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Freedom of Expression: Values and Harms

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FREEDOM OF EXPRESSION: VALUES AND HARMS

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When considering restrictions on socially disfavoured expression, the Supreme Court of Canada has often considered the targeted expression's "value." In the seminal cases of Ford v. Quebec *and* Irwin Toy Ltd. v. Quebec, *the Supreme Court articulated the importance of expressive freedom by relating it to three core values: (1) seeking and attaining the truth; (2) participation in democratic institutions; and (3) diversity in forms of individual self-fulfillment. Subsequent cases considering restrictions on expression have evaluated the extent to which the targeted expression advances these values. Ironically, although* Ford *and* Irwin Toy *embraced a broad conception of expressive freedom, the Supreme Court has used the values analysis developed in these cases to justify limiting disfavoured expression. As applied to marginalized ideas, the Supreme Court has tailored its balancing test under* R. v. Oakes *such that expression found to be "distant from the core of free expression values" is granted little protection under the* Canadian Charter of Rights and Freedoms. *Under this test, legal restrictions on hate speech, obscenity, and other forms of disfavoured expression have been upheld based on the Supreme Court's low assessment of the value of the underlying expression.*

This article argues that although certain forms of expression may be validly restricted under the Charter, *the Supreme Court's practice of assessing the value of targeted expression when applying the* Oakes *test is both politically illegitimate and vulnerable to error. This practice should be abandoned in favour of an alternative application of* Oakes *that balances (1) the severity of the restriction against (2) the harm of the targeted expression. Under this analysis, the value of the expression is not a factor because all expression is considered equally valuable. This approach adopts a relativistic perspective on the value of free expression and denies the ability of courts to mediate absolute truth. According to this view, the only characteristic of targeted expression that may justify its restriction is its likelihood to cause harm, a question more susceptible to judicial determination than its underlying value. The impetus for my argument is that, as applied, the Supreme Court's values analysis inevitably imposes political preferences onto* Charter *interpretation. A more politically-neutral framework would be more consistent with section 2's unqualified protection of "thought, belief, opinion and expression," as well as section 1's concern for "a free and democratic society."*

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I. INTRODUCTION

Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees "freedom of thought, belief, opinion and expression."[1] Pursuant to section 1, this guarantee is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[2] The Supreme Court of Canada has considered the meaning of section 1 for freedom of expression under the proportionality analysis established by *R. v. Oakes*.[3] To satisfy the *Oakes* test, a restriction on a *Charter* right or freedom must meet two criteria: First, the legislative objective must relate to societal concerns that are "pressing and substantial."[4] Second, the specific restriction must: (1) be rationally connected to its objective; (2) impair the *Charter* right as little as possible; and (3) be proportional in its effects.[5]

When applying this test to legal restrictions on socially disfavoured expression, the Supreme Court has often considered the targeted expression's "value."[6] In the seminal cases of *Ford v. Quebec (Attorney General)*[7] and *Irwin Toy Ltd. v. Quebec (Attorney General)*,[8] the Supreme Court articulated the importance of free expression by relating it to three core values: (1) seeking and attaining the truth; (2) participation in democratic institutions; and (3) diversity in forms of individual self-fulfillment.[9] Subsequent cases considering restrictions on expression have evaluated the extent to which targeted expression advances these values.[10] Ironically, although *Ford* and *Irwin Toy* embrace a broad conception of expressive freedom, the Supreme Court has used the values analysis developed in these cases to justify limiting disfavoured expression. As applied to marginalized ideas, the Supreme Court has tailored the *Oakes* test such that expression found to be "distant from the core of free expression values" is afforded little protection under section 1.[11] Thus, legal restrictions on several categories of disfavoured expression have been upheld based on the Supreme Court's low assessment of the value of the underlying expression.

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1 *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
2 *Ibid*, s 1.
3 [1986] 1 SCR 103 [*Oakes*].
4 *Ibid* at 138–39.
5 *Ibid* at 139.
6 *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at 943–44 (the value of the expression is a contextual factor in the Supreme Court's section 1 analysis); *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 [*Edmonton Journal*] (contextual approach to freedom of expression was first established).
7 [1988] 2 SCR 712 [*Ford*].
8 [1989] 1 SCR 927 [*Irwin Toy*].
9 *Ford*, *supra* note 7 (these values were introduced); *Irwin Toy*, *ibid* (applied to content-based restrictions); see also *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 [*Rocket*]. See also Thomas I Emerson, "Toward a General Theory of the First Amendment" (1963) 72:5 Yale LJ 877 (where the values originally derive from).
10 *R v Keegstra*, [1990] 3 SCR 697 at 772 [*Keegstra*] (the Supreme Court deemed expression that advances these values only minimally to be "low value" expression).
11 *Ibid* at 787.

This article argues that although certain forms of expression may be validly restricted under section 1, the Supreme Court's practice of assessing the value of targeted expression when applying the *Oakes* test is both politically illegitimate and vulnerable to error. This practice should be abandoned in favour of an alternative application of *Oakes* that balances (1) the severity of the restriction against (2) the harm of the targeted expression. Under this analysis, the value of the expression is not a factor because all expression is considered equally valuable. This approach adopts a relativistic perspective on the value of free expression and denies the ability of courts to mediate absolute truth. Under my proposal, the only characteristic of targeted expression that may justify its restriction is its likelihood to cause harm, a question more susceptible to judicial determination than its underlying value. The impetus for my argument is that, as applied, the Supreme Court's values analysis inevitably imposes political preferences onto *Charter* interpretation.[12] A more politically-neutral framework would be more consistent with section 2(b)'s unqualified protection of "thought, belief, opinion and expression,"[13] as well as section 1's concern for "a free and democratic society."[14]

In rejecting the Supreme Court's values analysis, this article proposes an alternative application of *Oakes* specific to section 2(b). To summarize, my proposal would operate as follows: First, *Oakes*' initial requirement that the governmental objective "relate to concerns which are pressing and substantial"[15] should remain deferential. Any serious, non-pretextual objective should clear this initial hurdle. The "rational connection" prong of *Oakes*' proportionality analysis should also be deferential; as a general matter, courts should defer to legislatures regarding the selection and design of public policy.[16] The second and third prongs of the proportionality analysis should be more exacting, however, and should eschew interrogation of the value of the targeted expression. Crucially, in cases where the government specifically targets disfavoured expression, the requirement that the restriction impair freedom of expression "as little as possible" should be unaffected by the court's assessment of the expression's relationship to "[section] 2(b) values."[17] In other words, the seriousness of the impairment for purposes of section 1 should be determined independently of the targeted expression's content. Finally, the "proportional effects" prong should be a cost-benefit analysis balancing (1) the severity of the restriction on freedom of expression against (2) the effectiveness of the restriction in preventing tangible harm.[18] The crux of my proposal is that at no point should courts assess the value of targeted expression, an inherently subjective and idiosyncratic exercise. Although disfavoured expression may be validly restricted under section 1, it should *only* be restricted on the basis of harmful consequences.

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12 By "political preferences," I do not mean narrow partisan concerns, but fundamental normative assumptions regarding the limits of expressive freedom.

13 *Charter*, *supra* note 1, s 2(b). Although section 2(b) is obviously qualified by section 1, the language of section 2(b) itself excludes no expression from its protection; *Keegstra*, *supra* note 10, McLachlin J, dissenting ("[section 2(b)] is a very broad guarantee, and all expression is *prima facie* protected" at 807).

14 *Charter*, *ibid*, s 1. My argument assumes that "harm," unlike value, is an objective concept. I address the objection that harm is itself subjective in Part III.B, below.

15 *Oakes*, *supra* note 3 at 138–39.

16 Thus, under my proposal, the "pressing and substantial" standard and the "rational connection" prong of *Oakes*' (*ibid*) proportionality analysis are not significantly different from existing jurisprudence.

17 See e.g. *Keegstra*, *supra* note 10.

18 The likelihood of preventing harm is directly related to the harm of the expression. Thus, more dangerous expression can be subject to greater regulation.

The premise of this article is not that truth seeking, democracy, and individual self-fulfillment are unimportant. Rather, my argument is that these values have proven impossible to apply objectively. This inherent subjectivity is clearest in the Supreme Court's hate speech jurisprudence, but it appears across a range of cases addressing restrictions on expressive conduct — what Robin Elliot has referred to as "standard or typical" section 2(b) cases.[19] Drawing on a relativistic theory of truth, my argument casts scepticism on the ability of courts to objectively determine the value of individual expression. I argue that risk of harm is far more relevant to constitutionally valid restrictions — though I acknowledge that a harm-based approach presents its own problems of subjectivity.[20] These difficulties notwithstanding, focusing on harm reduces the danger of judges imposing their *own* values. By centring section 1 analysis on likelihood of harm, courts can clarify and strengthen section 2(b) protections, while continuing to allow the restriction of truly harmful expression.

In critiquing the Supreme Court's values analysis, this article focuses primarily on hate speech jurisprudence, as articulated in the landmark cases of *Keegstra*,[21] *Taylor*, and *Saskatchewan (Human Rights Commission) v. Whatcott*.[22] However, my arguments apply equally to obscenity, libel, and other forms of "low value" expression.[23] My subject matter focus stems not from a desire to defend hate speech, but rather from concern for the difficult challenges that hate speech poses for freedom of expression.[24] As one of the most extreme forms of speech — entailing real potential for tangible harm — hate speech imposes a serious test of constitutional values.[25] It is also an issue of particular topical relevance; as of this writing, the federal government is considering unprecedented regulation of harmful expression.[26] In an era of shifting opinion regarding acceptable restrictions on speech,[27]

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19 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 209–10 (distinguishes "standard or typical" section 2(b) cases from cases involving compelled expression, government action to facilitate expression, or disputes over public access to government (or private) property for expressive purposes).

20 See Part III.B, below.

21 *Keegstra*, *supra* note 10. See also *R v Andrews*, [1990] 3 SCR 870 [*Andrews*] is a companion case to both *Keegstra* and *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 [*Taylor*]. The Supreme Court's reasons in *Andrews* simply reference the reasons in *Keegstra*.

22 2013 SCC 11 [*Whatcott*].

23 An earlier version of this article addressed these broader issues, specifically including the Supreme Court's decisions in *R v Butler*, [1992] 1 SCR 452 [*Butler*] and *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69. In the interests of scope and length, I ultimately decided to exclude these cases, though I may return to them in future research.

24 *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 [*Ward*] (freedom of expression, by its nature, fosters speech that is "unpopular, offensive or repugnant" at para 60).

25 Emmett Macfarlane, "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 35 [Macfarlane, *Dilemmas*] (a nuanced discussion of the harms of hate speech and the difficulty of addressing them through law).

26 Three bills regulating online communication have been introduced in the current Parliament: Bill C-11 would bring internet content within the purview of the Canadian Radio-Television and Telecommunications Commission under the *Broadcasting Act*; Bill C-18 would require search engines and social media platforms to compensate legacy news organizations for links to their articles; and, most significantly, Bill C-261 would reinstate a revised form of section 13 of the *Canadian Human Rights Act*, which was itself repealed in 2014. Among other things, this bill would grant the Human Rights Commission authority to suppress online hate speech; Bill Curry, "Liberals' Parliamentary Agenda Lists Three Internet Regulation Bills as Early Priorities," *The Globe and Mail* (30 September 2021), online: <www.theglobeandmail.com/politics/article-liberals-parliamentary-agenda-lists-three-internet-regulation-bills-as/>. In addition to these three bills, the Government of Canada is considering legislation specifically targeting five categories of harmful expression: terrorist content; content that incites violence; hate speech; non-consensual intimate images; and child pornography. This legislation, which is currently under advisement, may require online platforms to proactively monitor and remove offending content; Anja Karadeglija, "Liberals to Work with Experts on Revision of 'Fundamentally Flawed' Online Harms Bill," *The National Post* (3 February 2022), online: <nationalpost.com/news/

courts need to ensure that any such regulations strike a proper constitutional balance. From the outset, I should emphasize that I do *not* argue that hate speech is immune from regulation — indeed, I agree with the outcome in *Keegstra*, though I disagree with its section 1 analysis. Beyond its specific proposals, this article is intended to promote serious reflection on speech restrictions at a moment in which "free speech" has become increasingly contentious.

The remainder of this article proceeds as follows: Part II discusses the Supreme Court's jurisprudence regarding free expression values and the conflation of those values with progressive ideological commitments. I draw particular attention to the Supreme Court's hate speech jurisprudence, which is difficult to reconcile with a principled application of *Oakes*. Part III sets forth my proposal for a value-neutral *Oakes* test and discusses its application to the difficult problem of hate speech. Part III also addresses the problem of defining harm, drawing inspiration from the (non-*Charter*) case of *R. v. Labaye*.[28] Part IV concludes by questioning the role of extratextual values in *Charter* jurisprudence more broadly.

II. FREE EXPRESSION VALUES UNDER *KEEGSTRA*, *TAYLOR*, AND *WHATCOTT*

A central inquiry in the Supreme Court's freedom of expression jurisprudence is the relationship between targeted expression and the values underlying free speech. The Supreme Court has articulated these values as follows:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[29]

These values are central to the Supreme Court's analysis; expression that does not advance one or more of these values is granted less protection under *Oakes*.[30] This Part II discusses the development of these values in section 2(b) jurisprudence and their specific application in *Keegstra*, *Taylor*, and *Whatcott*.

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politics/liberals-to-work-with-experts-on-revision-of-fundamentally-flawed-online-harms-bill-after-criticism>. Bill C-261 is a reintroduction of legislation introduced during the previous Parliament; Marie Woolf, "Wrangling Over Language May Slow Online Bill, Anti-Hate Groups Say," *CBC News* and *The Canadian Press* (21 November 2021), online: <www.cbc.ca/news/politics/anti-hate-online-legislation-1.6257338>. These various legislative proposals remain in flux; but see Canadian Heritage, "The Government of Canada's Commitment to Address Online Safety," online: *Government of Canada* <www.canada.ca/en/canadian-heritage/campaigns/harmful-online-content.html> (sets out the Government of Canada's current thinking). See also Carissima Mathen, "Regulating Expression on Social Media" in Macfarlane, *Dilemmas*, *supra* note 25 at 91 (a more general discussion of the growing calls for regulating online expression).

27 The internet has brought about a massive proliferation of all forms of online communication, including obscenity and hate speech; The Strategic Counsel, "Attitudes of Canadians on Key Internet Issues," *CIRA* (March 2021), online: <static.cira.ca/2021-05/CIRA_better-internet-report-2021.pdf> (according to research on public opinion regarding internet issues, 79 percent of Canadians support government content regulation, including requiring online platforms to remove illegal content within 24 hours of being identified). See also Adrian Humphreys, "Canadians Want Online Hate and Racism Curbed, Even at Cost of Freedom of Speech, Poll Finds," *The National Post* (25 January 2021), online: <nationalpost.com/news/canadians-want-online-hate-and-racism-curbed-even-at-cost-of-freedom-of-speech-poll-finds>.

28 2005 SCC 80 [*Labaye*].

29 *Irwin Toy*, *supra* note 8 at 976.

30 *Ibid*.

A. JUDICIAL ARTICULATION OF FREE EXPRESSION VALUES

Ford was the first post-*Charter* case in which the Supreme Court considered the values underlying freedom of expression. The issue in *Ford* was the constitutionality of provisions of the Quebec *Charter of the French Language*[31] that required, among other things, that commercial advertising and signage be written exclusively in French.[32] The Supreme Court was forced to confront the question of whether commercial speech is "expression" for purposes of section 2(b).[33] Rather than adopting a categorical definition of expression, the Supreme Court focused on the narrower question of whether the commercial nature of advertising and signage removes commercial expression from section 2(b) protection.[34] Apparently prompted by submissions of the Attorney General of Quebec (who argued that commercial expression serves no values justifying section 2(b) protection), the Supreme Court identified the values underlying freedom of expression for the first time in its *Charter* jurisprudence.[35] Citing Thomas Emerson's "Toward a General Theory of the First Amendment," the Supreme Court concluded that free expression values support, rather than preclude, the inclusion of commercial expression within the scope of section 2(b).[36]

These values took on new significance in *Irwin Toy*, decided one year after *Ford*. The issue in *Irwin Toy* was the constitutionality of provisions of the Quebec *Consumer Protection Act*[37] that prohibited television advertising directed at children under 13.[38] Having determined in *Ford* that commercial expression is protected by section 2(b), the Supreme Court in *Irwin Toy* focused on whether commercial age restrictions limit expression.[39] According to the Supreme Court, this inquiry requires examination of both the purpose and effects of the challenged legislation.[40] Citing *R. v. Big M Drug Mart Ltd.*,[41] the Supreme Court held that if the purpose of the legislation is to regulate expressive content, or if the *effects* of the legislation infringe upon free expression, then it violates section 2(b).[42]

Under this analysis, it is only at the effects inquiry that free expression values come into play.[43] To establish restrictive effects, the party challenging the restriction must demonstrate that the targeted expression promotes at least one of the free expression values articulated by the Supreme Court — such as, truth seeking, democratic participation, or individual self-

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31 CQLR c C-11.
32 *Ford*, *supra* note 7 at 714.
33 *Ibid* at 754–67.
34 *Ibid* ("[t]he issue in the appeal is not whether the guarantee of freedom of expression in s. 2(*b*) of the Canadian *Charter* … should be construed as extending to particular categories of expression, giving rise to difficult definitional problems, but whether there is any reason why the guarantee should not extend to a particular kind of expression" at 755–56).
35 *Ibid* at 763.
36 *Ibid* at 765; the Supreme Court cited the following passage from Emerson, *supra* note 9 at 878–79:
> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

37 CQLR c P-40.1.
38 *Irwin Toy*, *supra* note 8 at 948.
39 *Ibid* at 947–48.
40 *Ibid* at 972.
41 [1985] 1 SCR 295.
42 *Irwin Toy*, *supra* note 8 at 971–72.
43 *Ibid* at 976–77.

fulfillment.[44] Although the Supreme Court cites *Ford* in identifying these values, they are actually a distillation of the four values identified by Emerson, now formally incorporated into the Supreme Court's freedom of expression jurisprudence.[45] Ultimately, the Supreme Court does not actually apply these values in *Irwin Toy*, as it was apparently convinced that the purpose of the legislation violated section 2(b), obviating the effects analysis.[46] Nevertheless, *Irwin Toy* set the stage for the values inquiry under section 1.

One year later, the Supreme Court applied this values inquiry in *Rocket*.[47] In this case, the Supreme Court addressed free expression values in a distinct analytical context: determining whether a violation of section 2(b) was "justifi[able] in a free and democratic society" under section 1.[48] The specific issue in *Rocket* was whether a restriction on commercial advertising imposed by Ontario's dental regulatory body was constitutional.[49] After concluding that the restriction violated section 2(b), the Supreme Court assessed whether the restriction was justified under section 1.[50] For the first time, the Supreme Court held that the values underlying free expression must be "weighed" against the values underlying the legislation.[51]

Applying this approach to the facts of *Rocket*, the Supreme Court considered the degree to which Ontario's advertising restrictions impeded or promoted the realization of free expression values, both from the point of view of dentists and from the point of view of the general public.[52] The Supreme Court held that dentists, who are primarily motivated by profit, lack a strong expressive interest in commercial advertising but that "the infringement of s. 2(*b*) cannot be lightly dismissed" given the interests of consumers in obtaining information regarding dental services.[53] Following a brief analysis, the Supreme Court concluded that dental advertising was of sufficient expressive value that its restriction was unjustified under section 1.[54] Although relatively undeveloped in *Rocket*, this nascent section 1 analysis and its focus on free expression values has been expanded in the hate speech context, where its more detailed application has revealed its inherent subjectivity.

B. *KEEGSTRA*

Given its offensiveness, exclusionary impacts, and potential for inciting violence, hate speech poses serious challenges to liberal commitments to free expression.[55] In light of the

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44 *Ibid.*

45 *Ibid* (Emerson's fourth value of "maintaining the balance between stability and change in society" is dropped by the Supreme Court without explanation (*supra* note 9)).

46 *Irwin Toy*, *ibid* at 977–78.

47 *Supra* note 9.

48 *Ibid* (section 1 has been the analytical focus of most of the Supreme Court's hate speech jurisprudence since this decision).

49 *Ibid* at 235.

50 *Ibid* at 241, 245–46.

51 *Ibid* at 241–42, 246–47. Note that although contextual balancing as applied to section 2(b) was first introduced in *Edmonton Journal*, *supra* note 6, *Rocket*, *ibid*, was the first Supreme Court decision to weigh expression in terms of free expression values; and the Supreme Court found that the expression in *Rocket* did not meaningly advance traditional free expression values, being purely commercial in nature, but that it was deserving of protection because it enhanced the ability of consumers to make informed decisions. See also notes 47–49 and accompanying text.

52 *Rocket*, *ibid* at 247–48.

53 *Ibid* at 247 (the Supreme Court's conclusions regarding the interests of dentists and the value of their expression can certainly be questioned, but the focus of this article is not commercial expression).

54 *Ibid* at 250–51.

55 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass: Harvard University Press, 2012) at 105–43.

difficulty of these challenges, it is unsurprising that hate speech has consistently produced unsatisfying Supreme Court jurisprudence. The problem with the Supreme Court's decisions is not that they restrict hate speech (which may be justified in certain circumstances), but rather the Supreme Court's reliance on its own subjective appraisal of expression, an approach inconsistent with the *Charter*'s protection of "freedom of thought, belief, opinion and expression."[56] Although the Supreme Court frames its analysis in objective terms, a close reading of its hate speech jurisprudence leads to the unavoidable conclusion that its decisions are primarily motivated by subjective disapproval.[57]

This is no more evident than in *Keegstra*. Decided in 1990, *Keegstra* was the first Supreme Court decision to address the criminalization of hate speech under the *Charter*, and the first instance of the Supreme Court's application of its values analysis to hate speech.[58] In *Keegstra*, the defendant James Keegstra, an Alberta high school teacher, was prosecuted under section 319(2) of the *Criminal Code* for teaching antisemitic doctrines (including Holocaust denialism) to high school students.[59] In reasons authored by Chief Justice Dickson, the Supreme Court held that Keegstra's expression was protected by section 2(b)[60] but that its criminalization was nevertheless permissible under section 1.[61] Unfortunately, the Supreme Court's decision was clearly influenced by its subjective disdain for Keegstra's expression, which it emphasizes at each stage of *Oakes*' proportionality analysis.

In *Keegstra*, the Supreme Court is persuaded, on a variety of grounds, that *Oakes*' initial requirement of a pressing and substantial objective is satisfied.[62] This conclusion is entirely sensible given the potential dangers of hate speech, as discussed in the Report of the Special Committee on Hate Propaganda in Canada, on which the Supreme Court relies.[63] The more difficult issues arise in *Oakes*' proportionality analysis, which requires (1) a rational connection to the government's objective, (2) minimal impairment of freedom of expression, and (3) proportionality between the effects of the restriction and the government's objective.[64] It is here, at the proportionality stage, that section 2(b) values come into play.

Prior to engaging in the proportionality analysis, the Supreme Court provides an extended discussion of hate speech and section 2(b) values.[65] According to Chief Justice Dickson, although the Supreme Court "must guard carefully against judging expression according to its popularity," it is necessary to interrogate, for purposes of section 1, the extent to which

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56 *Charter*, *supra* note 1, s 2(b).

57 Not all of the Supreme Court's hate speech decisions have taken this approach, however, a fact which can only be explained by the changing composition of the Supreme Court (many of the Supreme Court's hate speech cases have been narrowly split decisions). See e.g. *R v Zundel*, [1992] 2 SCR 731 [*Zundel*] (an alleged Holocaust denier was acquitted of spreading "false news" and Justice McLachlin (as she then was) adopted a relativistic approach to the value of expression that has not been followed in other cases. Justice McLachlin was in the minority in both *Keegstra*, *supra* note 10 and *Taylor*, *supra* note 21).

58 In *Keegstra*, *ibid*, Chief Justice Dickson uses the term "hate propaganda," which I treat as interchangeable with "hate speech" for purposes of this article. See also *Taylor*, *ibid*.

59 *Keegstra*, *ibid* at 713–14.

60 The conclusion that hate speech is protected by section 2(b) is consistent with the broad conception of expression articulated in *Irwin Toy*, *supra* note 8. Essentially, every Supreme Court hate speech case has centred on section 1.

61 *Keegstra*, *supra* note 10 at 867–68.

62 See generally *ibid* at 744–47 (the Supreme Court discusses the pressing and substantial nature of the objective of reducing hate speech at length).

63 *Ibid* at 745–46.

64 *Oakes*, *supra* note 3 at 139.

65 *Keegstra*, *supra* note 10 at 759–67.

targeted expression advances "principles at the core of s. 2(*b*)."[66] If expression is "distant" from section 2(b) values, then its suppression will be "easier to justify than other infringements."[67] Although Chief Justice Dickson finds Keegstra's expression "offensive and disturbing," he warns that subjective disapproval is not the appropriate standard.[68] Citing *Ford*, *Irwin Toy*, and *Rocket*, Chief Justice Dickson states that the proper test is whether the expression advances the values of section 2(b): (1) the search for truth; (2) participation in the community; and (3) individual self-fulfillment.[69]

The Supreme Court addresses each of these values in turn. Regarding the search for truth, Chief Justice Dickson begins by (rightly) stating that society should be wary of prohibitions on expression because "truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty."[70] Nevertheless, he asserts that courts are competent to assess the *likely* truthfulness of expression and can therefore evaluate the contribution of targeted expression to the search for truth.[71] Invoking the danger of an "unregulated marketplace of ideas," Chief Justice Dickson argues that although "the state should not be the sole arbiter of truth," neither should society assume that truth will prevail in the free interchange of ideas.[72] This reasoning leads him to conclude that since there is "very little chance" that hate propaganda is true, its expression does not meaningfully advance society's quest for truth.[73]

The second value addressed by the Supreme Court is "ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit."[74] Although Chief Justice Dickson acknowledges that section 319(2) inhibits the self-fulfillment of "individuals whose expression it limits," he focuses judicial attention not on speakers themselves, but rather on the self-fulfillment of other members of society, particularly members of identifiable demographic groups.[75] Chief Justice Dickson justifies this shift in focus from the self-fulfillment of speakers (and audiences) to other members of society by arguing that self-fulfillment is closely tied to group identity, claiming that the benefit of self-expression "stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group."[76] Based on this identarian premise, Chief Justice Dickson argues that hate speech prevents members of identifiable groups from realizing self-fulfillment.[77]

Finally, the Supreme Court explores the third value of participation in democracy. Chief Justice Dickson begins by conceding that most hate speech is political in nature, and thus arguably deserving of special protection under section 2(b).[78] Despite its political

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66 *Ibid* at 760.
67 *Ibid* at 761, citing *Rocket*, *supra* note 9 at 247.
68 *Keegstra*, *ibid* at 762.
69 *Ibid* at 761–65.
70 *Ibid* at 762.
71 *Ibid* at 762–63.
72 *Ibid* at 763.
73 *Ibid*.
74 *Ibid*.
75 *Ibid*.
76 *Ibid* (the implication of this argument is that individual self-fulfillment, independent of group identity, is somehow less valuable).
77 *Ibid*.
78 *Ibid* at 763–64.

significance, he argues that hate speech is antithetical to "democratic values" in that it denies "respect and dignity" to individuals based on racial or religious characteristics.[79] Since hate speech interferes with "democratic aspirations," the government is justified in criminalizing its dissemination to protect "values central to freedom of expression."[80] The criminalization of expression in order to protect free expression values is a common theme in the Supreme Court's hate speech jurisprudence. Although it never says so explicitly, the Supreme Court seems to suggest that freedom of expression is *not* freedom from government interference, but rather a form of positive right to a tolerant political environment.

Based on its discussion of the values from *Irwin Toy*, the Supreme Court concludes that hate speech "contributes little to the aspirations of Canadians or Canada."[81] Restricting hate speech is therefore "easier to justify than other infringements of s. 2(*b*)."[82] Each stage of the Supreme Court's analysis is questionable, however. Beginning with the search for truth, the Supreme Court's reasoning is vulnerable to two criticisms. First, the Supreme Court imposes its own opinion regarding the truthfulness of hate speech — i.e., that it is unlikely to be true — in the form of a self-evident assertion. Although most Canadians would agree that hate speech is unlikely to be true, this form of judicial notice as to the truthfulness of expression seems suspiciously similar to "judging expression according to its popularity," precisely the constitutional standard the Supreme Court claims to be rejecting.[83] Second, and more importantly, the Supreme Court assumes that "truth" is an objective property of reality, rather than a subjective concept that varies among individuals.[84] In questioning the "marketplace of ideas," the Supreme Court misunderstands the metaphor and the nature of its defence of intellectual exchange. When Justice Oliver Wendell Holmes wrote in his famous dissent in *Abrams v. United States*,[85] that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," he was not claiming the "market" is a mechanical engine of facts, in which rational, objective truth inevitably prevails, but rather that being "accepted in the competition of the market" is the very *definition* of truth, independent of the truth claims of official authority.[86] Following Holmes, I posit that for purposes of protecting "freedom of thought, belief, opinion and expression," *there is no truth independent of what*

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79 *Ibid* at 764.
80 *Ibid* at 764–65.
81 *Ibid* at 766.
82 *Ibid*, citing *Rocket*, *supra* note 9 at 247.
83 *Keegstra*, *ibid* at 759–60.
84 The nature of truth is a philosophical question beyond the scope of this article. It is fair, however, to criticize the Supreme Court's conception of truth as simplistic. See e.g. Maria Baghramian & Annalisa Coliva, *Relativism* (Abingdon-on-Thames: Routledge, 2020) (for a comprehensive examination of relativist understandings of truth). See also Søren Kierkegaard, *Concluding Unscientific Postscript* (Cambridge, UK: Cambridge University Press, 2010) (for perhaps the classic philosophical work on the subjective nature of belief).
85 250 US 616 (Sup Ct 1919), Holmes J, dissenting.
86 *Ibid* at 22. The concept of the marketplace of ideas is often attributed to John Stuart Mill, but Holmes was the first to express it in a judicial setting. According to Vincent Blasi, Holmes' metaphor has little to do with "the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating, and participation-enabling social mechanism," but is instead a check against dangerous "[c]onformity, deference to authority, stasis, [and] passivity in the realm of beliefs." Holmes was deeply mistrustful of enforced orthodoxy, which he viewed as antithetical to social dynamism and change. See Vincent Blasi, "Holmes and the Marketplace of Ideas" (2004) Sup Ct Rev 1 at 2, 29. For a discussion of Holmes' philosophical scepticism, see e.g. Samuel V LaSelva, "Toleration Without Hate Speech: The *Keegstra* Decision, American Free Speech Exceptionalism and Locke's *Letter*" (2015) 48:3 Can J Political Science 699 at 700–705 (discussion of Holmes' philosophical scepticism).

individuals actually believe.[87] To claim otherwise would subject a vast range of expression — including aesthetic and religious belief — to reduced constitutional protection if there is "very little chance" it is true.[88] Although there may be constitutional justifications for suppressing dangerous ideas, these justifications are properly grounded in the consequences of expression, and have little to do with the "search for truth," as properly understood.

The Supreme Court's theory of truth — as distinct from its own political values — is difficult to parse. On the one hand, the Supreme Court acknowledges a positive role for the marketplace of ideas, stating that the "free exchange of potentially valuable information" is an important guarantor of truth.[89] On the other hand, the Supreme Court is willing to suppress certain ideas if it believes they are unlikely to be true.[90] This gatekeeping function is problematic given the ecumenical language of section 2(b), which speaks in terms of "thought," "belief," and "opinion" rather than absolute truth. It would be one thing for the Supreme Court to openly reject the marketplace of ideas entirely, but Chief Justice Dickson does not venture this far. Instead, the Supreme Court acknowledges the value of the marketplace of ideas while subverting its very function. This ambivalence becomes explicit in Chief Justice Dickson's *obiter* regarding section 319's truth defence, in which he suggests that even truthful expression is not immune from prosecution.[91] This *obiter* becomes positive law in *Taylor* and *Whatcott*, in which the Supreme Court rejects literal truth as grounds for constitutional protection. Needless to say, a jurisprudence that allows the suppression of even concededly true expression is not credibly committed to the search for truth.

Moving to the second value, the Supreme Court rightly identifies self-fulfillment as an important aspect of freedom of expression, but its emphasis on the self-fulfillment of cultural and religious groups — as opposed to other forms of self-fulfillment, including individual political expression — is both arbitrary and overly restrictive. Moreover, the Supreme Court's framing of the self-fulfillment of individual speakers and that of identifiable groups as oppositional raises difficult questions of balancing and commensurability. In what cases, if any, might the self-fulfillment of individual speakers, and their actual and potential

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87 As previously mentioned, this relativistic position also finds support in Supreme Court case law, highlighting the inconsistencies in the Supreme Court's freedom of expression jurisprudence. See e.g. *Zundel*, *supra* note 57. A corollary of my position on truth is that preventing the spread of disfavoured ideas is not a legitimate ground for regulating speech (absent demonstrable harm). This is directly at odds with the conclusions of, for example, the Report of the Special Committee on Hate Propaganda in Canada, which essentially argues that hate speech should be suppressed because Canadians might believe it.

88 *Keegstra*, *supra* note 10 at 763. For example, it can be credibly argued, from a modern scientific perspective, that there is "very little chance" that historical religious texts are true. This should of course have no bearing on their constitutional protection.

89 *Ibid* at 762.

90 *Ibid*.

91 *Ibid* at 781 [emphasis in original]:

> The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated *with an intention to promote hatred* need be excepted from criminal condemnation.

audiences, outweigh that of vulnerable groups?[92] If the answer is "none," on what principle is this subordination of speakers' self-fulfillment to be based?[93] I submit that disapproval of targeted expression, no matter how deeply felt, is insufficient grounds. As discussed in Part III, focusing on harm provides a more principled basis for restricting individual speech.

Finally, the Supreme Court's discussion of the third value, participation in democracy, highlights the paradox at the heart of the Supreme Court's analysis, expression may be prohibited to promote the values of free expression. In upholding section 319(2), Chief Justice Dickson writes that by prohibiting hate speech, "the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers."[94] The obvious response to this argument is the state can better protect the values of free expression by simply declining to criminalize expression and that although the state may, and should, demonstrate "dislike for the vision forwarded by hate-mongers," "dislike" is not a constitutional basis for the criminalization of ideas.[95]

This paradox is not the only problem with the Supreme Court's discussion of democracy. In addition, the Supreme Court relies on two questionable political assumptions. First, the Supreme Court conflates "democracy" with a progressive political vision that disregards the reality of illiberal democratic politics.[96] For example, the Supreme Court claims that democratic values are violated if "individuals are denied respect and dignity simply because of racial or religious characteristics."[97] As admirable as this perspective may be, it represents a *political* commitment,[98] not an inherently democratic commitment. Sadly, the history of democracy, including Canadian democracy, is replete with examples of democratic majorities inflicting hateful policies upon minorities.[99] Even in Canada today, there are democratic laws that are flatly inconsistent with the Supreme Court's vision of civil tolerance.[100] Although restricting hateful expression is an understandable policy goal, and

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92 It is important to emphasize that this concern is not limited to individual speakers. The self-expression of members of one identity group may conflict with the self-fulfillment of another. For example, members of the Arab and Jewish Canadian communities have often engaged in heated political expression that implicates hate speech legislation; "Hate-Crime Charges Sought Against Pro-Palestine Protesters," *The Winnipeg Free Press* (31 May 2021), online: <www.winnipegfreepress.com/local/2021/05/31/hate-crime-charges-sought-against-pro-palestine-protesters>. See also *Canadian Arab Federation v Canada (Minister of Citizenship and Immigration)*, 2015 CAF 168 (the Canadian Arab Federation was denied renewal of a federal language education contract due to antisemitic statements made by its members).

93 See e.g. Terry Heinrichs, "Censorship as Free Speech: Free Expression Values and the Logic of Silencing in *R. v. Keegstra*" (1998) 36:4 Alta L Rev 835 at 849–50, 855 (for a fundamental criticism of the evidentiary basis for the view that self-expression undermines the self-fulfillment of targeted groups). See also *ibid* at 861–900 (for a detailed criticism of the Supreme Court's "silencing" argument).

94 *Keegstra*, *supra* note 10 at 764.

95 *Ibid*.

96 See e.g. James L Gibson, "Political Intolerance in the Context of Democratic Theory" in Russell J Dalton & Hans-Dieter Klingemann, eds, *The Oxford Handbook of Political Behavior* (Oxford: Oxford University Press, 2009) at 409 (for a summary of the ubiquity of political intolerance in western democracies). See also Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016) (for a book-length defence of the view that freedom of expression, including hate speech, is an essential attribute of democratic citizenship).

97 *Keegstra*, *supra* note 10 at 764.

98 By political commitment, I mean a normative principle established *through* the democratic process, rather than a universal principle that transcends the democratic process.

99 In Canada, democratic majorities have approved explicitly racist and exclusionary policies targeting Indigenous, Chinese, and Japanese Canadians, to cite only the most notorious examples.

100 See e.g. *Loi sur la laïcité de l'état*, CQLR c L-0.3 (Quebec's ban on religious apparel worn by public servants, which disproportionately affects (and arguably targets) religious minorities).

may be constitutionally permissible in certain circumstances, it makes little sense to describe such expression as inconsistent with democracy. Second, notwithstanding the Supreme Court's rhetoric, denying "respect and consideration" to one's political opponents — whether on partisan, ideological, or personal grounds — is an unfortunately common feature of contemporary political discourse. Even the most casual observation of "democratic participation," particularly as it occurs online, reveals that disrespect and indignity are wholly consistent with democracy. To suggest that disrespectful political expression is less deserving of constitutional protection is a sweeping and unwarranted claim. Again, although there may be valid reasons to restrict harmful expression, these reasons are not inherently related to democracy itself, which has often been a site of conflict between ethnic, religious, and linguistic groups.

These assumptions matter because the Supreme Court draws on them in concluding that hate speech is less deserving of constitutional protection. This conclusion plays an important role in the Supreme Court's proportionality analysis under *Oakes*, particularly with respect to the minimal impairment and proportional effects prongs. Regarding minimal impairment, Chief Justice Dickson focuses on two issues: (1) the scope of protections for defendants under section 319; and (2) the scope of the free expression values infringed by criminal prosecution.[101] I take little issue with the Supreme Court's discussion of the protections under section 319, which provide defendants with important safeguards. Specifically, these protections include a requirement of wilful intent, an affirmative truth defence,[102] an exemption for private communications, an exemption for good-faith religious expression, an exemption for expression "intended to point out" hate speech "for the purpose of removal," and a requirement that any prosecutions be approved by the Attorney General.[103] The second element of the Supreme Court's analysis is more problematic, however, in that it calibrates the standard of minimal impairment according to the targeted expression's value. Under this standard, Chief Justice Dickson concludes that section 319 is minimally impairing of free expression given "the discounted value of the expression at issue."[104] By relaxing the minimal impairment standard according to the "discounted value" of expression, the Supreme Court weakens constitutional protection for *any* disfavoured speech, particularly given its subjective application of free expression values.

On the issue of proportional effects, the Supreme Court again permits its balancing test to be influenced by the value of expression. The Supreme Court discounts the law's infringement of section 2(b) by claiming that it restricts expression "only tenuously connected with the values underlying the guarantee of freedom of speech," and therefore "represents an impairment of the individual's freedom of expression which is not of a most

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101 *Keegstra*, *supra* note 10 at 759–60.

102 Note, however, that section 319 reverses the onus of proof, requiring defendants to establish the truth of their expression. This reverse onus has been criticized for undermining the presumption of innocence. See e.g. David M Tanovich, "The Unravelling of the Golden Thread: The Supreme Court's Compromise of the Presumption of Innocence" (1993) 35:2 Crim LQ 194. In the United States context, the Supreme Court has held that a statute providing that "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons" was unconstitutional on its face, in that it reversed the burden of persuasion and thereby violated the due process clause of the Fourteenth Amendment; *Virginia v Black* (2003), 538 US 343 at 348, 363–67 [*Black*].

103 *Criminal Code*, RSC 1985, c C-46, ss 319(3)–(4).

104 *Keegstra*, *supra* note 10 at 785–86.

serious nature."[105] The Supreme Court finds that because section 319(2) is "directed at expression distant from the core of free expression values," it raises only minor concerns regarding the suppression of free expression.[106] Note that the Supreme Court's analysis does not hinge upon actual harm, whether to Keegstra's students, to Jewish Canadians, or to Canadian society more generally, but rather upon the Supreme Court's assessment of the abstract value of hate speech.

This focus on values is unfortunate, as it embraces a discriminatory conception of freedom of expression and opens the door to censorship of less harmful forms of unpopular speech. If the Supreme Court is to take seriously "freedom of thought, belief, opinion and expression," it would do better to avoid a legal analysis that focuses on subjective value. This is all the more so because hate speech could be constitutionally restricted based on its likelihood of causing harm. The facts of *Keegstra* themselves provide an example. Although the Supreme Court does not explore Keegstra's expression in detail, his virulent antisemitism, his wilful promotion of hatred (including teaching his beliefs to high school students), and the unique historical context of the Holocaust are all factors suggesting a real possibility of harm, arguably justifying the legal restriction of his speech.[107] Unfortunately, by focusing on whether expression is of sufficient constitutional value, the Supreme Court predicates its analysis on less objective criteria. The consequences of this approach are evident in both *Taylor* and *Whatcott*, which address hate speech in the context of human rights legislation and grant government even broader power to restrict unpopular speech.

C. *TAYLOR*

Issued the same day as *Keegstra*, *Taylor* involved complaints under section 13 of the *Canadian Human Rights Act*.[108] This provision (since repealed) granted the Canadian Human Rights Tribunal the power to issue cease and desist orders regarding telephonic communications likely to expose members of identifiable groups to "hatred or contempt."[109] The defendant John Taylor and the Western Guard Party operated a telephonic message service that, when dialed, delivered pre-recorded political messages including antisemitic content.[110] In response to a complaint by the Canadian Human Rights Commission, the Human Rights Tribunal ordered Taylor to cease and desist operating the message service.[111] Taylor refused, and was sentenced to prison for contempt.[112] Upon release, he recommenced the message service in violation of the Tribunal's order, this time challenging section 13 under section 2(b) of the *Charter*.[113]

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105 *Ibid* at 787.
106 *Ibid*.
107 *Ibid*.
108 *Taylor*, *supra* note 21.
109 *Ibid* at 903 (section 13 was repealed in 2014 — the current government has proposed reintroducing a similar provision).
110 *Ibid* at 903–904.
111 *Ibid* at 904–905.
112 *Ibid* at 905.
113 Taylor was originally imprisoned from 17 October 1981 to 19 March 1982, prior to the effective date of the *Charter*. The *Charter* became effective 17 April 1982, prior to Taylor's second contempt order (for which he was again sentenced to prison); *ibid*.

The *Taylor* reasons are also authored by Chief Justice Dickson and, unsurprisingly, share many similarities with the reasons in *Keegstra*. A decisive factor in both cases is the Supreme Court's low opinion of hate speech. Chief Justice Dickson's discussion of section 2(b) values is less developed in *Taylor*, however, as instead of conducting a detailed analysis of truth seeking, democratic participation, and individual self-fulfillment, Chief Justice Dickson simply references his reasons in *Keegstra*.[114] Despite this more superficial values analysis, *Taylor* is nonetheless worthy of examination. If anything, the Supreme Court's focus on the value of targeted expression is even more problematic in the human rights context, which lacks many of the substantive protections existing under criminal law.

In *Taylor* (as in *Keegstra*), the Supreme Court prefaces its proportionality analysis with a discussion of free expression values.[115] This discussion strikes a sceptical tone regarding the benefits of unregulated expression. In determining whether a restriction is proportionate, Chief Justice Dickson warns that courts should not rely on "abstract panegyrics to the value of open expression."[116] Instead, courts must examine the context of the expression to assess whether its restriction "debilitates or compromises" free expression values.[117] Under this contextual approach, expression that advances free expression values is more deserving of *Charter* protection, while expression at odds with free expression values is less deserving of *Charter* protection. Thus, as in *Keegstra*, section 2(b)'s broad guarantee of "freedom of thought, belief, opinion and expression" is transformed into a narrower focus on constitutional "values" — some of which, according to the Supreme Court, are directly opposed to hateful expression. Ironically, despite emphasizing context, the Supreme Court never addresses the factual relationship between Taylor's expression and section 2(b) values, but instead relies on the categorical claim that all hate speech is low value.[118] The result is that contextual factors play a limited role in the Supreme Court's analysis, at least beyond the threshold issue of whether the expression constitutes "hate propaganda."[119]

Having discussed free expression values, the Supreme Court then addresses the three factors of the proportionality analysis under *Oakes*: (1) rational connection; (2) minimal impairment; and (3) proportionality of effects.[120] The Supreme Court's rational connection discussion is straightforward. The Supreme Court essentially asks whether section 13 is rationally connected to combatting discrimination.[121] As I argue in Part III, the rational connection inquiry should be deferential to legislative judgment, and by this standard, the Supreme Court's approach is unobjectionable. At the rational connection stage, it is both difficult as a practical matter and institutionally inappropriate for courts to second-guess

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114 *Ibid* at 915.
115 *Ibid* at 916–17.
116 *Ibid* at 922.
117 *Ibid*.
118 *Ibid* (although it may seem axiomatic that hate speech is low value, it is a fundamental premise of this article that any such determination is subjective).
119 *Ibid*, citing *Keegstra*, *supra* note 10 at 766 (the fact that Taylor's expression violated section 13 was apparently not contested at the Supreme Court).
120 *Taylor*, *ibid* at 921–40.
121 *Ibid* at 923–26.

legislative decisions, particularly given the legislature's advantages in identifying solutions to social problems.[122]

The Supreme Court's minimal impairment discussion focuses on two issues: (1) the remedial, as opposed to punitive, nature of human rights legislation; and (2) the resultant lack of substantive protections available in criminal law. Essentially, the Supreme Court argues that since section 13 is primarily concerned with eliminating discrimination, rather than punishing individuals, and because a ruling of the Human Rights Tribunal does not involve a criminal conviction, the substantive protections of the criminal law are unnecessary to a finding of minimal impairment.[123] The Supreme Court holds that several features of section 13, including: (1) its lack of specificity in the words "hatred or contempt";[124] (2) the absence of an interpretative provision intended to protect freedom of expression;[125] (3) the absence of any intent requirement; (4) the absence of any truth defence; and (5) the inclusion of private communication within the prohibitions of the statute, are not — individually or collectively — grounds for finding that section 13 excessively impairs freedom of expression.[126]

The argument that fewer safeguards are required under human rights law due to its "remedial" nature is frankly bizarre given the significant carceral punishment faced by Taylor — far greater than that faced by Keegstra, who was convicted under a criminal statute. Although the Supreme Court emphasizes that Taylor's prison sentence was due to his refusal to comply with the Human Rights Tribunal, this truism is of little comfort to other speakers facing section 2(b) violations. A citizen with a credible section 2(b) claim who is effectively told "you won't go to prison as long as you shut up" faces the same restrictions on their expressive freedom as a speaker subject to criminal law. The Supreme Court's emphasis on remedial intent is beside the point, as it fails to recognize that the extent of the impairment is measured by the severity of the restriction, not the government's motives in imposing it. Despite the Supreme Court's insistence on the remedial nature of section 13, the reality is that its legal enforcement, like that of any mandatory law, rests on the implicit

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122 The proper extent of the judiciary's role in creating public policy is a contested issue. "Legal process" scholarship, such as the work of Lon Fuller, suggests that the proper role of the judiciary is to address the discrete issues of the litigants, against a backdrop of more general law enacted by the legislature. Without democratic legitimacy or the informational resources to assess "polycentric problems," the judiciary is not the optimal venue for public policy reform; Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353. In the words of Chief Justice McLachlin, "[t]he judicial role is to resolve disputes and decide legal questions which others bring before the courts. It is not for judges to set the agendas for social change, or to impose their personal views on society. The role of judges is to support the rule of law, not the rule of judicial whim"; The Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "Respecting Democratic Roles" (Speech delivered at the Conference on the Law and Parliament, Ottawa, 22 November 2004), Supreme Court of Canada, "Speeches," online: <www.scc-csc.ca/judges-juges/spe-dis/bm-2004-11-22-eng.aspx> [unpublished].

123 *Taylor*, *supra* note 21 at 928.

124 Although it was raised by the defendant (and interveners), the vagueness of the words "hatred or contempt" is the least concerning feature of section 13. In *Taylor*, the Supreme Court specifies that "hatred" refers to "unusually strong and deep-felt emotions of detestation, calumny and vilification" *ibid*. The meaning of the word "hatred" for purposes of human rights legislation has been further clarified in *Whatcott*, *supra* note 22.

125 Many provincial human rights statutes include an interpretive provision stating that they shall not be interpreted in a manner inconsistent with freedom of expression. See e.g. *The Saskatchewan Human Rights Code 2018*, SS 1979, c S-24.2, ("[n]othing in subsection (1) restricts the right to freedom of expression under the law on any subject," s 14(2)).

126 Although not relevant to the facts of *Taylor*, *supra* note 21, section 13 also lacked any protection for religious expression.

threat of state violence. Rather than obscuring this reality, judicial analysis should focus on whether this violence is justified.

Among the protections absent from section 13, its lack of any truth defence is the most relevant to free expression values. In *Keegstra*, the Supreme Court emphasizes the search for truth as an important justification for expressive freedom. Indeed, its decision to uphold section 319(2) rests, in part, on its conclusion that hate speech is unlikely to be true. This justification is challenged by section 13, which, unlike section 319, includes no exemption for truthful expression. Despite the importance of the search for truth in the Supreme Court's freedom of expression jurisprudence, Chief Justice Dickson expresses little concern for the possibility of restricting true expression. As foreshadowed by *Keegstra*, and notwithstanding Chief Justice Dickson's assertion that "the value of truth in all facets of life, including the political, is central to the s. 2(*b*) guarantee,"[127] the Supreme Court ultimately concludes that truthful statements are not immune from legal prohibition.[128] This reasoning is, again, informed by the Supreme Court's dovish conception of human rights legislation, which Chief Justice Dickson describes as "less confrontational than would be the case with a criminal prohibition, the legislative framework encouraging a conciliatory settlement."[129] Given that even a "conciliatory settlement" requires the defendant to cease expressing their views, on pain of carceral punishment, and given that the defendant in *Taylor* was literally sentenced to prison, this is a remarkably cavalier attitude toward the protections of section 2(b).

The final element of the Supreme Court's analysis is proportionality of effects. In *Taylor*, the proportional effects discussion is a single paragraph.[130] To support its conclusion that section 13 is proportionate, the Supreme Court merely states that section 13 "impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee."[131] Although the Supreme Court never engages in a detailed analysis of the value of Taylor's expression, it clearly deems that value to be minimal.

This superficial engagement with free expression values reveals the weakness of the Supreme Court's section 2(b) jurisprudence. In reality, the Supreme Court's analysis provides cover for an ideological privileging of the values of equality and dignity over textually guaranteed individual rights.[132] In many ways, *Taylor* is even more rights-violative than *Keegstra*, which involved a narrow criminal statute of delimited application. The legislation challenged in *Taylor* was far broader in scope, potentially encompassing expression that was, among other things, privately communicated, lacking hateful intent, grounded in religious belief, and even factually true. To argue that suppressing such expression is consistent with a "free and democratic society" is to elevate political preferences over the radical tolerance embodied in section 2.[133]

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127 *Ibid* at 934.
128 *Ibid*.
129 *Ibid* at 935–36.
130 *Ibid* at 939–40.
131 *Ibid*.
132 "Equality" is of course a *Charter* right, though the text of section 15 does not create a positive right enforceable against private individuals; *Charter*, *supra* note 1, s 15.
133 *Supra* note 12.

D. *WHATCOTT*

Like *Taylor*, *Whatcott* also deals with human rights legislation. Rather than federal law, however, *Whatcott* considers section 14 of the *Saskatchewan Human Rights Code*, which prohibits expression "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person" on various identity grounds, including sexual orientation.[134] William Whatcott, a social conservative activist, had distributed political flyers criticizing homosexuality and opposing the teaching of LGBT issues in Saskatoon public schools.[135] These flyers contained language describing gay men and lesbians in highly disparaging terms, including associating them with pedophilia.[136] Four residents of Saskatchewan who received the flyers filed human rights complaints, and the Saskatchewan Human Rights Tribunal found that the flyers violated section 14.[137] On appeal, the Supreme Court ruled that section 14's prohibition of expression that merely "ridicules, belittles or otherwise affronts the dignity of" protected identity groups was unconstitutional.[138] However, it upheld the ruling that Whatcott had exposed LGBT individuals to "hatred."[139]

Whatcott's contribution to freedom of expression jurisprudence was to limit the meaning of "hatred" so as to exclude language that merely ridicules, belittles, or causes an affront to dignity.[140] In this respect, the case is an improvement over *Taylor*. It requires a more objective standard for identifying hate speech and limits its definition to a narrower range of expression.[141] Unfortunately, *Whatcott* also continues the Supreme Court's practice of calibrating its section 1 analysis according to the value of targeted expression. This practice is particularly questionable in *Whatcott*, as the specific expression at issue, although highly offensive, was both grounded in religious belief and directly related to a political issue (changes to the public school curriculum). Despite the religious and political aspects of Whatcott's expression, the Supreme Court shows little hesitation in dismissing it as hate speech.

As in *Keegstra* and *Taylor*, the Supreme Court's proportionality analysis hinges on the expression's content.[142] The Supreme Court frames its section 1 analysis not as a question of exigency — in which a *Charter* right is violated to meet an overriding social need — but merely as a balancing of competing constitutional values. On the one hand are the free expression values of "individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."[143] On the other hand is "a commitment to equality and respect for group identity and the inherent dignity owed to all

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134 *Whatcott*, *supra* note 22 at para 12.
135 *Ibid* at para 8.
136 *Ibid* at paras 169–77.
137 *Ibid* at para 9.
138 *Ibid* at para 89.
139 *Ibid* at para 91.
140 See e.g. *Ward*, *supra* note 24.
141 *Whatcott* narrows *Taylor* in three ways: (1) by applying an objective, "reasonable person" standard to the definition of hatred (i.e., courts must consider whether a reasonable person would consider the expression hateful); (2) by specifying that hatred includes only extreme emotion; and (3) by focusing the determination of whether expression is hateful on effects rather than intent; *Whatcott*, *supra* note 22 at paras 20–59.
142 *Ibid* at paras 78–84.
143 *Ibid* at para 65, citing *R v Sharpe*, 2001 SCC 2 at para 23.

human beings."[144] Thus, even before engaging in the section 1 analysis, the Supreme Court presents a conflict between extratextual *Charter* values and assigns itself the authority to determine their proper balance. In practice, of course, this "balancing" of values is an invitation for the Supreme Court to impose its *own* values.

Applying the *Oakes* test, the Supreme Court first determines that the legislature is pursuing a pressing and substantial societal objective and that its chosen legislative approach is rationally connected to its goal.[145] As in *Keegstra* and *Taylor*, these determinations are appropriately deferential. The Supreme Court only requires that the legislature present a reasonable inference as to the harmful nature of hate speech and that its chosen legislative response is reasonable (rather than perfect).[146] At the same time, the Supreme Court holds that section 14's prohibition of expression that "ridicules, belittles or otherwise affronts the dignity" of vulnerable groups (without promoting hatred) is *not* rationally connected to the objective of reducing discrimination.[147] This conclusion does not aid Whatcott, but it provides an important limitation of section 14 in other cases. Greater problems arise in the Supreme Court's minimal impairment and proportional effects analyses, which are inappropriately dismissive of the value of targeted expression and insufficiently demanding of evidence of potential harm.

Much of the Supreme Court's discussion of the minimal impairment prong focuses on the low value of Whatcott's expression.[148] Justice Rothstein, writing for the Supreme Court, makes clear that "not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis."[149] According to the Supreme Court, certain forms of expression advance free expression values, while other forms of expression serve to undermine those values.[150] If expression is found to undermine free expression values, then the government will have freer scope to legally restrict it.[151]

Even assuming the *Charter* protects free expression "values" rather than expression itself (a dubious proposition), the Supreme Court's approach to determining whether targeted expression advances these values is questionable. Regarding the search for truth, the Supreme Court asserts that hate speech can "distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group."[152] Similarly, with respect to democratic participation, the Supreme Court argues that hate speech "shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond."[153] In effect, the Supreme Court conceptualizes hate speech as a form of anti-speech, which reduces rather than contributes to the diversity of expression in Canada. The problem with this perspective is that claims as to the silencing effects of hate speech are difficult to sustain

144 *Whatcott*, *ibid* at para 66.
145 *Ibid* at paras 69–100.
146 *Ibid* at para 77.
147 *Ibid* at para 99.
148 *Ibid* at para 101.
149 *Ibid* at para 112.
150 *Ibid* at para 104.
151 *Ibid*.
152 *Ibid* at para 114.
153 *Ibid* at para 117 (rather than specifically addressing the value of participation in democracy, which Whatcott's expression would seem to advance, the Supreme Court incorporates the value of democracy into its discussion of the search for truth).

empirically. If unaccompanied by violence, harassment, or other forms of personal intimidation, there is nothing about hate speech that forcibly silences targeted groups.[154] In the face of bigoted expression, LGBT people, their allies, and other concerned Canadians remain free to criticize homophobia and to advocate inclusivity. The reality in modern Canada is that outspoken homophobes are more likely to be denounced and ostracized than to successfully silence the targets of their expression.[155] From a constitutional perspective, this denouncement and ostracization is unobjectionable — such is the proper operation of the marketplace of ideas. Although there may be situations in which hate speech silences targeted groups, the facts of *Whatcott* are not one of them.

The Supreme Court's discussion of self-fulfillment embraces a similar fallacy that individual self-fulfillment can be negated by hostile expression. According to the Supreme Court, self-fulfillment is a zero-sum game whereby hate speech furthers its speaker's self-fulfillment at the cost of "reducing the participation and self-fulfillment of individuals within the vulnerable group."[156] Again, absent something *more* than speech, such as violence or harassment, it is unclear how hate speech reduces *self*-fulfillment, at least not in a manner that justifies violating section 2(b). To understand why, consider how broadly the Supreme Court's logic could extend. The Supreme Court states that hate speech "acts to cut off any path of reply by the group under attack" by questioning their deservedness of social recognition.[157] But this same logic also applies to almost any "hateful" expression based on partisan, ideological, or other forms of political identify. Discourse that seeks to discredit or even dehumanize one's political opponents is unfortunately common in Canadian society, particularly online.[158] To claim that such expression is less worthy of constitutional protection would potentially affect an enormous swath of core political speech.

Having concluded that section 14 impairs free expression values only minimally, the Supreme Court then addresses proportional effects.[159] The Supreme Court finds section 14 proportional based on its view that Whatcott's expression "by its nature, does little to promote the values underlying freedom of expression."[160] As in *Taylor*, the Supreme Court emphasizes the remedial nature of human rights legislation, which, according to the Supreme Court, mitigates its infringement of freedom of expression.[161] In fairness, this conclusion is more plausible in *Whatcott* than in *Taylor*, as prior amendments to the *Saskatchewan Human Rights Code* had strengthened the law's mediation provisions and eliminated the possibility

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154 Heinrichs, *supra* note 93 at 861–900. See also Nadine Strossen, *HATE: Why We Should Resist it with Free Speech, Not Censorship (2018)* (Oxford: Oxford University Press, 2018) at 124–25 (arguing that anti-racist activism (rather than intimidation) is an increasingly common response to hate speech).

155 Homophobic rhetoric — increasingly unacceptable in Canadian society — does not risk resonating with the masses and thus "[silencing] the voice of its target group"; *Whatcott*, *supra* note 22 at para 114. Happily, public opinion polls have shown declining homophobia for decades. See e.g. David Akin, "Federal Government Asked Canadians if They're 'Comfortable' with LGBT People," *Global News* (28 December 2019), online: <globalnews.ca/news/6344287/canadian-government-asked-canadians-comfortable-lgbtq2/> (survey by the Federal Government indicated that 91.8 percent of Canadians would be comfortable if their next-door neighbour were gay, lesbian, or bisexual, while 90.5 percent of Canadians would be comfortable if their boss were gay, lesbian, or bisexual).

156 *Whatcott*, *ibid* at para 104.

157 *Ibid* at para 75.

158 Maan Alhmidi, "Torrent of Online 'Toxicity,' Including Hate, Targeting Election Candidates: Study," *The Toronto Star* and *The Canadian Press* (25 August 2001), online: <www.ctvnews.ca/politics/federal-election-2021/torrent-of-online-toxicity-including-hate-targeting-election-candidates-study-1.5561041>.

159 *Whatcott*, *supra* note 22 at para 148.

160 *Ibid*.

161 *Ibid*.

of prison.[162] That said, the Supreme Court clearly finds that section 14 violates section 2(b) — a violation permissible only if justified under section 1.[163] This justification should not depend on the subjective value of expression.

Although it helpfully clarified certain aspects of freedom of expression jurisprudence, *Whatcott* shares many of *Taylor*'s flaws. In addition to tying speech protections to the content of the expression itself, thus engaging in unambiguous viewpoint discrimination, the Supreme Court also dispenses with the substantive protections available under criminal law. As in *Taylor*, the Supreme Court protects neither factual statements, nor religious belief, nor expression lacking hateful intent. Nor does the Supreme Court require any evidence of actual or potential harm, either to individual complainants or to Canadian society more generally.[164] Troublingly, *Whatcott* relies on an abstract conception of "hate speech" without any serious contextual inquiry into the facts of the specific case. As I elaborate below, this method of analysis — such as emphasizing values rather than consequences — is the inverse of the proper approach to freedom of expression.

E. SUMMARY

Keegstra, *Taylor*, and *Whatcott* reveal the flaws in the Supreme Court's freedom of expression jurisprudence. Rather than considering the consequences of targeted expression, the Supreme Court assesses the abstract value of its propositional content. Although this inquiry is framed in the language of section 2(b) values, the Supreme Court's application of these values is largely unpersuasive and seems to mask an intrinsic hostility toward the expression of certain viewpoints. Specifically, the search for truth is trivialized when the Supreme Court decides what is "likely to be true" while simultaneously allowing the restriction of *concededly* true expression. Similarly, the Supreme Court's denial of political expression to speakers motivated by hate betrays a narrow and historical understanding of the reality of democracy. Finally, a vision of self-fulfillment that depends on censoring unwelcome viewpoints hardly seems compatible with section 2(b) values at all. Indeed, the central, self-contradictory irony of the Supreme Court's hate speech jurisprudence is its willingness to prohibit actual expression in order to protect expressive "values." Rather than attempting to define and police values, a more principled approach to section 1 should focus on objective harm. I develop this argument in the remainder of this article.

III. AN ALTERNATIVE TEST: FREEDOM VERSUS HARM

No *Charter* rights, including freedom of expression, are absolute. Section 1 provides that the government may impose "reasonable limits" that are "demonstrably justified in a free and democratic society."[165] The question of whether particular limits are "demonstrably justified" is often difficult, and different jurists will inevitably bring different perspectives to the inquiry. Nevertheless, it is worth rendering the section 1 analysis as objective and transparent

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162 *Ibid* at para 150.

163 *Ibid* at paras 151–57.

164 This is despite the fact that the Supreme Court has demanded this evidence in other contexts. See e.g. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 128–29, 133 [*RJR-MacDonald Inc*].

165 *Charter*, *supra* note 1, s 1.

as possible to reduce the risk of normative preferences influencing the scope of *Charter* rights. This Part III proposes an alternative application of the *Oakes* test in the section 2(b) context. My approach eschews interrogation of the value of targeted expression and instead focuses on likelihood of harm. This framework borrows from the Supreme Court's existing jurisprudence in *Labaye*, which provides a useful objective harm standard.[166]

A. THE SCOPE OF EXPRESSIVE FREEDOM UNDER SECTION 1

My proposal follows the *Oakes* test's existing structure: It begins by asking whether the legislative objective is "pressing and substantial," and then proceeds to *Oakes*' three-prong proportionality analysis. The first two elements of my proposal — the "pressing and substantial" requirement and the "rational connection" prong of the proportionality analysis — are substantially similar to existing case law. Since these elements involve legislative questions of whether and how to make law, courts should defer to the democratic legitimacy and informational resources of the legislature, at least to the extent that the legislature's objectives relate to pressing and substantial societal concerns. To avoid judicial overreach, analysis should focus on the effects of specific restrictions, not the wisdom of legislation in the abstract.

Greater scrutiny should be reserved for the "minimal impairment" and "proportional effects" prongs. First, the requirement that legislation impair section 2(b) rights "as little as possible" should be applied rigorously, with a focus on the impairment of actual expression rather than underlying values. This is not because the values underlying freedom of expression are unimportant, but rather because they are easily employed to justify the suppression of disfavoured ideas. By avoiding subjective value assessments, courts can avoid suppressing expression in the name of free expression values.

The "proportional effects" analysis should be significantly reworked. Rather than balancing the effects of a restriction against the importance of its objective, courts should conduct a cost-benefit analysis comparing (1) the extent of the restriction on freedom of expression against (2) the individual or social harms *prevented* by the restriction.[167] For purposes of this analysis, broader restrictions should obviously be considered more "costly" than narrower restrictions, but *any* restriction of a fundamental freedom such as freedom of expression should be accorded significant weight.[168] In addition to direct costs, courts should consider the chilling effect of a restriction on expression when estimating its total costs. As with the minimal impairment inquiry, the proportional effects analysis should not assess the value of the expression itself — all expression should be considered equally valuable for

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166 *Supra* note 28.

167 See e.g. *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 [*Dagenais*] (the Supreme Court ruled that the salutary effects of a judicial publication ban must outweigh the ban's deleterious effects on freedom of expression).

168 I must admit candidly to the difficulty of balancing an abstract cost such as infringement of a constitutional right against incommensurable (and more tangible) costs such as the consequences of harmful expression; Grégoire Webber, "Proportionality and Limitations on Freedom of Speech" in Adrienne Stone & Frederick Schauer, eds, *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021) 173. I take recourse in the fact that the text of the *Charter* itself places great weight on freedom of expression, justifying a "heavy thumb on the scale" in favour of protecting expression. See e.g. Daniel Hemel, "Economic Perspectives on Free Speech" in Stone & Schauer, *ibid*, 118 (a similar argument in the First Amendment context).

purposes of proportionality. Neither the cost nor the benefit of restricting expression should be measured in terms of "values," which are inherently subjective. Instead, costs should be measured by the severity of the restriction itself, with broader or more draconian restrictions entailing a greater cost on *Charter* rights. Conversely, benefits should be measured in terms of individual or societal harms avoided.

In assessing these costs and benefits, courts should maintain a distinction between realistically probable harms and abstract speculation. To avoid exaggerating speculative harms, and thus undermining section 2(b), the court's analysis should focus on the facts of the specific case, not the category of expression to which the defendant's speech belongs. To give a specific example, a challenge to human rights legislation involving an antisemitic message service (such as the message service operated in *Taylor*) should be considered in terms of its specific factual context, rather than in terms of the broader implications of the existence of hate speech in society. In the case of *Taylor*, the narrow (as opposed to mass) nature of the communication at issue may have reduced its potential for harm, thus reducing the benefit of its restriction.

The importance of this distinction becomes clear when one considers the proper role of the judiciary. The judicial role is legitimated in large part through the intelligibility and cogency of courts' judgments; allowing courts to separate freedom of expression issues from the factual context of specific cases allows unprincipled speculation about both values *and* harms, threatening the transparency and predictability of courts' decisions. Abstract speculation also creates evidentiary issues, as the invitation for courts to engage in *a priori* reasoning makes it difficult for defendants to discern what types of evidence are relevant to their exoneration. Expecting courts to closely attend to the factual context of expression is therefore a natural extension of the basic structure of our judicial system.

A more rigorous cost-benefit approach has jurisprudential advantages as well. First, it imposes discipline on what is arguably the most discretionary aspect of the *Oakes* test by clarifying the factors to be considered in assessing proportionality of effects. In so doing, it prevents the use of "values" as an open-ended mechanism for the rationalization of judges' moral and political intuitions. Second, by deeming the "cost" of legislation to be the scope of its restrictions, it allows a Court's finding under the minimal impairment prong to be transposed onto the proportional effects inquiry with little modification, thereby focusing analysis on the "benefit" of restricting expression. Even if legislation impairs freedom of expression as little as possible, the benefits of the legislation must still outweigh its costs.

This approach is both rigorous and flexible, and avoids the aporias of personal judicial preference. The question of whether expression advances section 2(b) values, an inherently subjective inquiry, is dispensed with entirely and analysis focuses on the likelihood of harm. The difficult nature of "harm" in the section 2(b) context is the subject of the following section.

B. THE NATURE OF HARM

Evaluating expression in terms of section 2(b) values invites excessive subjectivity into the adjudication of *Charter* rights. If the concern is subjectivity, however, my admonition

that courts focus exclusively on harm is vulnerable to two objections: (1) harms, like values, are inherently subjective; and (2) characterizing speech as "harmful" is simply another way of assigning it low value. Addressing both of these objections requires an objective conception of harm. An objective standard is particularly important given the reality that harm, especially psychological harm, is subjectively experienced (i.e., harm is, to a certain extent, defined by those who experience it).[169] This subjective nature of harm creates a legal and political risk that "harm" could be expansively defined by the most sensitive members of society.[170] Moreover, without an objective conception of harm that is uniform across individuals, it would be difficult for courts to adjudicate cases consistently.[171] It would also be impossible to predict the scope of protected speech, thereby chilling public expression.

Fortunately, the Supreme Court has already established an objective standard of harm, albeit outside the *Charter* context.[172] In *Labaye*, the Supreme Court considered the issue of whether consensual group sex performed within a private commercial establishment constituted "acts of indecency" under section 210(1) of the *Criminal Code*.[173] In setting aside the defendant's conviction, a majority of the Supreme Court rejected the "community standard" of indecency that had informed prior decisions, and instead developed an objective test of legally recognizable harm.[174] In the indecency context, this test identifies "harm" by requiring clear evidence of loss of personal autonomy or liberty, either directly at the individual level or indirectly as a result of social change.[175] Although *Labaye* is not a *Charter* case, its objective conception of harm provides a useful analytical framework for broader questions regarding nonphysical harm.

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169 My own perspective is that "harm" should be conceptually limited, for freedom of expression purposes, to violence, personal intimidation, and targeted infliction of emotional distress, and that offensive or even hateful expression rarely causes legally recognizable harm. However, many scholars, legal activists, and other commentators have argued that hateful or offensive expression — even if not individually targeted — can amount to legally recognizable or even physical harm. See e.g. Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in Mari J Matsuda, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (New York: Routledge, 1993) 17 (argued that hate speech can cause physiological symptoms including stress, hypertension, and chronic nightmares in addition to restrictions on personal autonomy). See also Lisa Feldman Barrett, "When is Speech Violence?," *The New York Times* (14 July 2017), online: <www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> (similarly argued that the physiological stress caused by chronic exposure to abusive speech can take a physical toll on the human body). In the litigation domain, the Women's Legal Education & Action Fund has taken the legal position that hate speech can have a "profound negative effect on the individual's sense of self-worth, dignity, and safety" in cases such as *Keegstra*, *Taylor*, and *Whatcott*: "Hate Speech and Online Hate," online: <www.leaf.ca/issue-area/hate-speech-and-online-hate/>. Although the Supreme Court of Canada has recognized that hate speech may desensitize society to the plight of vulnerable groups, potentially leading to "ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide," it has specifically rejected the argument that hate speech is analogous to violence itself: Lex Gill, "The Legal Aspects of Hate Speech in Canada" (June 2020) at 12, online: *Public Policy Forum* <ppforum.ca/wp-content/uploads/2020/07/1.DemX_LegalAspects-EN.pdf>.

170 Compounding this problem, cultural trends may be increasing the likelihood that individuals perceive unwelcome speech as harmful. See generally Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (New York: Penguin Press, 2018) at 19–32.

171 Macfarlane, *Dilemmas*, *supra* note 25 at 44 (the intractably subjective nature of psychological harm is addressed in).

172 *Whatcott*'s conception of harm is exceedingly broad, and the Supreme Court provides no guidance as to how to identify or measure harm in specific cases; *Whatcott*, *supra* note 22 at paras 79–84 (the Supreme Court discusses the nature of harm in relation to the rational connection prong). See also *Butler*, *supra* note 23 (harm is also a central concern, but again, the Supreme Court provides no standard for determining its existence); *Labaye*, *supra* note 28 (does not address section 2(b), but its analysis provides a more developed and objective conception of harm).

173 *Labaye*, *ibid* at paras 1–8.

174 *Ibid* at paras 13–39.

175 *Ibid* at paras 32–39.

Labaye recognizes three types of harm that may support a finding of criminal indecency: "(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct."[176] The third type of harm is less important in the freedom of expression context — not only is it a core purpose of freedom of expression to facilitate individual autonomy, but most forms of expression are unlikely to cause harm to the speaker (unlike certain forms of sexual conduct, which may injure or otherwise harm participants). The first and second types of harm, however, are directly applicable to expression. Regarding the first type, hate speech can potentially restrict the autonomy and liberty of its victims by threatening their position and safety within the community. As to the second type, hate speech can predispose its audience to antisocial conduct such as aggression, harassment, violence, or even genocide.

Crucially, the Supreme Court's analysis in *Labaye* demands evidence of tangible harm. Writing for the majority, Chief Justice McLachlin argues that speculative conceptions of harm are inappropriate when defining the scope of individual rights.[177] She contends that "[i]f the harm is based on the threat to autonomy and liberty arising from unwanted confrontation by a particular kind of sexual conduct, for example, the Crown must establish a real risk that the way people live will be significantly and adversely affected by the conduct."[178] She specifically states that the number of people involuntarily exposed to the conduct has a direct bearing on the scope of harm, a concept directly analogizable to expression.[179] When considering the danger of encouraging antisocial behaviour, "a real risk that the conduct will have this effect must be proved. Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice."[180] Arguments that indecency will lead to individual or social harm "are matters that can and should be established by evidence, as a general rule."[181] Although *Labaye* addresses conduct that is not expressly protected by the *Charter*, its requirement of proving harm is consistent with Chief Justice McLachlin's admonition in *RJR-MacDonald Inc* regarding the nature of the section 1 analysis:

> In determining proportionality, [the reviewing court] must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation

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176 *Ibid* at para 36 (this case is particularly relevant to the Supreme Court's obscenity jurisprudence, which shares many of the same problems as its hate speech jurisprudence).

177 *Ibid* at para 57.

178 *Ibid*.

179 Antisemitic messages played over a loudspeaker in a public area, for example, are more harmful than the same messages played to individuals who call a message service. The advent of ubiquitous online communication raises difficult questions in this area. On the one hand, expression published on the internet can easily, and inexpensively, reach a wide audience. On the other hand, it can often be easily avoided, by simply not accessing an offending webpage, for example. The potential dissemination of hateful messages on public social media platforms such as Twitter raises even more difficult problems. See generally Mathen, *supra* note 26 (highlights the risks of regulating social media).

180 *Labaye*, *supra* note 28 at para 58. Although *Labaye* cites *Butler*, *supra* note 23, approvingly, this requirement highlights a major weakness of *Butler*, which is its reliance on a "reasoned" but essentially unevidenced relationship between obscene pornography and the victimization of women.

181 *Labaye*, *ibid* at para 60 (again, *Labaye* imposes a higher standard than *Butler*, *ibid*, despite the fact that *Butler* addresses a fundamental right).

> of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.[182]

This evidentiary requirement notwithstanding, harm need not *actually occur* on the facts of a specific case. It is sufficient for the government to establish a significant *risk* of harm. In *Labaye*, Chief Justice McLachlin suggests that the severity of harm should be discounted by its probability — that is, imminently likely harm may justify greater restrictions on liberty, whereas remote or unlikely harm justifies fewer restrictions on liberty.[183] This approach implies that even a small risk of an extremely harmful outcome may justify rights restrictions. In the words of the Supreme Court, "[t]he more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law."[184] Again, this logic can be usefully applied to the freedom of expression context, as it fits particularly well within the proportional effects prong of *Oakes*. To provide an example under the section 1 framework, I would argue that advocating genocide is constitutionally sanctionable under criminal law.[185] Although the likelihood of genocide in modern Canada is remote,[186] a humanitarian disaster of such enormous costs justifies effective preventative measures, even when discounted by its probability.[187]

Given the relevance of *Labaye* to the question of harm, I therefore propose the following proportional effects analysis under *Oakes*. When considering the proportionality of a restriction's effects, a Court should demand evidence that the targeted expression is likely to cause either (1) harm to individuals whose autonomy or liberty may be injured or (2) harm to society by predisposing individuals to antisocial conduct. For the restriction to be permissible, the harm to individuals' autonomy or liberty must extend beyond feelings of condemnation or offence. In the language of *Labaye*, there must be a "real risk that the way people live will be significantly and adversely affected" by the expression.[188] Speech that causes an individual to experience reasonable fear of physical danger would be an example

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182 *RJR-MacDonald Inc*, *supra* note 164 at para 133 (note that Justice McLachlin emphasizes "the actual connection between the objective and what the law will in fact achieve," a more rigorous approach than merely assessing the importance of the objective itself, as done in *Keegstra*, *supra* note 10; *Taylor*, *supra* note 21; *Whatcott*, *supra* note 22).

183 Richard A Posner, "Free Speech in an Economic Perspective" (1986) 20:1 Suffolk UL Rev 1 (similar economic argument to this heuristic). In addition to discounting for probability, Posner also explicitly discounts over time (such as future harm is less costly than present harm) by employing a financial discount rate (*ibid*). Formal financial discounting is probably unnecessary for my proposal, though Canadian courts often engage in implicit temporal discounting.

184 *Labaye*, *supra* note 28 at para 61.

185 *Criminal Code*, *supra* note 103, s 318 (advocating or promoting genocide is currently illegal).

186 Following section 318 and the *Convention on the Prevention and Punishment of the Crime of Genocide*, I take "genocide" to mean the intentional physical destruction of an identifiable group. A broader definition of genocide, such as that suggested by the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, would weaken the constitutionality of section 318; *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 50–54. See also *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) at 3–11.

187 *Brandenburg v Ohio*, 395 US 444 (USSC 1969) (note that this risk assessment differs from the "imminence" approach of First Amendment jurisprudence, under which violent or inflammatory speech may be prohibited only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" at 447). My approach (as informed by Justice McLachlin's reasons in *Labaye*, *supra* note 28) would potentially allow greater restriction of expression, in that it does not require future harms to be temporally "imminent."

188 *Labaye*, *ibid* at para 57.

of "significantly and adversely affected."[189] A similarly high standard should apply to "predisposing others to antisocial conduct."[190] Expression that influences social attitudes in a manner disfavoured by government may not be prohibited unless it can be shown that such attitudinal changes lead to antisocial behaviour.[191] Unless the harm has already occurred, courts must discount the severity of the harm by its probability of occurrence. This probability inquiry should consider the cultural, social, and political context of modern Canada to properly assess whether potential harms are likely to materialize.[192] Finally, once a Court has estimated the discounted harm of expression, it should be weighed against the constitutional harm of the specific restriction on section 2(b). As discussed above, this harm should be afforded significant weight given freedom of expression's status as a fundamental freedom.

If adopted, this analysis would establish an objective standard of harm in the freedom of expression context. By integrating *Labaye* with the proportionality analysis under *Oakes*, and declining to pass judgment on the value of expression, the Supreme Court could offer a more principled standard for regulating harmful speech.

C. APPLYING THE TEST

In this section, I apply my analysis to *Keegstra*, *Taylor*, and *Whatcott*. In doing so, I demonstrate how my proposal would apply to concrete cases and whether it would lead to different legal outcomes. As discussed below, the outcome in *Keegstra* would likely remain unchanged, but the human rights legislation in *Taylor* and *Whatcott* would be held unconstitutional.

Beginning with *Keegstra*, section 319(2) of the *Criminal Code* clearly relates to social concerns that are "pressing and substantial." Ethnic, racial, and other forms of hatred are a serious issue in Canadian society. Moving to the second step, the first prong of the proportionality analysis, section 319(2) is also "rationally connected" to the objective of reducing hate speech. This connection is clear, criminalizing an activity increases its expected costs, thereby reducing its incidence.[193] Note that the requirement is *not* that the legislature develop an ideal solution, merely that its response be rationally connected to its objective.[194]

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189 My test is, in this specific sense, similar to the US Supreme Court's approach in *Black*, which held that the government may prohibit "forms of intimidation that are most likely to inspire fear of bodily harm"; *Black*, *supra* note 102 at 363.

190 *Labaye*, *supra* note 28 at para 36.

191 Relevant evidence establishing a risk of antisocial behaviour may include direct factual evidence or social scientific evidence.

192 For example, hateful expression directed at vulnerable demographic groups that have historically (or currently) been targets of violence should be taken more seriously than other forms of hateful expression.

193 Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 J Political Economy 169 at 177–80.

194 This approach rejects Justice McLachlin's (as she then was) more stringent rational connection analysis, which would seem to require the legislature to develop an *effective* policy solution (in the opinion of a reviewing court); *Keegstra*, *supra* note 10 at 851–54, McLachlin J, dissenting (in my view, this standard would usurp the legislature's proper role in designing public policy).

As discussed, the "pressing and substantial" and "rational connection" standards are easily satisfied. The final two prongs of the *Oakes* test are more demanding, however. With respect to minimal impairment, section 319's restrictions are, in fact, carefully tailored. The protections of section 319, including (1) its requirement of wilful intent, (2) its exclusion of private conversations, (3) its exemption of good-faith religious discussion, (4) its exemption of statements directed to the public interest (if the speaker believed them to be true), (5) its exemption of expression intended to identify and criticize hate speech, (6) the availability to defendants of an affirmative truth defence,[195] and (7) its requirement that any prosecution be approved by the Attorney General, help limit the provision's restrictions to a narrow range of expression. In terms of proportionality of effects, section 319(2) does impose substantial limits on freedom of expression, in that it outright prohibits hate speech, on pain of criminal punishment. On the facts of *Keegstra*, however, the cost of this limit was likely outweighed by the danger of Keegstra's expression. Perhaps more so than other forms of hate speech, Keegstra's antisemitic teachings raise specific historical concerns, as they targeted a minority group that, within living memory, was subject to one of the deadliest extermination campaigns in human history.[196] Moreover, by denying the reality of the Holocaust itself, Keegstra's words might increase the risk of similar tragedies occurring in the future.[197] These dangers were exacerbated by the specific educational context,[198] in that Keegstra was teaching his beliefs to impressionable young people.[199] In combination, the historical experience of the Holocaust, the dangers of indoctrinating minors, and the extreme nature of Keegstra's expression, establish a sufficient risk of harm under the modified *Labaye* standard to justify restricting Keegstra's section 2(b) rights.[200]

Taylor also addresses antisemitic expression, but its statutory and factual context suggest a different legal outcome. As in *Keegstra*, the requirements of showing a rational connection to a pressing and substantial social concern are easily satisfied. Again, the difficulty lies in the minimal impairment and proportionate effects analyses. As discussed above, the human rights legislation in *Taylor* lacked many of the substantive protections provided by criminal

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195 *Supra* note 102.

196 As the culmination of centuries of deeply engrained antisemitism, the Holocaust deserves special consideration in debates regarding hate speech. There may be justification in restricting even insipient expression of the ideas that led to the Holocaust in Europe. The same consideration applies to other historical genocides.

197 Indeed, Holocaust denialism is often used as a rhetorical device by antisemites who explicitly advocate for the extermination of Jews. See generally Robert Solomon Wistrich, ed, *Holocaust Denial: The Politics of Perfidy* (Berlin: De Gruyter, 2012).

198 Robert Simpson has suggested that the communication of hateful ideas by authority figures (such as teachers) to children may be particularly harmful; Robert Mark Simpson, "'Won't Somebody Please Think of the Children?' Hate Speech, Harm, and Childhood" (2019) 38:1 Law & Phil 79 at 100.

199 Indeed, the influence of Keegstra on his students should not be understated; Raphael Cohen-Almagor, "Hate in the Classroom: Free Expression, Holocaust Denial, and Liberal Education" (2008) 114:2 American J Education 215 ("[e]vidence showed that a generation of students accepted almost all of the details of Keegstra's views about the international Jewish conspiracy" at 222). "Keegstra's students came to believe that Judaism and Christianity were mortal enemies, that the Talmud is a perverted and evil book, and that Jews have been taking over the world" (*ibid*). Young people may be particularly vulnerable to Holocaust denialism. See especially Daniel Otis, "A Third of Students Think Holocaust Exaggerated or Fabricated: Study," *CTV News* (26 January 2022), online: <www.ctvnews.ca/canada/a-third-of-students-think-holocaust-exaggerated-or-fabricated-study-1.5753990> (recent study, a disturbingly high percentage of Canadian students believe the Holocaust has been exaggerated).

200 This conclusion is not without doubt, however. Note, for example, that Keegstra did not explicitly advocate violence. Perhaps more importantly, it is easy to imagine factual situations captured by section 319 that would not create the same risk of harm occasioned by Keegstra's teachings. Much of Justice McLachlin's (as she then was) dissent in *Keegstra*, *supra* note 10, focused on this issue of potential overbreadth.

law. The fact that section 13 captured private communication, expression lacking hateful intent, good-faith religious and political expression, and even literally true statements suggests that it failed to strike an appropriate balance between the governmental objective and section 2(b) rights. Similarly, the harm visited upon John Taylor, including literal imprisonment, would appear to exceed the risk of harm from his antisemitic message service. On the facts of *Taylor*, the expression at issue was likely consumed primarily by individuals already receptive to its content.[201] This factual context poses less danger than Keegstra's teachings to high school students.

Whatcott would also be decided differently under my proposal. Given the similarity of the legislation in *Taylor* and *Whatcott*, the "pressing and substantial" and "rational connection" analyses are essentially the same. The minimal impairment analysis is also similar, given the lack of substantive protections under both statutes. If anything, the minimal impairment issue is even more pressing in *Whatcott* given the nature of Whatcott's expression. The content of Whatcott's flyers was explicitly political, in that it called upon readers to engage with curricular decisions of the Saskatoon Public School Board by contacting board members and threatening to withhold votes for local trustees.[202] Setting aside its offensiveness, there is little doubt that Whatcott's speech addressed a question of public interest. His expression was also religious in nature: Whatcott's flyers — which included biblical quotations — were clearly informed by his sincerely-held religious beliefs.[203] Indeed, Whatcott's defence included a section 2(a) religious freedom claim in addition to his section 2(b) claim, and although he lost on both claims, the fact that Whatcott's expression was so closely interrelated with "core" political and religious expression suggests that Saskatchewan's legislation extended further than minimally necessary to achieve its objective.[204] For instance, the legislation could, and does, prohibit discriminatory practices, rather than prohibiting political expression that may "lead to discrimination."[205]

Regarding proportional effects, the legislation's infringement of expressive freedom was substantial. On the facts of the case, Whatcott's commentary on a controversial and, at the time, unsettled political issue was effectively censored from public discussion. Moreover, there was no evidence that Whatcott's speech caused "harm" within the meaning of *Labaye*.[206] The individuals who brought the complaint were understandably offended, but there was no evidence, or even allegation, that they had suffered discrimination as a result

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201 The telephone number was listed in the telephone book under the unambiguous title "White Power Message." Note that the communitive reach of Taylor and the Western Guard Party was limited by the technology of the time. The advent of the internet gives rise to greater concerns regarding the dissemination and influence of hate speech.

202 *Wallace v Whatcott* (2 May 2005), CHRR Doc 05-265 at 6–8.

203 *Ibid* (Whatcott called an ordained minister as an expert witness regarding the Lutheran Church of Canada's position on homosexuality).

204 *Ibid* at 10.

205 *Whatcott*, *supra* note 22 at para 52.

206 The complainants who initiated the proceeding testified that they were "offended, hurt and, to some extent, frightened" by Whatcott's flyers: *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 at para 127 [*Whatcott* SKCA]. The Saskatchewan Human Rights Tribunal awarded damages on the basis of the complainants' "loss of their dignity, self-respect and hurt feelings"; *ibid* at para 14. Without discounting the significance of the complainants' emotions, they fail to meet the high threshold required by *Labaye*, *supra* note 28.

of Whatcott's expression.[207] On the question of social harm, although the persecution of LGBT people has a long and tragic history (a contextual factor relevant to assessing the risk of harm), there was no evidence Whatcott's expression contributed to increasing intolerance toward the LGBT community.[208] Indeed, the facts suggest that Whatcott himself was a marginalized figure with little social influence.[209] Perhaps due to this lack of evidence, the Supreme Court explicitly rejects any requirement that the government establish proof of harm, either through specific factual evidence or social scientific findings.[210] Rather, the Supreme Court states that reviewing courts are entitled to use "common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms."[211] Although hate speech may be capable of inflicting societal harm, it is a core argument of this article that reliance, without more, on "common sense and experience" is a formula for silencing unpopular expression. Given the limited impact of Whatcott's flyers, it is difficult to see how censorship was necessary to protect Canadian society.

D. SUMMARY

By rejecting judicial assessment of the value of targeted expression, my proposal would reduce the subjectivity of section 2(b) jurisprudence. My central thesis is that in order for a restriction to be "reasonably justified" under section 1, it must prevent actual harm to actual human beings. Abstract considerations of whether expression advances constitutional values are beside the point. The unambiguous textual mandate of section 2(b) itself provides that, at least in matters of "thought, belief, opinion and expression," individual Canadians are free to choose their own values. No rights are absolute under the Canadian constitutional order,[212] and section 1 wisely provides for reasonable limitations. But, if rights as fundamental as the freedom to express one's views can be limited by majoritarian preferences, rather than by evidence of injury to the rights of others, it becomes questionable whether the *Charter* serves any constitutional function beyond reifying the values of the Canadian political establishment.

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207 *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2007 SKQB 450 (no evidence was introduced "in relation to the flyers depriving, or tending to deprive, homosexuals of rights they were entitled to under law" at para 9).

208 *Whatcott* SKCA, *supra* note 206 at para 127 (testimony at the Human Rights Tribunal focused on the harms of homophobia in a general sense, rather than on the specific effects of Whatcott's flyers). It is important to note that at least two of the complainants had themselves suffered anti-gay discrimination in the past. This personal history may have been grounds for a reasonable fear that Whatcott's expression would cause future discrimination, potentially justifying its suppression, but the Human Rights Tribunal never makes this specific contextual inquiry.

209 According to his autobiography, Whatcott's experience with the criminal justice system began at an early age. He transitioned among foster homes, juvenile detention centres, psychiatric hospitals, homeless shelters, and prisons. Often physically attacked by his peers, as well as socially ostracized by others, he developed severe substance abuse and mental health problems, including numerous suicide attempts. Although he engaged in gay sex himself, he eventually "found God" and renounced homosexuality. See Bill Whatcott, *Born in a Graveyard: One Man's Transformation from a Violent, Drug-Addicted Criminal into Canada's Most Outspoken Family Values Activist* (Langley: Good Character Books, 2014).

210 *Whatcott*, *supra* note 22 at paras 132–33. To emphasize, although my proposal requires evidence establishing risk of harm, it does not necessarily require social scientific evidence. Evidence of potential harm arising from the factual circumstances of the specific case is sufficient.

211 *Ibid* at para 132.

212 But see Webber, *supra* note 168 (critiques proportionality analysis in the freedom of expression context, suggesting that freedom of expression can, in fact, be absolute within its proper scope). Whatever the jurisprudential merits of an absolute conception of freedom of expression, however, this approach seems precluded by section 1.

IV. CONCLUSION

Freedom of expression is a cornerstone of Canadian democracy. Without the freedom to express oneself, many other civil and political rights would be rendered hollow. Although freedom of expression has long been recognized in Canadian law,[213] its enshrinement in the *Charter* has elevated its status in Canadian legal and political culture.[214] Ironically, despite this increased importance, the Supreme Court's *Charter* jurisprudence raise serious questions as to the strength of the constitutional protections provided by section 2(b), particularly with respect to disfavoured expression. These questions grow ever more salient in our current political moment, in which both popular and elite commitments to freedom of expression may be waning.[215]

Although hate speech is particularly controversial, it is not the only area of expression to which this article applies. The Supreme Court's jurisprudence regarding obscenity,[216] libel,[217] and, to a lesser extent, commercial speech,[218] is similarly characterized by subjective valuation of targeted expression and vaguely defined conjecture as to the nature of potential harms. Unsurprisingly, the Supreme Court's decisions in these cases, which are often the focus of political pressure in favour of limiting expression,[219] can seem inconsistent and unprincipled. This problem is not limited to section 2(b). Throughout its *Charter* jurisprudence, the Supreme Court describes its legal analysis as "balancing" competing *Charter* values, many of which are nowhere mentioned in the text of the *Charter* itself.[220] In reality, this "balancing" is often a euphemism for privileging certain values over others, rarely with clear textual justification.[221] Over time, the *Charter* has become the instrument of a teleological project aimed at manifesting and constitutionalizing progressive political commitments, even at the expense of individual rights. In contrast to this teleological approach, the analysis presented in this article strives for greater constitutional neutrality and

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213 Prior to the *Charter*, Canadian courts recognized free expression rights derived from the English Constitution. See e.g. *Reference Re Alberta Statutes*, [1938] SCR 100 (discussion of freedom of the press). These rights were limited by statutes prohibiting seditious libel, blasphemy, and other forms of controversial expression. Later, section 2(b) of the *Charter* was anticipated by section 1 of the *Canadian Bill of Rights*, SC 1960, c 44.

214 A Wayne MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68:4 Can Bar Rev 713 ("[f]reedom of expression was not invented by the Charter of Rights and Freedoms but it has acquired new dimensions as a consequence of its entrenchment" at 714).

215 For discussion of changing attitudes regarding freedom of expression: see e.g. Dennis Chong & Morris Levy, "Competing Norms of Free Expression and Political Tolerance" (2018) 85:1 Soc Research: An Intl Q 197. See also Humphreys, *supra* note 27; Richard Wike & Katie Simmons, "Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech" (2015) Pew Research Center at 5; Michelle Carbert, "Majority of Canadians Support Federal Government's Plan to Regulate Internet, Poll Shows," *The Globe and Mail* (10 May 2022), online: <www.theglobeandmail.com/politics/article-liberal-internet-regulation-bill-c-11>. These shifts are reflected in the Government of Canada's recent online harms legislation, though it remains to be seen whether this legislation will be enacted; *supra* note 26.

216 *Butler*, *supra* note 23.

217 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130.

218 Although commercial expression is protected under section 2(b), several Supreme Court cases on commercial expression have explicitly considered its value. See e.g. *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 (emphasized the low value of tobacco advertising, in addition to the harm of promoting tobacco use, in upholding government restrictions).

219 This political pressure has often taken the form of interveners' facta. Note that the Supreme Court has recently suggested limiting interveners' submissions: David Power, "November 2021 - Interventions" (November 2021), online: <scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx>.

220 Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67:1 SCLR 361.

221 See e.g. *Dagenais*, *supra* note 167; *R v NS*, 2012 SCC 72; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

denies a role for the *Charter* in serving extratextual political goals. By rejecting a hierarchy of expression based on judicial value assessments, and by centring speech restrictions on the principle of harm, courts can offer robust protection for intellectual freedom while limiting the social costs of truly dangerous expression.