments about what is bad, a judgment that relates to our experiences and can relate to our ideological commitments.

Binnie's comments in *Little Sisters* evidence this problem. In denying the bookstore a "special standard" on the basis that the existing one unduly punishes queer expression he notes: "The fact is, however, that they operate a public bookstore in a very public place open to anyone who happens by, including potentially outraged individuals of the local community who might

---

[603] Cossman Discipline, *supra* note 34 at 89. See also: *Labaye supra* note 537 at para 52.
[604] Bakan, *supra* note 18at 69
[605] Young, *supra* note 12 at 100.
[606] Karaian and Van Meyl, *supra* note 41 at 27.
[607] *Ibid* at 28.
[608] *Ibid* at 2, they reference Ummni Khan's consideration of *R v JA*, an SCC decision dealing with sadomasochistic behaviour, wherein timing and risk were determined in the views of the Court, divorced from a different perception of risk that might occur in the context of kink.

wish to have the bookstore closed down altogether."[609] Thus, it is through the aggregating of multiple minorities together in the community standards test that the "guarantee of toleration" arises.[610] While the bookstore is in a public place, and someone certainly could walk by who could be 'outraged' by displays of gay sex, suggesting that tolerance is the same for the person outraged by the bookstore and those who may use it, as set out above. It is suspicious whether the concern for the passerby outraged about a display of Sarah J. Maas romance books in the window of a local bookstore would be similarly balancing. The denial of individual difference may not occur in this idealistic notion of a community of tolerance: but that tolerance must first exist.

Pursuing objective harm does not avoid moral judgment and can entrench an ideological and majoritarian moral view that may deepen marginalization. It still requires political and ideological judgments, only now instead of such judgments relating to one's perception of what is 'good', it relates to one's perception of what constitutes 'the community', and what is reasonable, normal, and risky.

3.5.2.4 Harm and the Denial of Difference

The need for objective harm as a limit arises in part because of the abstract conception of expressive freedom. Difference is not accounted for in the conception of freedom because individuals are presumed to be free, so harm is used, as a purportedly objective limit, to address instances where protecting expression seems abhorrent. And because the 'good' of expression is left largely undefined what constitutes a relevant level of harm becomes unclear.[611] For example, discrimination against queer people would seem to only occur on an exceptional basis: thus,

---

[609] *Little Sisters*, *supra* note 88 at para 57.
[610] *Ibid* at 57.
[611] Moon Book, *supra* note 104 at 5.

presumably, it is not worth abrogating a fundamental freedom to address someone's hurt feelings in such rare occasions.

Objective harm (at least through community standards) then denies difference under section 1. While it purports to be objective, and separated from moral judgment, it is not and risks entrenching dominant and majoritarian norms. Cossman argues *Little Sisters* was not just about equality but about "sexual freedom and sexual expression."[612] It was a claim to "the right to be treated the same" but it was also an "assertion of difference" in the form of gay and lesbian sex.[613] While the Court seemingly believed that the community standards test does not render inequality in reality, *Little Sisters* exemplifies how non-heterosexual erotica *was* specifically targeted by government agents, even though those agents may have been behaving badly.[614] The materials were targeted by customs officials because they were queer and *different.*[615] Formal equality under the Charter is an obstacle to freedom for differences: "the Court could not see past sameness to appreciate the importance of the freedom claim" in part because the idea of sameness was entrenched in earlier jurisprudence.[616]

Little Sisters was discriminated against, but the law that enabled this discrimination was formally non-discriminatory. In the hate speech context in *Whatcott*, the harm of two of the anti-queer pamphlets was not sufficient, despite perpetuating stereotypes.[617] Hurt feelings did not constitute enough offence to limit anti-queer expression, and only in the most extreme of instances did Rothstein think discriminatory harm would arise.[618] In contrast, obscenity standards are

---

[612] Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) 40:3 Osgoode Hall LJ 223, online: < digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss3/2> [Cossman Charter] at 240.
[613] *Ibid.*
[614] Karaian, *supra* note 30 at 392 citing *Little Sisters* at para 7.
[615] Cossman Discipline, *supra* note 34 at 79, LS at 121, 124, 154.
[616] Cossman Charter *supra* note 609 at 241.
[617] *Whatcott, supra* note 87 at 7.
[618] *Ibid.*

justified limits on sexual expression because they may offend some people's notions of propriety. Hutchison, an advocate for a strict standard of objective harm, argues that while *Whatcott* would be decided differently and all four pamphlets would be constitutionally protected because the harm was not sufficiently enough to limit the political aspects, the Holocaust denial of *Keegstra* would still establish this requisite level of harm because of the historical background of them.[619] In his view, homophobic rhetoric, however, "does not risk resonating with the masses" because it is "increasingly unacceptable".[620] It is unclear to me on what basis Holocaust denial, which is surely unacceptable and has been for three-quarters of a century, risks resonating with the masses, but homophobic rhetoric does not. Moreover, queer voices are routinely silenced, whereas victims of the Holocaust are, rightfully, given platforms to express their views.[621] Hutchison's view demonstrates that it is not harm that is being addressed but political, and moral, preferences.

It is difficult to see how mere feelings of offence in one instance do not affect the shielding of anti-queer expression and yet justify the potential limitation of queer sexual material in another, based on harm. It is unclear, on an objective standard, on what grounds the harm caused by antisemitic materials is different from the harm caused by homophobic vitriol. It is unclear how one can say that the latter is merely offensive, but that the former, somehow, causes harm. To be clear, there may be good reasons for limiting one and not the other: there may be very good reasons to limit the exposure of children to explicit sex, whether because it harms them directly, or exposes them to views of sex disconnected from reality. There may be very good reasons to limit exposing young men to depictions of sex that perpetuate misogynistic views or (truly) non-consensual sex as ideals. But harm, particularly objective harm, does not accurately encapsulate these reasons, nor

---

[619] Hutchinson, *supra* note 73 710-5.
[620] *Ibid* at 710.
[621] It should also be noted that it is not as if the horrors of the Holocaust were not also borne by queer people, exposing some of Hutchison's ignorance.

does obscuring the ideological debate make the disagreement go away. Rather, it is the suggestion that we can reason about justice in ignorance of morality that becomes problematic.

The problem is not moral judgments: moral judgments are inevitable. Just as sex is not inherently bad, neither is queerness; attempting to universalize either leads to issues. As Young argues, this need for objectivity removes the substance of our moral claims: that is, the experience we have amongst others as feeling beings. It is reasoning about harm in the shadow of a presumption of abstract expressive freedom that we run into problems. Abstracting away from these judgments gets us no closer to justice.

4 Conclusion

I have traversed significant ground in this thesis. I have attempted to trace the difficulties in the abstract doctrine of freedom of expression. Responding to the confused discourse about freedom of expression and the related problems of queer and anti-queer expression and digital regulation, I have argued that the doctrine abstracts from the social and emotional nature of expression itself. In part because of this abstraction, the conception of freedom as non-interference is similarly abstract and divorced from the social conditions that make expression real and valuable for individuals. Resultingly, this broad conception of freedom does not provide an adequate conception of the value of expression nor of expressive freedom, which troubles the articulation of limits: it offers little to answer the question of why some expression can be limited. As seen with the difficulties of an objective harm approach to limits that abstracts from the moral and ideological judgments, focusing instead on oppression would help to centre these inevitable moral judgments on a conception of freedom that matters for the individual experience of expression. The exclusion of violence, in this way, provides an initial foothold to assess expressive freedom as the absence of oppression.

This paper contributes a Canadian critique of freedom of expression rooted in the structure and interpretation of *Charter* protections. More specifically, it looks at freedom of expression and its issues for the digital age from an underutilized queer perspective, engaging tacitly with ongoing debates about digital regulation and inflamed social and legal debates about queer (and antiqueer) expression. Because theoretical conceptions and critiques of ‘free speech’ rights, including the scope and limits of these protections, are largely American, this thesis seeks to provide an additional Canadian perspective. Engaging with existing Canadian literature in critiquing the notions of abstraction and abstract freedom, it explores some of the ways in which this abstraction

affects the practical dimensions of the *Charter* doctrine, with an eye to its interpretation in the public eye. It is this link between legal and common understandings of freedom of expression that this paper's contribution comes through more clearly, as it attends to the experience of expression in a way Canadian constitutional literature largely does not. It is in grounding future work of 'rethinking' where the value of this thesis's problem-identifying approach ultimately lies: before we can build something new, we have to know what we are building.

With an eye on my doctoral work, this thesis aims to ground further examination of freedom of expression on several fronts that are not wholly considered here. For one, it takes for granted the link between constitutional law and the public conception of rights. A deeper understanding of this would solidify (and potentially challenge) subsequent points in this paper, particularly about individual behaviour and moral conceptions stemming from doctrine. Two, exploring the notion of identity, particularly queer identity, and the relationship of expression to that identity would be helpful to ground this conception of freedom of expression more deeply. Three, examining lower court decisions for their interpretation of the SCC's doctrine would clarify how the law works at a more grassroots level. So too would socio-legal work about the use and perception of constitutional doctrine in social discourse. Four, a deeper understanding of how queer expression, specifically, is treated or ignored by the law would help bolster some of the theoretical claims made here. Five, digital expression provides a host of case studies to explore these themes, while also presenting challenges for law itself: exploring specific dimensions of digital expression in greater detail would be fruitful.

At the start of this thesis, I noted two problems: one, the doctrine inadequately answers koan of freedom of expression in 'for me and not for thee', and two, this inadequacy leads to the inadequate protection of individual difference, particularly queerness. As I have attempted to trace

through this thesis, abstraction prevents a full analysis of what freedom of expression, as constitutional protection, ought to protect. That is, the doctrine leaves us with a broad, abstract conception of all expression being presumptively good, and a shaky conception of harm as an exception to equal discourse absent the state. Because the abstraction does not provide a clear conception of expression and expressive freedom, the reasons *why* expression and expressive freedom are valuable for the individual and deserving of constitutional protection are obscured. The scope becomes overbroad, protecting objectionable expression. The broad protection that emerges overprotects anti-queer expression, which risks subjecting queer people to its vitriol and derision. Depending largely on external limits under section 1 to address this overprotection, however, is fraught with issues. Harm, in the expressive context, risks imposing majoritarian, moral judgments on marginalized expression, despite purporting to avoid this very thing through the idea of universality and normal social functioning.

What emerges from this abstract conception of freedom of expression leads to profoundly different effects on the experience of expressive freedom for marginalized individuals and for those who seek to further marginalize them. Disconnecting the conception of expressive freedom from reality and our experiences as different, expressive individuals leaves us with an empty understanding of expressive freedom as an essential part of being human, resulting in inadequate constitutional protection for our individuality. We cannot rely on the existing doctrinal understanding to shape our views of what we can and cannot say. Particularly in the digital age, this conception poses a problem. Our social conditions have shifted, as have our understandings of harm. In part because digital expression occurs in a space disconnected from our physical body, we have started to recognize how expression can affect the individual beyond direct violence or coercion of the state. No longer are we in the 1980s and the early days of the *Charter*, where

hockey helmets were new, gay marriage was illegal, and therapy was stigmatized as the domain of criminals and degenerates.

To address issues of queer and digital expression, constitutional law must go beyond abstract principles. If our goal is to live "without fear of censure" as articulated by Dickson CJ in *Irwin Toy* 35 years ago,[622] we ought to understand why we fear censure. We need to understand that this fear comes not only from the state but from other sources as well. We ought to protect expressive freedom from oppressive forces that impact the lived experiences of individuals,[623] recognizing not only our experiences of our world but how our experiences have shifted with the dominance of the internet in our lives. What is needed is a consideration of the activity in its specific form, rather than references to abstract ideas like harm and risk.[624] This conception must attend to the subjective nature of selfhood and expression. For it is in this subjectivity that the precious nugget of value of expression lies. If we forget about this value—this good—our doctrine struggles to see the wrongs and the threats to expressive freedom. If we forget about what is good about expression, we will fail to see the wrong. If we fail to see the wrong or ignore it for abstraction, we will continue to miss important claims of injustice, and risk heightening our already polarized discourse.

Constitutional law ought to, ultimately, make life better for individuals. In Young's view, the abstraction of impartiality can be challenged as a concept of justice by seeing the "heterogeneous public that acknowledges and affirms group differences."[625] Our consideration of expression should shift away from the universalist ideals of rights and move to "exhibit the

[622] *Irwin Toy*, *supra* note 139 at 970.
[623] Franks Avatars, *supra* note 112 at 228.
[624] Karaian and Van Meyl, *supra* note 41 at 30.
[625] Young, *supra* note 12 at 10.

positivity of group differences, passion, and play."[626] In this way, constitutional law ought not aspire to grand principles as end goals, but rather use them to guide our law towards a society of equality and justice. Prioritizing principles over justice as a lived experience turns this pursuit on its head. Should we wish to ensure law respects us, and enables us to be free, we ought to recognize the blurriness that constitutional questions contain, not abstract away from them.

We need a conception of constitutional protection that is clear in understanding, even if that means sacrificing some clarity of principle. That is, the conception needs to align with what it actually means to be free to express ourselves amidst a society of equals. We need to foster constitutional protection of disagreement, dissent, and unpopularity, but we do not have to tolerate the protection of hatred or diminution of others within our idea of freedom. The point is not to eliminate objections, but to ensure objections are heard and respected. The point of freedom of expression is that *everyone* must be free to express.

[626] *Ibid* at 97.

5 Bibliography

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

JURISPRUDENCE

Baier v Alberta, 2007 SCC 31.
Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30.
Canadian Broadcasting Corp v New Brunswick (Attorney General), 1996 CanLII 184 (SCC)
Committee for the Commonwealth of Canada v Canada, 1991 CanLII 119 (SCC)
Edmonton Journal v Alberta (Attorney General), 1989 CanLII 20 (SCC)
Egan v Canada, 1995 CanLII 98 (SCC)
Grant v Torstar Corp, 2009 SCC 61
Greater Vancouver Transportation Authority v Canadian Federation of Students, 2009 SCC 31.
Hansman v Neufeld, 2023 SCC 14.
Hill v Church of Scientology of Toronto, 1995 CanLII 59 (SCC).
Irwin Toy Ltd v Quebec (Attorney General), 1989 CanLII 87 (SCC).
Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69.
Montréal (City of) v 2952-1366 Québec Inc, 2005 SCC 827.
Native Women's Assn of Canada v Canada, 1994 CanLII 27 (SCC).
R v Big M Drug Mart Ltd, 1985 CanLII 69 (SCC).
R v Butler,1992 CanLII 124 (SCC).
R v Keegstra, 1990 CanLII 24 (SCC).
R v Khawaja, 2012 SCC 69.
R v Labaye, 2005 SCC 80.
R v Mara, 1997 CanLII 363 (SCC).
R v Tremblay, 1993 CanLII 115 (SCC)
R v Zundel, 1992 CanLII 75 (SCC).
Rainbow Alliance Dryden et al v Webster, 2023 ONSC 7050.
RJR-MacDonald Inc v Canada (AG), 1995 CanLII 64 (SCC).
Rocket v Royal College of Dental Surgeons of Ontario, 1990 CanLII 121 (SCC).
RWDSU v Dolphin Delivery Ltd, 1986 CanLII 5 (SCC).
Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11.
Thomson Newspapers Co. v Canada (Attorney General), 1998 CanLII 829 (SCC).
Toronto (City) v Ontario (Attorney General), 2021 SCC 34.
Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse), 2021 SCC 43.

SECONDARY SOURCES: ARTICLES

Altman, Andrew "Legal Realism, Critical Legal Studies, and Dworkin" (1986) 15:3 Phil & Pub Affairs 205.

Ashley, Florence "Don't Be So Hateful: The Insufficiency of Anti-Discrimination And Hate Crime Laws In Improving Trans Well-Being" (2018) 68:1 UT L J 1, doi: <10.3138/utlj.2017-0057>.

Bakan, Joel, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: Univ. of Toronto Press, 1997).

Banovic, Damir "Queer Legal Theory" in Dragica Vujadinović, Antonio Álvarez Del Cuvillo & Susanne Strand, eds, *Feminist Approaches to Law: Theoretical and Historical Insights* Gender Perspectives in Law (Springer International Publishing, 2023)

Barlow, John Perry "A Declaration of the Independence of Cyberspace" (1996) (published 20 January 2016), online: *Electronic Frontier Foundation* <eff.org/cyberspace-independence>

Berlin, Isaiah "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118.

Bhagwat, Ashutosh & James Weinstein, "Freedom of Expression and Democracy" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 82.

Brettschneider, Corey "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion" (2010) 8:4 Perspectives Pol 1005, doi: <10.1017/S1537592710003154>.

Brison Susan J & Katharine Gelber, eds, *Free Speech in the Digital Age* (New York: Oxford University Press, 2019).

Brown, Alexander, "What is so Special About Online (as Compared to Offline) Hate Speech?" (2018) 18:3 Ethnicities 297, doi: <10.1177/1468796817709846>.

Brown, Alexander, “Averting Your Eyes in the Information Age: Online Hate Speech and the Captive Audience Doctrine” (2017) 12:1 Charleston L Rev 1.

Cameron, Jamie “The First Amendment and Section 1 of the Charter” (1990) 1 Media & Comm L Rev 59

Cameron, Jamie, “A Reflection on Section 2(b)’s Quixotic Journey, 1982-2012” (2012) 58:1 SCLR 163, doi: <10.60082/2563-8505.1252>.

Cameron, Jamie, “Abstract Principle v. Contextual Conceptions of Harm: A Comment on R v Butler” (1992) 37 McGill LJ 1135.

Cameron, Jamie, “Big M’s Forgotten Legacy of Freedom” (2020) Osgoode Leg Stud Research Paper, doi: <10.2139/ssrn.3659471>.

Cameron, Jamie, “Freedom of Expression and the Charter: 1982-2022” (2023) Centre for Free Expression. Blog: <cfe.torontomu.ca/blog>.

Cameron, Jamie, “Renewing Freedom of Expression, Part Two: From the Contextual Approach to Proportionality Balancing” (2023) SCLR (forthcoming), SSRN: <ssrn.com/abstract=4342708>.

Cameron, Jamie, “Resetting the Foundations: Renewing Freedom of Expression Under Section 2(b) of the Charter” (2022) 105:2d SCLR 120.

Cameron, Jamie, “The First Amendment and Section 1 of the Charter” (1990) 1 Media & Comm L Rev 59.

Citron, Danielle Keats & Jonathon W Penney, “When Law Frees Us to Speak” (2019) 87:6 Fordham L Rev 2317.

Citron, Danielle Keats & Mary Anne Franks, “The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform” (2020) 2020:3 U Chicago Leg Forum 45.

Citron, Danielle Keats & Neil M Richards, “Four Principles for Digital Expression (you Won’t Believe #3!)” (2018) 95 Wash U L Rev 1353.

Citron, Danielle Keats, “Cyber Civil Rights” (2009) 89:1 Boston U L Rev 61.

Citron, Danielle Keats, “Law’s Expressive Value in Combating Cyber Gender Harassment” (2009) 108 Mich L Rev 373.

Cossman, Brenda “#MeToo, Sex Wars 2.0 and the Power of Law” (2019) 3 Asian YB Human Rights & Humanitarian L 18, doi:<10.1163%2F9789004401716_003>.

Cossman, Brenda, “Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler” (2003) 36 UBC L Rev 77.

Cossman, Brenda, “Gender Identity, Gender Pronouns, And Freedom Of Expression: Bill C-16 And The Traction Of Specious Legal Claims” (2018) 68:1 UTLJ 37.

Cossman, Brenda, “Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms” (2002) 40:3 Osgoode Hall LJ 223, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss3/2> [Cossman 2002].

Cossman, Brenda, “Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)” (2019) 6:1 Critical Analysis L 23, doi: < 10.33137/cal.v6i1.32562>.

Cossman, Brenda, “When Queer Theory Goes to Law School” in *The Oxford Handbook Of Feminism And Law In The United States* (New York: Oxford University Press, 2023).

D’Orazio, Dax, “Free Expression Walks into a Bar: The Case of Mike Ward and the Future of Canadian Comedy: Part 1”, *Centre for Free Expression* online: <cfe.torontomu.ca/blog/2022/03/free-expression-walks-bar-case-mike-ward-and-future-canadian-comedy-part-1>.

Da Silva, Michael, “Positive Charter Rights: When Can We Open the ‘Door?’” (2021) 58:3 Osgoode Hall LJ 669, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol58/iss3/4>

Danaher, John “Virtual Reality and the Meaning of Life” in Iddo Landau, ed, (final draft for Oxford Handbook of Meaning in Life).

Delgado, Richard “The Inward Turn in Outsider Jurisprudence” (1993) 34:3 William & Mary L Rev 741.

Delgado, Richard & Jean Stefancic, “Hate Speech in Cyberspace” (2014) 49:2 Wake Forest L Rev 319.

Diaz, Angel & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation* (New York: Brennan Center for Justice at NYU School of Law, 2021).

Elliot, Robin, “Back To Basics: A Critical Look at the Irwin Toy Framework for Freedom of Expression” (2011) 15:2 Rev Const Stud 205.

Elliot, Robin, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I - Taking Stock" (2012) 59 Sup Ct Rev 435.

Feldman, Stephen M “Postmodern Free Expression: A Philosophical Rationale for the Digital Age” (2017) 100:4 Marquette L Rev 1123.

Franks, Mary Anne & Ari Ezra Waldman, “Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions” (2019) 78:4 Maryland L Rev 892.

Franks, Mary Anne, "Fearless Speech" (2018) 17 First Amendment L Rev 294.
Franks, Mary Anne, "Beyond the Public Square: Imagining Digital Democracy" (2021) 131 Yale LJ Forum 427.
Franks, Mary Anne, "Freedom of Speech, Power, and Democracy: Freedom From Speech" (2022) 20 Geo J L & Pub Pol'y 865
Franks, Mary Anne, "How the Internet Unmakes Law" (2020) 16:1 Ohio St Tech L J 10.
Franks, Mary Anne, "The Lost Cause of Free Speech" (2022) 2 J Free Speech L 337.
Franks, Mary Anne, "Unwilling Avatars: Idealism and Discrimination in Cyberspace" (2011) 20:2 Columbia J Gender & L 224.
Gelber, Katharine "Speaking Back" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech*, (Oxford: Oxford University Press, 2021) 249.
Hutchison, Camden, "Freedom of Expression: Values and Harms" (2023) 60:3 Alta L Rev 687
Jochelson, Richard "After *Labaye*: The Harm Test of Obscenity, the New Judicial Vacuum, and the Relevance of Familiar Voices" (2009) 46:3 Alta L Rev 741, doi: <10.29173/alr224>.
Jochelson, Richard & Kirsten Kramar, "Governing through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada after R. v. Labaye 2005" (2011) 36:4 Can J Soc 283.
Kalogiannides, Andreas "What I'd Do Differently: Peter Hogg" *Juste* (1 April 2015) online: <oba.org/JUST/Features_List/2015/What-Id-do-Differently-Peter-Hogg?lang=fr-ca>.
Karaian, Lara "The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law" in Martha Albertson Fineman, Jack E Jackson & Adam P Romero, eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge, 2016)
Karaian, Lara "Troubling the Definition of Pornography: Little Sisters, a New Defining Moment in Feminists' Engagement with the Law?" (2005) 17:1 CJWL 117, doi: <10.1353/jwl.2006.0011>.
Karaian, Lara & Dillon Brady, "Revisiting the 'Private Use Exception' to Canada's Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age" (2019) 56:2 Osgoode Hall LJ 301, doi: <10.60082/2817-5069.3483>.
Karaian, Lara & Katherine Van Meyl, "Reframing Risqué/Risky: Queer Temporalities, Teenage Sexting, and Freedom of Expression" (2015) 4:1 Laws 18, doi: <10.3390/laws4010018>.
Laidlaw, Emily B "Private Power, Public Interest: An Examination of Search Engine Accountability" (2009) 17:1 Intl JL & IT 113: doi: <10.1093/ijlit/ean018>.
Laidlaw, Emily, "Technology-Facilitated Mind Hacking: Protection of Inner Freedoms in Canadian Law" (2024) Policy Brief No. 5, Centre for International Governance Innovation, online: <cigionline.org/static/documents/FoT_PB_no.5.pdf>Moon, Richard, "The Scope of Freedom of Expression" (1985) 23:2 Osgoode Hall Law Journal 331, online: < digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss2/5>.
Lamble, Sarah, "Queer Theory and Socio Legal Studies" in Mariana Valverde et al, eds, *Routledge Handbook of Law and Society* (Routledge, 2021).
Lepoutre Maxime Charles, "Can 'More Speech' Counter Ignorant Speech?: Tackling the Stickiness of Verbal Ignorance" (2019) 16:3 J Ethics & Soc Phil 155.
Lepoutre, Maxime "Hate Speech Laws: Expressive Power Is Not the Answer" (2019) 25:4 Leg Theory 272.
Loidolt, Sophie, "Order, Experience, and Critique: The Phenomenological Method in Political and Legal Theory" (2021) 54:2 Cont Philos Rev 153.
Macfarlane, Emmett "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 35.
Macfarlane, Emmett ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022).
Mackenzie, Catriona & Denise Meyerson, "Autonomy and Free Speech" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 61.
Mathen, Carissima "Regulating Expression on Social Media" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 91.
McCormick, Conor "Freedom of Speech: A Pernicious Shroud for Homophobia" (2014) 5:1 King's Student L Rev 30
Moon, Richard, "Does Freedom of Expression Have a Future?" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 15.
Moon, Richard, "The Social Character of Freedom of Expression" (2009) 2:1 Amsterdam L Forum 43.
Moon, Richard, "What Happens When the Assumptions Underlying Our Commitment to Free Speech No Longer Hold?" (2019) 28:1 Const Forum 1, doi: <10.21991/cf29373>.
Moon, Richard, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000)
Nelson, Maggie *On Freedom: Four Songs of Care and Constraint* (London: Random House, 2021).

Oliphant, Benjamin J., "Positive Rights, Negative Freedoms, and the Margins of Expressive Freedom" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 130.
Penney, Jonathon W "Understanding Chilling Effects" (2022) 106 Minn L Rev 1451.
Raz, Joseph "Free Expression and Personal Identification" (1991) 11 Oxford J Leg Stud 303.
Satokhina, Natalia & Yulia Razmet, "'The Loss of Experience' in Digital Age: Legal Implications" (2021) 20 Phenomenology & Mind 128, doi: <10.17454/pam-2011>.
Sciullo, Nick J "Queer Phenomenology in Law: A Critical Theory of Orientation" (2019) 39:2 Pace L Rev 667, doi: 1<0.58948/2331-3528.2000>.
Sethi, Chanakya, "Beyond Irwin Toy: A New Approach to Freedom of Expression Under The Charter" (2012) 17 Appeal 21–45.
Shiffrin, Seana Valentine, "Methodology in Free Speech Theory" (2011) 97:3 Va L Rev 549.
Shiffrin, Seana Valentine, "A Thinker-Based Approach to Freedom of Speech" (2011) 27 Const Commentary 283.
Shiffrin, Seana Valentine, *Speech Matters: On Lying, Morality, and the Law* (Princeton: Princeton University Press, 2014)
Slattery, Brian, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51:10 SCLR 245.
Søraker, Johnny Hartz "How shall I compare thee? Comparing the prudential value of actual and virtual friendship" (2012) 14 Ethics Inf Technol 209 at 216).
Søraker, Johnny Hartz "Virtual Worlds and their Challenge to Philosophy: Understanding the 'Intravirtual' and the "Extravirtual'" (2012) 43:4 Metaphilosophy 499.
Sultany, Nimer "What Good is Abstraction? From Liberal Legitimacy to Social Justice" (2019) 67 Buff L Rev 823.
Taylor, Charles, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985) 187.
Taylor, Charles, "What's Wrong with Negative Liberty" in *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985) 211.
Unger, Roberto Mangabeira "The Critical Legal Studies Movement" (1983) 96:3 Harvard L Rev 561.
Valdes, Francisco "Afterword & Prologue: Queer Legal Theory" 83:1 Cal L Rev 344.
Valverde, Mariana, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8:2 Soc & Leg Stud 181, online: <journals.sagepub.com/doi/10.1177/096466399900800202>
Waldman, Ari Ezra, "Disorderly Content" (2022) 97 Wash L Rev 907.
Webber, Grégoire "Proportionality and Limitations on Freedom of Speech" in Adrienne Stone & Frederick Schauer, eds, *Oxford Handbook Of Freedom of Speech* (Oxford: Oxford University Press, 2021)
Webber, Grégoire C N "What Oakes could have said (or how else to read a limitations clause)" (2023) 112:2d SCLR 61 (forthcoming), doi: <10.2139/ssrn.4214646>.
Weinrib, Jacob, "What is the Purpose of Freedom of Expression?" (2009) 67:1 UT Fac L Rev 165.
Weinstein, James, "Cyber Harassment and Free Speech: Drawing the Line Online" in Susan J Brison & Katharine Gelber, eds, *Free Speech in the Digital Age* (New York: Oxford University Press, 2019) 52.
Weinstein, James, "Participatory Democracy as the Central Value of American Free Speech Doctrine" (2011) 97:3 Va L Rev 491.
Whitten, Suzanne, "Recognition, Authority Relations, and Rejecting Hate Speech" (2019) 22 Ethical Theory & Moral Practice 555, doi: </10.1007/s10677-019-10003-z>.
Williams, Susan H "Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech" (2011) 27:2 Const Commentary 399.
Young, Hilary, "Hansman v Neufeld: The Supreme Court of Canada protects counterspeech under anti-SLAPP law, but is it even defamatory?" (2023) 15:2 J Media L 125, doi: <10.1080/17577632.2023.2288395>. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).
Zwibel, Cara Faith, "Reconciling Rights: The Whatcott Case as Missed Opportunity" (2013) 63:1 SCLR: Osgoode's Annual Constitutional Cases Conference, doi: < 10.60082/2563-8505.1272>.

MISC SECONDARY SOURCES

Bennett, Dean, "Alberta premier accuses Facebook of censorship over temporary site restriction" *CBC News* (15 June 2023), online: <cbc.ca/news/canada/calgary/danielle-smith-alberta-premier-1.6878438>
Bruch, Tim Brendan Ellis, "Danielle Smith facing federal criticism after participating in Alberta Tucker Carlson events" CTV News Calgary (25 Jan 2024), online: <calgary.ctvnews.ca/danielle-smith-facing-federal-criticism-after-participating-in-alberta-tucker-carlson-events-1.6742272>.

Canadian Heritage, *Proposed Bill to address Online Harms,* (04 April 2024), online: <canada.ca/en/canadian-heritage/services/online-harms.html>

Criddle, Cristina "Transgender users accuse TikTok of censorship" *BBC News* (12 Feb 2020) online: <bbc.co.uk/news/technology-51474114>.

Dietzel, Christopher et al, "Queerphobic hate is on the rise, and LGBTQ+ communities in Canada need more support" *News@York* (27 Oct 2023), online: <yorku.ca/news/2023/10/27/queerphobic-hate-is-on-the-rise-and-lgbtq-communities-in-canada-need-more-support;>

Egale Canada, "Brief on Statistics Canada Hate Crimes Report" (2022), online: <egale.ca/wp-content/uploads/2022/04/Brief-on-Statistics-Canada-Hate-Crimes-Report-2.pdf>

Fox, Chris, "TikTok admits restricting some LGBT hashtags" *BBC News* (10 Sept 2020) online: <bbc.co.uk/news/technology-54102575>.

French, Janet, "Alberta premier says legislation on gender policies for children, youth coming this fall", *CBC News* (1 February 2024), online: <cbc.ca/news/canada/edmonton/danielle-smith-1.7101595>.

Hempel, Rosanna "Winnipeg drag queens, cafe face alleged online harassment, threats ahead of drag story time" *Global News* (23 Oct 2022), online: <globalnews.ca/news/9220283/drag-story-time-cafe-protest>.

Iovine, Anna, "Is Instagram shadowbanning LGBTQ and sex ed accounts?" *Mashable*, (1 Sept 2023) online: <mashable.com/article/instagram-shadowbanning-lgbtq-sex-educator-accounts>.

Jaffray, Brianna "Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018" *Canadian Centre for Justice and Community Safety Statistics* (9 Sept 2020), online: <150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00009-eng.html>.

Johnson, Lisa, "Westlock bans Pride flags, rainbow crosswalks after plebiscite" *Edmonton Journal*, 23 Feb 2024, online: <edmontonjournal.com/news/politics/westlock-alberta-citizens-vote-to-banish-rainbow-sidewalk>.

Legal Information Institute, "Critical Legal Theory" Cornell Law School (Aug 2022) online: <law.cornell.edu/wex/critical_legal_theory - :~:text=Proponents of CLS believe that, and disadvantages the historically underprivileged>.

Leonid Sirota, "We were a vote away from devastating our free-speech rights" *The Line* (16 Nov 2021), online: <readtheline.ca/p/leonid-sirota-we-were-four-votes>.

Lorenz, Taylor, "Meta is failing to curb anti-trans hate, new report says" *The Washington Post*, (27 Mar 2024) online: <washingtonpost.com/technology/2024/03/27/meta-glaad-report-released/>; CITING: GLAAD, "Unsafe: Meta Fails to Moderate Extreme Anti-trans Hate Across Facebook, Instagram, and Threads" *GLAAD* (2024), online: < glaad.org/smsi/report-meta-fails-to-moderate-extreme-anti-trans-hate-across-facebook-instagram-and-threads/>

McGinn, Dave "Anti-gay activists target children's libraries and drag queen story hours" *The Globe and Mail* (11 Mar 2023), online: <theglobeandmail.com/canada/article-anti-gay-activists-target-childrens-libraries-and-drag-queen-story>.

Queer Events, "Protests, riots, raids timeline" online: <queerevents.ca/classification-tags/protest-riots-raids>

Sirota, Leonid, "The Woke Dissent" (2 November 2021), *Double Aspect*, online (blog): <doubleaspect.blog/2021/11/02/the-woke-dissent>.

Smith, Danielle, "Free speech means you don't just have to talk to the mainstream media" (25 Jan 2024), online: <x.com/ABDanielleSmith/status/1750314605316833396>.

Woolf, Marie, "Online harms bill's proposed changes risk silencing free speech, experts warn" *The Globe and Mail* (23 Feb 2024), online: <theglobeandmail.com/politics/article-online-harms-bills-proposed-changes-risk-silencing-free-speech-experts/>.