

# JUSTIFIED LIMITS ON FREE EXPRESSION: THE COLLAPSE OF THE GENERAL APPROACH TO LIMITS ON *CHARTER RIGHTS*©

BY RICHARD MOON\*

The author argues that the apparent collapse or erosion of the *Oakes* test reflects the problem of fitting a right such as freedom of expression, which is social and relational in character, into a structure of constitutional adjudication, which is built on an individualist conception of rights. In the leading Canadian freedom of expression cases, the task for the courts under section 1 is not simply to strike the proper balance between competing interests, but rather to resolve the single but complex question of whether the expression contributes to, or undermines, human agency or autonomous judgment. In these cases, the “value” of expression and the “harm” of expression are not distinct issues, but rather two sides of the same basic issue. Whether expression is more likely to contribute to insight and judgment or to manipulate and lead to an unreflective response is a relative judgment that will depend significantly on the social and economic circumstances in which it occurs. This issue fits awkwardly within an adjudicative structure that is based on an individual liberty model of rights. The author argues that this awkwardness accounts for the “erosion” of the *Oakes* test in freedom of expression cases and more specifically for the court’s increasing, and inadequately justified, deference to legislative judgment under section 1.

L’auteur maintient que l’érosion ou l’effondrement du test *Oakes* fait voir comment il peut être difficile d’apparier un droit à caractère social et relationnel, tel que la liberté d’expression, à une structure de décisions constitutionnelles à la base d’un concept individualiste du droit. Selon les décisions de pointe en matière de la liberté d’expression au Canada, les cours de justice ne doivent pas seulement balancer des intérêts contradictoires sous l’article premier, mais elles doivent aussi résoudre la question complexe à savoir si l’expression contribue ou diminue le jugement autonome des gens ou leur habileté de modifier les institutions. Ces décisions font voir que le tort causé par la liberté d’expression, ainsi que sa valeur, ne constituent pas deux problèmes distincts, mais plutôt, font tous deux partie de la même problématique. Soit que l’expression saura contribuer à l’obtention de renseignements et de jugement ou bien qu’elle servira à manipuler et à inciter des réponses non-réfléchies: ceci dépendra d’une appréciation des circonstances sociales et économiques du jour. Cette question se prête mal au mécanisme de jugement basé sur un modèle individualiste du droit à la liberté. L’auteur maintient que cet maladresse est responsable pour l’érosion du test *Oakes* dans les cas traitant de la liberté d’expression. Cette maladresse est aussi à la base de la retenue accrue—qui se justifie avec difficulté—des cours de justice devant le jugement du législateur sous l’article premier.

I.	INTRODUCTION .....	338
II.	THE COURT’S APPROACH TO SECTION 2(B) AND SECTION 1 .....	344
III.	THE VALUE OF EXPRESSION AND THE SCOPE OF SECTION 2(B) .....	352
IV.	SECTION 1 LIMITS: THE HARM OF EXPRESSION .....	357
	A. <i>Deference</i> .....	358
	B. <i>Context</i> .....	361
V.	CONCLUSION: THE INTEGRITY OF THE <i>OAKES</i> TEST .....	364

---

© 2002, R. Moon.

\* Faculty of Law, University of Windsor.

## I. INTRODUCTION

The *Canadian Charter of Rights and Freedoms*<sup>1</sup> establishes a two-step process for the adjudication of rights claims. The first step is concerned with whether a *Charter* right has been breached by a state act. The court must define the protected interest or activity and determine whether it has been interfered with by the state. At this first step, the burden of proof lies with the party claiming a breach of rights. The second step in the adjudicative process is concerned with the justification of limits on *Charter* rights. Section 1 of the *Charter* states that the protected rights and freedoms may be subject to limits that are “prescribed by law,” “reasonable,” and “demonstrably justified in a free and democratic society.” The limitation decision is described by the Supreme Court of Canada as a balancing of competing interests or values.<sup>2</sup> At this stage, the burden of proof lies with the party seeking to uphold the limitation, usually the state, who must justify the restriction “on a balance of probabilities.” In *R. v. Oakes*,<sup>3</sup> the Supreme Court of Canada set out a general test for determining when a limit on a *Charter* right is justified under section 1. When assessing a limit under section 1, the Court must consider whether the restrictive law has a substantial and compelling purpose, whether it advances this purpose rationally and with minimal impairment to the right, and whether the benefit of the law outweighs its cost to the right.

While the Court continues to follow the *Oakes* test when assessing limits, what was initially presented as a *strict* test for the justification of *all* limits on *Charter* rights increasingly appears vague and malleable. Many commentators have criticized the Supreme Court of Canada for failing to live up to the promise of *Oakes* and other early *Charter* cases, in which the Court signalled its intention to carefully scrutinize limits on *Charter* rights and to set a high standard for their justification.<sup>4</sup> Critics complain that the Court “engage[s] in a case-by-case manipulation of *Oakes*,”<sup>5</sup> “chooses between strict

---

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Ford v. Quebec (A.-G.)*, [1988] 2 S.C.R. 712 at 766 [*Ford*]: “It is within the perimeters of s.1 that courts will in most instances weigh competing values in order to determine which should prevail.” Justice McLachlin in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 845 [*Keegstra*]: “The task which judges are required to perform . . . is essentially one of balancing . . . . The exercise is one of great difficulty, requiring the judge to make value judgments.”

<sup>3</sup> [1986] 1 S.C.R. 103 [*Oakes*].

<sup>4</sup> The focus in this article will be on the judgments of the Supreme Court of Canada. Throughout the article, “the Court” refers to the Supreme Court of Canada.

<sup>5</sup> Jamie. Cameron, “Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R. v. Butler*” (1992) 37 McGill L.J. 1135 at 1147.

and deferential standards of justification on purely subjective grounds,”<sup>6</sup> has “transformed section 1 review into an ad hoc exercise that exalts flexibility at the expense of principle,”<sup>7</sup> has turned “s.1 justification [into] free-form balancing—a decidedly subjective exercise, serviced by a superficial cost-benefit analysis, informed by a less than rigorous attitude to facts and data, and deferential in the extreme to majoritarian policy formation,”<sup>8</sup> has adopted a deferential approach that is “inherently indeterminate, and consequently open to manipulation,”<sup>9</sup> and has “reduce[d] adjudication to a highly subjective exercise with little predictability.”<sup>10</sup>

In this article, I want to examine why the *Oakes* test has not fulfilled its initial promise. My focus will be on the freedom of expression jurisprudence of the Supreme Court of Canada, particularly the justification of limits on protected expression under section 2(b). However, as I will later suggest, the difficulties faced by the Court in developing a coherent approach to limits on section 2(b) rights may apply to other *Charter* rights.

Two things about the relationship between section 2(b) and section 1 are noteworthy. First, in most of the Canadian freedom of expression cases, the section 2(b) analysis seems to be little more than a formal step that must be taken before the Court moves on to the more substantial issue of limits under section 1. The Court has interpreted the scope of the freedom broadly. Expression includes any act that is intended to convey a message. At this first stage of the adjudicative process, the Court describes the value of expression in very general terms (noting its contribution to truth, democracy, and self-realization), and says very little about the connection between the restricted expression and the values underlying the freedom. A more concrete or substantial discussion of the value of expression is deferred until the second stage of the adjudicative process, as part of the contextual “balancing” of competing interests under section 1.

Second, many of the leading section 1 cases in which the Supreme Court of Canada discusses its general approach to limits on *Charter* rights involve restrictions on freedom of expression. In freedom of expression cases

---

<sup>6</sup> *Ibid.*

<sup>7</sup> Jamie Cameron, “The Past, Present, and Future of Expressive Freedom under the Charter” (1997) 35 *Osgoode Hall L.J.* 1 at 5.

<sup>8</sup> L. Weinrib, “Hate Promotion in a Free and Democratic Society: R v. Keegstra” (1991) 36 *McGill L.J.* 1416 at 1424.

<sup>9</sup> Terry Macklem & John Terry, “Making the Justification Fit the Breach” (2000) 11 *Sup. Ct. L. Rev.* (2d) 575 at 593.

<sup>10</sup> C. Bredt & A. Dodek, “The Increasing Irrelevance of Section 1 of the Charter” (2001) 14 *Sup. Ct. L. Rev.* (2d) 175 at 185.

such as *Irwin Toy Ltd. v. Quebec (A.G.)*,<sup>11</sup> *Edmonton Journal v. Alberta (A.G.)*,<sup>12</sup> *Dagenais v. CBC*,<sup>13</sup> *RJR-Macdonald Inc. v. Canada (A.G.)*,<sup>14</sup> and *Thomson Newspapers v. Canada (A.G.)*,<sup>15</sup> the Court has elaborated a “contextual” approach to the assessment of limits and described the general circumstances in which deference to legislative judgment is appropriate.

My claim is that the contextual assessment of limits and deference to legislative judgment are the responses of the Court to the problem of fitting a right such as freedom of expression, which is social or relational in character, into a structure of constitutional adjudication, which is built on an “individualist” conception of rights. The two-step structure of *Charter* adjudication assumes a bright line between the protected right or interest of the individual (for example, in expression) and the conflicting interests or rights of other individuals or of the collective (for example, in privacy or in being free from manipulation).<sup>16</sup> At the first stage of the adjudication, the Court determines whether the restricted activity falls within the scope of the right. At the second stage, the Court balances the right against the competing interest to determine whether the restriction should be upheld. This understanding of the issue, as the balancing of separate and competing interests, rests on the idea that *Charter* rights protect individual liberty, understood as freedom from external interference. This view of *Charter* rights is described by Justice Wilson in her dissenting judgment in *R. v. Morgentaler*.<sup>17</sup>

The Charter is predicated on a particular conception of the individual in society. ... [T]he rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.<sup>18</sup>

The fundamental rights protected by the *Charter* are the basic conditions of individual autonomy that must be protected from the demands of collective welfare or the common good. In exceptional situations, individual rights may be subject to limits that protect the rights (and not simply the

---

<sup>11</sup> [1989] 1 S.C.R. 927 [*Irwin Toy*].

<sup>12</sup> [1989] 2 S.C.R. 1326 [*Edmonton Journal*].

<sup>13</sup> [1994] 3 S.C.R. 835 [*Dagenais*].

<sup>14</sup> [1995] 3 S.C.R. 199 [*RJR-Macdonald*].

<sup>15</sup> [1998] 1 S.C.R. 877 [*Thomson*].

<sup>16</sup> *Ford*, *supra* note 2 at 766 observes that the definition of the freedom and the justification of limits “are two distinct questions and call for two distinct analytical processes.”

<sup>17</sup> [1988] 1 S.C.R. 30 [*Morgentaler*].

<sup>18</sup> *Ibid.* at 164.

preferences) of other individuals or of the larger community. The role of the Court is to determine when such limits are justified.

However, the constitutional right to freedom of expression does not simply protect individual freedom or liberty from state interference. Rather, it protects the individual from state interference with her or his liberty or freedom to communicate with others—to engage with others and participate in community life. Expression is valuable because individual identity and agency emerge in communicative interaction, because our understanding of self and the world develops through communication with others. Human reflection or judgment are dependent on socially created languages. They are born and sustained only in dialogue with others.<sup>19</sup> The individual's ideas and feelings take shape in the social process of expression, in the joint activity of creating meaning. While the individual is socially situated, he or she is not simply the product of social forces. The individual is capable of making judgments, reflecting upon his or her circumstances, and finding his or her own way in the world. As Jennifer Nedelsky puts it, "Human beings are *both* essentially individual and essentially social creatures."<sup>20</sup> "[W]e become individuals," Clifford Geertz observes, "under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point, and direction to our lives."<sup>21</sup> Because freedom of expression rests on the social character of agency (on a recognition that agency and identity are realized in communicative interaction), it will not quite fit within the *Charter's* adjudicative process, which regards the individual as distinct from the community and his or her interests as separate from, and potentially in opposition to, those of others or of the larger community.

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression, but also its potential for harm. Our dependence on expression means that words can sometimes be hurtful. Our identity is shaped by what we say, and what others say to us and about us. Expression can cause fear, it can harass, and it can undermine self-esteem. Expression can also be deceptive or manipulative. While language enables us to formulate and communicate ideas and to understand the ideas of others, it is not a transparent vehicle, an instrument that lies within our perfect control. We cannot simply stand apart from the words we use to express ourselves, or the words that others use to communicate with us,

---

<sup>19</sup> Calvin O. Schrag, *Communicative Praxis and the Space of Subjectivity* (Bloomington: Indiana University Press, 1986) at 171.

<sup>20</sup> J. Nedelsky, "Reconceiving Rights as Relationship" in Jonathan Locke Hart & Richard W. Bauman, eds., *Explorations in Difference: Law, Culture and Politics* (Toronto: University of Toronto Press, 1996) at 75.

<sup>21</sup> Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 52.

and ask whether they match our real feelings or the way the world really is. But if expression is never fully transparent, neither is it entirely opaque, a “cause” that simply impacts upon its audience. Some instances of expression encourage reflection and insight even about some of our most basic assumptions, while others bypass or discourage reflection. However, this distinction is a relative one. There is no clear line between manipulative and rational expression. How we label a particular act of expression will depend on its form but also on its social and economic context, including the distribution of communicative power.

The development or realization of agency and individuality is impeded by state acts that isolate the individual, deny him or her access to a range of ideas and information, and prevent him or her from articulating views in a public space. Agency may also be compromised by irrational appeals or “expression” that seeks to overwhelm or bypass reflection and critical judgment. The individual must be free to interact with others and must not be isolated from the linguistic and intellectual resources that are necessary to his or her development as an autonomous agent. But, at the same time, he or she should not be subjected to manipulative or deceptive “expression” that seeks to overwhelm or bypass rational or independent judgment. The manipulative impact of expression, if any, is the consequence, not only of its form, but also of the social and economic context in which it occurs, of systemic factors, and, more specifically, the domination of public discourse by a narrow range of voices and views—for example, the overwhelming presence in our public discourse of degrading sexual imagery, racist stereotypes, and lifestyle product associations. Instead of censoring particular instances of expression, the legislature or the court might respond to the problem of manipulation by opening public discourse to a wider range of voices and views. However, because they are unwilling or unable to respond directly to the larger problem of the imbalance of communicative power and the rise of advertising as the paradigm of public communication, legislatures and courts have responded to the problem of “manipulation” by supporting content restrictions on “extreme” instances of expression, such as violent sexual imagery and lifestyle cigarette ads.

In some familiar freedom of expression cases (most obviously time, place, and manner restrictions) the Court must strike the proper or fair balance between competing interests. For example, in the case of a noise bylaw, the Court must balance or reconcile the expression interests of some with the interests of others in peace and quiet.<sup>22</sup> However, in the leading Canadian

---

<sup>22</sup> Yet, even in the case of a time, place, and manner restriction, resolution of the issue may involve more than simply balancing competing interests, since an important consideration in these cases is whether the individual seeking to communicate in a particular manner or form has effective alternatives.

freedom of expression cases, the issue for the court is not the correct or reasonable balance between separate but competing interests. In cases dealing with picketing, advertising, hate promotion, and pornography, the argument for limitation is based either explicitly or implicitly on the irrational appeal or manipulative character of the expression.<sup>23</sup> The critical issue for the Court seems to be whether the form or instance of expression in the particular context contributes to insight and understanding, or whether it manipulates or appeals to the irrational. Freedom from manipulative or irrational appeals is not a competing interest. When it assesses the “manipulative” impact of expression, the Court is not simply balancing the distinct interests of separate individuals—the interest in communicating or receiving information and ideas against the interest in not being manipulated or deceived. It is instead making a contextual judgment about the relative value/harm of expression, or about the character or quality of the communicative relationship. In these cases, the “value” of expression and the “harm” of expression are not distinct issues, but are instead two sides of the same basic issue.

Once we recognize that autonomy and agency are capacities that are realized in the social realm and are dependent on community resources and social practices, it becomes clear that there can be no bright line between expression that appeals to reflection and contributes to autonomy and identity, and expression that is irrational and manipulative. Whether expression is more likely to contribute to insight and judgment or to manipulate and lead to an unreflective response is a relative judgment that will depend significantly on the social and economic circumstances in which it occurs. The space available for an individual to evaluate critically what he or she hears or sees can vary dramatically depending on factors such as the speed or manner of the message’s delivery and the effective absence of competing messages in public discourse. And so, in the leading freedom of expression cases, the task for the Court under section 1 is not simply to strike the proper balance between competing interests, but is instead to resolve the single but complex question of whether the expression contributes to, or undermines, human agency or autonomous judgment. In addressing this question, the Court must look to both the form and social conditions of the expression. Yet this issue fits awkwardly within an adjudicative structure that is based on an individual liberty model of rights. This awkward fit accounts for the “erosion” of the *Oakes* test in freedom of expression cases, and, more specifically, for the Court’s increasing and

---

<sup>23</sup> I will not make the case here that these forms of expression are (sometimes) manipulative. I will only argue that the Court’s judgments sometimes implicitly and other times explicitly rest on the view that they are. For example, in *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 and *BCGEU v. B.C. (A.G.)*, [1988] 2 S.C.R. 214 [BCGEU], two cases concerned with labour picketing, the irrational appeal of labour picketing was critical to the Court’s judgment that the restriction was justified. In *BCGEU* at 232, the Court described the response of individuals to a picket line as “automatic” and “almost Pavlovian.”

inadequately justified deference to legislative judgment under section 1.

## II. THE COURT'S APPROACH TO SECTION 2(B) AND SECTION 1

According to the Supreme Court of Canada, section 2(b) protects any activity that conveys "or attempts to convey a meaning."<sup>24</sup> An act of expression is distinguished from other voluntary human acts by the intention with which it is performed. If the act is intended by the actor to convey a message to someone, it is an act of expression and prima facie protected under section 2(b). Protection is given "irrespective of the particular meaning or message sought to be conveyed."<sup>25</sup> This is because "in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value to both the community and the individual."<sup>26</sup> In a variety of decisions, the Court has held that the category of human acts intended to carry a message, and so protected under section 2(b), includes advertising, picketing, defamation, hate promotion, soliciting for the purposes of prostitution, and pornography.

Despite the Court's stated commitment to interpret *Charter* rights purposively,<sup>27</sup> it has defined expression without any explicit reference to the values that are said to underlie the freedom. Indeed, the Court has said on several occasions that it will not exclude an act of expression from the scope of the freedom simply because the message is thought to be of little value. According to Chief Justice Dickson in *Keegstra*:

Content [of expression] is irrelevant at this stage of the interpretation [of the scope of section 2(b)], the result of a high value being placed upon freedom of expression in the abstract. This approach to s.2(b) often operates to leave unexamined the extent to which the expression *at stake in a particular case* promotes freedom of expression principles.<sup>28</sup>

The underlying values of truth, democracy, and self-realization only play an active or explicit role later in the adjudicative process, after the Court has defined the category of "expression."

There are two exceptions to the Court's broad definition of the scope of freedom of expression under section 2(b). The Court has held that a violent act, even if intended to carry a message, does not fall within the scope of section 2(b).<sup>29</sup> The Court has also narrowed the scope of section 2(b) by drawing a

---

<sup>24</sup> *Irwin Toy*, *supra* note 11 at 968.

<sup>25</sup> *Keegstra*, *supra* note 2 at 729.

<sup>26</sup> *Irwin Toy*, *supra* note 11 at 968.

<sup>27</sup> See e.g. *Hunter v. Southam*, [1984] 2 S.C.R. 145.

<sup>28</sup> *Keegstra*, *supra* note 2 at 760 [emphasis in the original].

<sup>29</sup> *Irwin Toy*, *supra* note 11 at 970.

distinction between two different kinds of state restriction on expressive activity: state acts that have as their purpose the restriction of expression, and state acts that do not have this purpose but nevertheless, have this effect. The significance of this distinction between purpose and effect, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place, and manner restrictions, is that a law intended to limit expression, and in particular the expression of certain messages, will be found to violate section 2(b) “automatically,” while a law that simply has the effect of limiting expression will be found to violate section 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression.

Once the Court has determined that the state has restricted expression protected by section 2(b), it then considers whether the restriction is justified under section 1 of the *Charter*. The Court asks whether the restricting law has a substantial purpose, advances this purpose rationally, impairs the freedom no more than is necessary, and is proportionate to the impairment of the freedom.<sup>30</sup> The first step of the *Oakes* test involves a judgment about the significance of the law’s general purpose—whether the purpose is substantial enough to justify the restriction of a fundamental freedom. The next two steps involve an assessment of the means chosen to advance that purpose. The rational connection test asks whether the means (the restriction) “rationally” advance the law’s substantial and compelling purpose. The minimal impairment test asks whether the measure restricts the protected activity (expression) more than is necessary to advance its purpose. The rational connection and minimal impairment tests are closely related. A law that does not rationally advance the pressing and substantial purpose for which it was enacted can be seen as unnecessarily restricting the right or freedom. Similarly a law that restricts the right or freedom more than is necessary to advance its pressing purpose (that does not minimally impair the freedom) is to that extent ineffective or irrational. At the final stage of the *Oakes* test, the Court compares or balances the restrictive law’s benefit or value with its actual costs to the right.<sup>31</sup>

In those cases in which the Court finds that a restriction is not justified under section 1, the decision is most often based on the minimal impairment test, and, occasionally, on the rational connection test. Undoubtedly these tests have come to play a central role in the Court’s assessment of limits under section 1, because they appear to involve nothing more than a technical assessment of legislative means. A law may be struck down by the Court not because its purpose is objectionable or because the constitutional values it impedes outweigh the values it advances, but simply because the means chosen

---

<sup>30</sup> *Oakes*, *supra* note 3 at 138-39.

<sup>31</sup> *Dagenais*, *supra* note 13.

to advance that purpose are ineffective or will impair the protected freedom unnecessarily. However, as many have observed, and as I will argue below, these tests are anything but value-neutral in practice.

In a variety of judgments, many involving restrictions on freedom of expression, the Supreme Court of Canada began to call for a more contextually sensitive balancing of competing interests under section 1. In *Edmonton Journal*, Justice Wilson argued that “the importance of the right or freedom must be assessed in context rather than in the abstract.”<sup>32</sup> She observed:

[t]hat a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.<sup>33</sup>

In this and other freedom of expression cases, the Court emphasizes that a key factor in the assessment of limits under section 1 is the relative value of the restricted expression. According to the Court, pornography, commercial expression, hate promotion, soliciting for the purposes of prostitution, and defamation are less directly connected to the values underlying the freedom than political or artistic expression, and should, therefore, be subject to a less demanding standard of justification under the *Oakes* test.<sup>34</sup>

The other significant development in the section 1 jurisprudence has been the Court’s willingness to defer to legislative judgment about the need for a restriction on expression. In *Irwin Toy*, which involved a challenge to a legislative ban on advertising directed at children, Chief Justice Dickson, for the Court, indicated that in certain circumstances the Court should defer to the legislature’s reasonable judgment that the restriction rationally advances an important end and does so with minimal impairment to the right or freedom. Specifically, he argued that deference is appropriate “[w]here the legislature mediates between the competing claims of different groups in the community.”<sup>35</sup> In his view, the Court should not simply “second-guess” the legislature’s “reasonable assessment” as to where the line “marking where one set of claims legitimately begins and the other fades away,” “especially if that

---

<sup>32</sup> *Edmonton Journal*, *supra* note 12 at 1355.

<sup>33</sup> *Ibid.* at 1355.

<sup>34</sup> See e.g. Justice Cory in *R. v. Lucas*, [1998] 1 S.C.R. 439 at 459 [*Lucas*]: “Quite simply, the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of the right the greater will be the ability to justify the state’s restrictive action.”

<sup>35</sup> *Irwin Toy*, *supra* note 11 at 990.

assessment involves weighing conflicting scientific evidence.”<sup>36</sup> According to Chief Justice Dickson, when the Court applies both the rational connection and minimal impairment tests, it should be sensitive to the fact that “a legislature mediating between the claims of competing groups will be forced to strike a balance without absolute certainty as to how that balance is best struck.”<sup>37</sup> Underlying his call for deference is first a concern that the *Charter* “not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons,”<sup>38</sup> and second a belief that the Court should be cautious when displacing the compromises struck by democratic institutions.

Chief Justice Dickson also describes the contrasting situation in which deference to legislative judgment is not appropriate. In his view, deference is inappropriate when the state is “the singular antagonist of the individual whose right has been infringed”<sup>39</sup> and is not simply mediating between different groups. Specifically, deference will not be appropriate when the state is seeking to justify infringements of the legal rights protected in sections 7 to 14 by asserting “its responsibility for prosecuting crime” and the individual is asserting “the paramountcy of principles of fundamental justice.”<sup>40</sup>

In subsequent judgments, the Court seems to merge the contextual and deferential approaches to the assessment of limits. For example, in *Ross v. New Brunswick School District (No. 15)*<sup>41</sup> Justice La Forest, speaking for the Court, argues that a variety of contextual factors, including the relative value of the protected activity, will affect the strictness or flexibility of the Court’s application of each part of the *Oakes* test. Justice La Forest holds that, “the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take account of both the nature of the infringed right and the specific values the state relies on to justify the infringement.”<sup>42</sup>

In *Thomson*,<sup>43</sup> Justice Bastarache describes some of the contextual factors that the Court should take into account when assessing limits under section 1. In particular, he notes that “the vulnerability of the group which the

---

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at 993.

<sup>38</sup> *Ibid.* (quoting *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 at 779).

<sup>39</sup> *Ibid.* at 994.

<sup>40</sup> The distinction drawn by Chief Justice Dickson has been the subject of criticism. See *e.g.* the remarks of Justice McLachlin in *ibid.*

<sup>41</sup> [1996] 1 S.C.R. 825 [*Ross*].

<sup>42</sup> *Ibid.* at 872.

<sup>43</sup> *Thomson*, *supra* note 15.

legislator seeks to protect ... that group's own subjective fears and apprehension of harm ... and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy" are all relevant factors when the Court is "assessing whether a limit has been demonstrably justified ... ." <sup>44</sup> The other contextual factor, he notes, "is the nature of the activity which is infringed."<sup>45</sup> Justice Bastarache observes that "the degree of constitutional protection may vary depending on the nature of the expression at issue."<sup>46</sup> He insists (and agrees with Justice McLachlin in *Lucas*, below) that "[t]his is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by the government objective."<sup>47</sup> The "standard" remains the same: proof on a balance of probabilities that the restriction is justified. It is easier to meet this standard when the expression is less valuable or when the state is seeking to protect a vulnerable group. Justice Bastarache accepts that the contextual approach is relevant to all stages of the *Oakes* analysis, including "the proper characterization of the objective of the impugned provision ... and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right."<sup>48</sup> Since "the context of the impugned provision is also important" in determining "the type of proof which a court can demand of the legislator to justify its measures under s. 1," contextual factors, including the relative value of the restricted expression, "affects the entirety of the s. 1 analysis."<sup>49</sup>

In *RJR-Macdonald*,<sup>50</sup> a case concerning the constitutionality of a federal ban on tobacco advertising, Justice McLachlin (as she then was) acknowledges that deference to legislative judgment is sometimes appropriate when the courts are determining whether a restriction is demonstrably justified, and in particular when they are applying the rational connection and minimal impairment components of the *Oakes* test. According to Justice McLachlin, the degree of deference shown by the courts may be affected by "the situation which the law is attempting to redress" or the "difficulty of devising legislative solutions to social problems which may be only incompletely understood ... ." <sup>51</sup> She accepts that "[a] limit prescribed by law should not be struck out merely because the

---

<sup>44</sup> *Ibid.* at 942-43.

<sup>45</sup> *Ibid.* at 943.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 939.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra* note 14.

<sup>51</sup> *Ibid.* at 332.

Court can conceive of an alternative which seems to it to be less restrictive.”<sup>52</sup> However, she also argues that the courts have a constitutional responsibility to ensure that Parliament responds to social problems “within the limiting framework of the Constitution.”<sup>53</sup> Judicial deference, therefore, “must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable.”<sup>54</sup> Justice McLachlin distinguishes between deference to legislative judgment and the contextual assessment of limits. She argues that the contextual approach does not involve any reduction of the state’s obligation “to meet the burden of demonstrating that the limitation on rights imposed by law is reasonable and justified.”<sup>55</sup> The standard of proof remains the same. The state must still show that the restriction is justified on a balance of probabilities.

In *R. v. Lucas*,<sup>56</sup> Justice McLachlin (dissenting from the majority judgment of Justice Cory, which upheld the defamatory libel provision of the *Criminal Code*<sup>57</sup> as a justified restriction on freedom of expression) raises questions about the majority’s application of the contextual approach. Specifically, she argues that the lower value of the restricted expression should be relevant only at the final step of the *Oakes* test, when the courts balance the costs and benefits of the restriction:

To allow the perceived low value of the expression to lower the bar of justification from the outset of the s. 1 analysis is to run the risk that a judge’s subjective conclusion that the expression at issue is of little worth may undermine the intellectual rigour of the *Oakes* test. This risks reducing the s. 1 analysis to a function of what a particular judge thinks of the expression, thus shortcutting the cost-benefit analysis proposed by *Oakes*. Instead of insisting that the limitation on the right be justified by a pressing concern and that it be rationally connected to the objective and appropriately restrained, the judge may instead reason that any defects on these points are resolved in favour of justification by the low value of the expression. The initial conclusion that the expression is of low value may thus dictate the conclusion on the subsequent steps of the analysis in a circular fashion.<sup>58</sup>

According to Justice McLachlin, the obligation of the government to demonstrate a pressing and substantial objective, rational connection, and minimal impairment should not be affected by the Court’s view that the

---

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 331.

<sup>56</sup> *Supra* note 34 at 486.

<sup>57</sup> R.S.C. 1985, c. C-46.

<sup>58</sup> *Lucas*, *supra* note 34 at 486-87.

restricted expression is of little value. At the rational connection stage, “the focus is on whether there is a link based on reason or logic between the objective and the limitation of the right,” while at the minimal impairment stage the question is whether “the legislature has restricted the Charter right as little as reasonably possible to achieve the desired objective.”<sup>59</sup> According to Justice McLachlin, only at the final stage of the *Oakes* proportionality analysis is the value of the restricted expression relevant. The task at this stage is to determine “whether the benefits of the limitation outweigh its detrimental effects.”<sup>60</sup>

In *Lucas*, Justice McLachlin again argues that the contextual approach does not involve a lowering of the standard for justifying limits: “Legislative limits on expression that falls far from the core values underlying s. 2(b) are easier to justify, not because the standard of justification is lowered, but rather because the beneficial effects of the limitation more easily outweigh any negative effects flowing from the limitation.”<sup>61</sup> She distinguishes between, on the one hand, the “weight” or value of the freedom of expression interest and, on the other, the standard of proof for the factual claim that the limit is rational or effective.

Others have echoed these criticisms of the Court’s contextual/deferential approach. They have argued that the Court’s selective deference to legislative judgment lacks adequate justification and is inconsistent with the Court’s role as protector of fundamental rights.<sup>62</sup> They have argued that a contextual approach does not necessarily involve judicial deference to legislative judgment. Taking account of context, in particular the lesser value of certain forms of expression, and deferring to the legislature’s judgment about the proper limits on expression are not the same thing and rest on different grounds. They argue (following from the second point) that the lesser value of the protected activity (the contextual approach) is relevant only at the final balancing stage of the *Oakes* test and has no role to play at the rational connection and minimal impairment stages, which are concerned with the effectiveness of the restrictive measure in advancing its substantial and compelling purpose.<sup>63</sup>

In the sections that follow, I will argue that the increasing flexibility of the *Oakes* test reflects the difficulties in fitting a social or relational right, such as freedom of expression, into an adjudicative structure that is based on an

---

<sup>59</sup> *Ibid.* at 487.

<sup>60</sup> *Ibid.* at 488.

<sup>61</sup> *Ibid.*

<sup>62</sup> See e.g. Macklem & Terry, *supra* note 9 at 605-06.

<sup>63</sup> Guy Davidov, “Separating Minimal Impairment from Balancing: A Comment on *R. v. Sharpe* (B.C.C.A.)” (1999/2000) 5 *Rev. Const. Stud.* 195.

individualist model of rights. It is assumed by both the Court and its critics that the section 1 task is to balance distinct and competing interests. Critics believe that the Court has failed to maintain a clear distinction between these competing claims when applying the *Oakes* test, and, as a consequence, has given inadequate protection to constitutionally protected interests. Yet, as I have suggested, the “limitations” task in most freedom of expression cases does not involve the balancing of distinct interests. Instead, it involves a contextual judgment about the contribution of expression to individual judgment and identity. In these cases, the value of expression and the harm of expression (or the value of the restriction) are not distinct issues but are instead two sides of a single, but complex, issue. The Court must determine the relative value/harm of a particular form or practice of expression within the social and economic context.

### III. THE VALUE OF EXPRESSION AND THE SCOPE OF SECTION 2(B)

At the first stage of freedom of expression adjudication, the court makes a formal or threshold determination about whether the restricted activity falls within the scope of section 2(b). The court asks simply whether the activity has the general form of expression and can be understood as conveying a message. Any significant or concrete discussion of the value of expression or the particular form of expression is deferred until the limitations stage of the analysis, when the court balances the value of the restricted expression against the value of the restriction. At this later stage, the court accepts that some forms of expression are less valuable (are less directly connected to the values underlying the freedom). While these less valuable forms of expression fall within the scope of section 2(b), they can be restricted on less substantial grounds than would be needed to support the restriction of core forms of expression.

I want to suggest that the court defers its assessment of the value of the restricted expression until the second stage of adjudication because value and harm are really two sides of the same issue, and the resolution of this issue depends significantly on contextual factors which are more appropriately or easily dealt with under section 1 as part of the *Oakes* analysis. In most freedom of expression cases, the assessment of the value/harm of expression are not distinct issues that can be addressed at different stages of the adjudication. When adjudicating freedom of expression issues, the court does not assess the value of the expression and then balance this value against the harmful effects of the expression. Instead, it assesses the relative value/harm of expression—its contribution to human reflection and judgment and, more fundamentally, to agency and identity. The court makes a relative judgment about the contribution

of expression to both speaker and listener or about the character or quality of the communicative relationship. Within the two-step adjudicative structure the court has found it easier to address this single but complex issue at the second stage, since any judgment about the relative value/harm of expression such as tobacco advertising or Holocaust denial “literature” will depend on a variety of contextual factors and factual findings. However, while the issue may seem easier to address at the section 1 stage, it does not involve the balancing of distinct interests (of value and harm), and, therefore, fits awkwardly within the justification analysis. As I will discuss in the next part, this awkward fit has resulted in what Justice McLachlin and others see as distortions of the *Oakes* test.

The court assesses the value (or lack of value) of the restricted expression as a preliminary to its application of the *Oakes* test. The Court has said that commercial expression and hate promotion, for example, are less clearly or directly connected to the values of truth, democracy, and self-realization that underlie the constitutional commitment to the freedom than “core” forms of expression such as political or artistic expression. While the Court talks about value and harm as if they are separate issues, its discussion of the value of particular forms of expression, such as advertising or hate speech, seems very similar to (and relies on the same factors and concerns as) its discussion of the harm caused by this expression.

In the Court’s judgments the basis for the lesser value of commercial expression is never clearly explained. According to the Court, commercial advertising is less valuable than other forms of expression because it is “profit-motivated.” This view is routinely expressed at the beginning of nearly all judicial decisions concerning the regulation of advertising. However, in *Rocket v. Royal College of Dental Surgeons*, Justice McLachlin offers a more detailed explanation of the lesser value of this form of expression. She observes that in the case of commercial expression, the motive for imparting information is “primarily economic” and that, “[the] loss” that censorship might cause to the speaker “is merely loss of profit, and not loss of opportunity to participate in the political process or the “marketplace of ideas,” or to “realize one’s spirited or artistic self-fulfillment.”<sup>64</sup> For these reasons, Justice McLachlin holds that “restrictions on expression of this kind might be easier to justify than other infringements of s.2(b).”<sup>65</sup> However, she recognizes that while commercial expression may be “designed only to increase profits,” it may also play “an important role in consumer choice.”<sup>66</sup> Because the interests of the profit-

---

<sup>64</sup> [1990] 2 S.C.R. 232 at 247 [*Rocket*].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

motivated speaker are not significant, any value that profit-motivated (or commercial) expression may have will depend on its contribution to the listener. Justice McLachlin in *Rocket* considers that, “[t]hese two opposing factors—that the expression is designed only to increase profit, and that the expression plays an important role in consumer choice—will be present in most if not all cases of commercial expression. Their precise mix, however, will vary greatly . . . .”<sup>67</sup>

For this reason, she thinks it “inadvisable to create a special and standardized test for restrictions on commercial speech.”<sup>68</sup>

In the later judgment of *RJR-Macdonald*, Justice McLachlin argues that profit motive or economic orientation should not lessen the claim of expression to constitutional protection: “In my view, motivation to profit is *irrelevant* to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.”<sup>69</sup> She observes that profit is the motive, in whole or in part, behind a variety of expressive forms, some of which are seen as core to the freedom: “Book sellers, newspaper owners, toy sellers—are all linked by their shareholder’s desire to profit from the corporation’s business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not.”<sup>70</sup>

It is not clear whether Justice McLachlin changed her mind and came to believe that commercial expression is no less valuable than other forms of expression, or whether she simply thought that the lesser protection granted to commercial expression rests on something other than its profit motivation. Despite the remarks by Justice McLachlin in *RJR-Macdonald*, the Supreme Court of Canada, in other judgments such as *Hill v. Church of Scientology*, has stated that “the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.”<sup>71</sup> This confusion or ambiguity may stem from the fact that sometimes when the Court discusses the value of expression, it focuses on the interests of the speaker, while other times it focuses on the interests of the audience. Yet if we see expression as a relationship, then the interests of the audience and the speaker are not in competition. Freedom of expression protects communicative relationships—the joint interests of speaker and audience.

As Justice McLachlin recognizes, it is not clear why profit-motive should affect the value of the expression and the level of protection it receives.

---

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *RJR-Macdonald*, *supra* note 14 at 348 [emphasis added].

<sup>70</sup> *Ibid.*

<sup>71</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1174.

Despite the Court's frequent, but very general, references to profit-motive, I suspect that the real concern underlying the decision to locate commercial advertising at the margins of freedom of expression is the belief that advertising sometimes has a manipulative or misleading effect on its audience. This is suggested by Justice McLachlin's statement in *Rocket* that the value of commercial expression depends on its contribution to the audience's interests—commercial expression sometimes offers important information and ideas to its audience and other times does not. The Court recognizes that at least sometimes advertising does not seek to convince the audience of the merits of a particular product, but attempts instead to influence audience behaviour without making any sort of reasoned appeal.

A commitment to freedom of expression must at least mean that expression does not receive a lower level of protection simply because the larger community or the Court disagree with its message or consider it to be offensive. A judgment that expression deserves less protection must be based in whole or in part on concerns about the nature or character of its appeal to the audience. Profit motive may serve as a crude proxy for this concern. Pursuit of profit leads speakers to adopt the most effective means of influencing consumer behaviour, which may be something other than rational persuasion. As well, in a market economy, where mass communication is expensive, profit motivated speech such as advertising, comes naturally to dominate public discourse.

Advertising, then, is less valuable not because of its content per se (its explicit message), but because it is often manipulative or irrational in its appeal.<sup>72</sup> Yet in commercial expression cases such as *Irwin Toy*, manipulation is also the harm of the expression, and the basis for its restriction under section 1.<sup>73</sup> The expression in that case is less valuable because it is manipulative, but it is also harmful because it is manipulative, and more specifically because it has a manipulative impact on children. According to the Court, children are “particularly vulnerable to the techniques of seduction and manipulation abundant in advertising”<sup>74</sup> because their reasoning capacities are not yet fully developed. The Court's focus on children, an exceptional group to whom the standard assumptions of rationality and freedom of choice do not apply, allows it to say very little about “manipulation” and the distinction between rational

---

<sup>72</sup> I have argued in *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) c. 3 [*Constitutional Protection*] that the manipulative force of certain ads rests in part on the domination of public discourse by commercial messages and the advertising form which reduces the space for critical viewing of individual ads.

<sup>73</sup> In *Ford*, *supra* note 2 at 767, the Court emphasizes that advertising is valuable because it “enabl[es] individuals to make informed economic choices, an important aspect of individual self-fulfilment and personal autonomy” but that there is a competing value that may justify restriction and that is “the value of consumer protection against harmful speech.” In this context harmful must mean deceptive or manipulative.

<sup>74</sup> *Irwin Toy*, *supra* note 11 at 987.

and manipulative expression. Yet unless we think that children have no freedom of expression rights, the restriction of advertising directed at children must rest, at least in part, on the character of the “expression” at issue and not simply on the special circumstances of the audience.

The link between the value and harm of expression is more obvious in *Keegstra*, when the Court assesses the value of hate promotion as part of the balancing of competing interests under section 1. The Court’s determination that hate promotion is of limited value is stated in terms similar to those it uses to describe the harmful or injurious character of the expression. When Chief Justice Dickson, for the majority, assesses the particular value of the hate promotion prohibited under the *Criminal Code*, he concludes that the restricted expression is without significant value because it undermines democracy, damages individual self-realization or autonomy, and contributes to the spread of falsehood rather than truth. More specifically, he says that hateful views are without value because they often lead to hatred and intolerance thereby undermining the self-realization of some members of the community. He observes that “hate propaganda” argues “for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics.”<sup>75</sup> While Chief Justice Dickson sometimes seems to be arguing that the lesser value of hate propaganda rests on its content, on the wrongfulness of its message, the use of the term “propaganda” suggests that the effect of this material depends on something other than audience persuasion. The lesser value of hate promotion is based not simply on the offensive or inaccurate character of the communicated message, but also on its irrational appeal or manipulative impact. Chief Justice Dickson maintains that we should not “overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.”<sup>76</sup> Hate propaganda undermines democracy or the realization of truth/knowledge because of the way it impacts on its audience. If the Court’s only concern was that audience members might, after careful reflection, come to accept the argument being made, a commitment to freedom of expression would preclude censorship.

Chief Justice Dickson identifies two general harms resulting from hate promotion. The first is the “emotional damage” caused to members of the target group. He observes that “[a] person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs”<sup>77</sup> so that hateful words can have “a severely

---

<sup>75</sup> *Keegstra*, *supra* note 2 at 764.

<sup>76</sup> *Ibid.* at 763.

<sup>77</sup> *Ibid.* at 746.

negative impact on the individual's sense of self-worth and acceptance."<sup>78</sup> The second harm identified by Chief Justice Dickson is "the influence upon society at large." He recognizes the irrational appeal of hate propaganda, and observes that "individuals can be persuaded to believe almost anything if information or ideas are communicated using the right technique and in the proper circumstances."<sup>79</sup> In Chief Justice Dickson's account, the reasons that hate promotion is harmful seem to be the same reasons that it is less valuable than other forms of expression. He appears to be double counting when he assesses the value/harm of hate promotion. Hate promotion is less valuable because it is false, anti-democratic, and contrary to individual self-realization. It is harmful for the same reasons.

But, as I have argued, the Court is not simply confusing arguments about value with arguments about harm. Whether expression contributes to self-realization/knowledge (valuable), or whether it is manipulative (harmful) are two sides of the same question. This is why the first stage of the adjudication, the definition of the freedom's scope, is entirely formal. At this first stage, the Court seeks to define the scope of the right without any consideration of context. Yet, as it turns out, the social and economic context in which expression occurs is critical to any judgment about the relative value/harm of the expression, and, more specifically, its audience appeal or engagement.

#### IV. SECTION 1 LIMITS: THE HARM OF EXPRESSION

The issue for the Court in the leading freedom of expression cases is not the appropriate balance between competing interests, but rather the relative value/harm of expression. The *Oakes* test has become increasingly flexible as the Court has struggled to address this single but complex issue within an adjudicative structure that is designed to balance or reconcile the competing interests of distinct individuals. As noted earlier, there is no bright line between expression that contributes to insight and understanding and expression that is deceptive or manipulative. Moreover, how we resolve this issue will depend significantly on the social and economic context of the expression. We should not be surprised if the Court defers to legislative judgment concerning the need for restriction, particularly when it is being asked to assess social science evidence about the impact of expression on human agents.

---

<sup>78</sup> *Ibid.*

<sup>79</sup> Chief Justice Dickson in *ibid.* at 747 cites the Cohen Commission Report on this point.

A. *Deference*

The Court may defer to the legislature's judgment in two ways. The first involves judicial deference to relevant findings of fact by the legislature. The Court may lower the standard of proof that the legislature must meet when establishing the factual basis for the justification argument. In *Irwin Toy* there was little dispute that protecting children from manipulation was an objective important enough to justify restricting free expression. The more difficult issue was whether or not the government had proved that the restriction on advertising advanced this important end effectively and without unnecessarily impairing freedom of expression. In seeking to justify the restriction on advertising directed at children who were thirteen and under, the legislature relied on social science evidence that children were unable to assess advertisements critically. However, this evidence was not clear cut, particularly on the question of whether children over the age of six were subject to the manipulative influence of advertisements. Yet the Court deferred to the government's reading of the social science evidence. The principal reason for this deference seems to have been the Court's sense of its limited competence in such matters and the inappropriateness of substituting its own reading of the evidence for that of the elected legislature.

The second form of judicial deference concerns the legislature's accommodation of competing values or interests. If the legislature has made an apparently reasonable judgment that concerns about the manipulation of children (or some other interest) justify the restriction of certain forms of expression, the Court may be reluctant to substitute its own judgment for that of the legislature. The reason for this form of deference may be the Court's "lingering doubt" about the legitimacy of second-guessing the value judgments of democratic institutions. The Court may be uncomfortable substituting a different resolution of the issue, when the legislature has attempted to mediate between competing private interests.

It is not immediately obvious why the Court should defer to the legislature's judgment about the proper balance between competing values. The most powerful modern defence of judicial review argues that the courts are the appropriate place to resolve conflicting value claims, because they are insulated from the give and take of ordinary preference-based politics. Nor is it clear why judges, given their experience as triers of fact, should defer to legislative factual judgments. Should we not be concerned that the legislature, which represents the majority view, might read the facts in a way that is insensitive to individual or minority rights? When the Court defers to legislative judgments of either fact or value by the legislature, are they not refusing to perform their constitutional duty, as critics have argued?

Deference becomes more understandable once we recognize that the

legislative judgment to which the Court is deferring is not simply fact- or value-based. Factual findings and value judgments are merged in the issue of the impact of expression such as labour picketing or tobacco advertising or sexually violent imagery on its audience. The Court has said that the justification of a limit must be established on a balance of probabilities. The reference to a standard of factual proof might suggest that the justification issue is simply factual. Indeed, in a variety of freedom of expression cases, the Court has framed the issue as if it were a matter of cause and effect, asking, for example, whether this advertising causes people to smoke, or whether there are reasonable grounds to believe that this sexually explicit material causes viewers to act in a discriminatory way towards women, and looking to empirical evidence to determine the issue.

But any judgment about the harm of expression involves issues of fact and value that are impossible to separate. In the leading freedom of expression cases, the judgment made by the legislature, and reviewed by the Court, concerns the contribution of the restricted expression to audience reflection and judgment. The Court does not simply balance the value of equality against, for example, the value of expression, isolated or abstracted from social circumstances. Nor does the Court simply determine, as a factual matter, whether the expression causes harm or leads its audience to behave in a certain way—for example, to discriminate against women, hold racist views, or smoke cigarettes. The Court's judgment could be exclusively value-based only if we believed, as some do, that individual autonomy (the capacity to think and judge) is pre-social, is something that simply belongs to the individual and is not socially grounded or shaped. On the other hand, the issue could be approached as exclusively factual only if the Court removed human agency from the analysis and adopted a behavioural approach. The Court would ask simply whether the social science evidence showed that this expression, in this context, caused individuals to think or act in a particular (harmful) way.<sup>80</sup> The first approach excludes any consideration of the social context of individual agency or judgment, while the second excludes the role of human agency and treats individual action as the product of social forces. If we see human autonomy as socially grounded—as dependent upon and shaped by social interaction—then the judgment the Court must make is about the impact of expression on human agents in context. Because human agency is socially situated, judgments about the contribution of expression to its realization must take account of the conditions of the social world (facts) and their impact on human reflection and judgment (valued capacities).

*Irwin Toy* illustrates how fact and value, or context and agency, are

---

<sup>80</sup> There are times when the Court seems to take a behavioural approach, treating the issue as factual, and asking simply does this expression cause harm. See Moon, *Constitutional Protection*, *supra* note 72.

inseparable parts of any judgment about the value/harm of expression. In this case, the Court defers to the legislature's judgment, based on social science evidence, that children up to the age of thirteen are vulnerable to manipulation. However, as noted earlier, the social science evidence was ambiguous on this point. The Court might have held that in the absence of clear evidence that children over the age of six are affected by this advertising, the ban was overbroad and, therefore, not justified. But, of course, this was not simply a factual issue, with a correct and clear answer. The evidence in such a case is bound to be ambiguous or inconclusive, to some degree, because it concerns the impact of advertising on children (human agents, even if not yet fully mature) and whether they understand the persuasive character of the advertisement. Any judgment about whether expression provides information and supports independent judgment or whether it is deceptive or manipulative depends on context, on systemic patterns of advertising, and the distribution of communicative power. The judgment must take account of the conditions of community life and their impact on agency. In that sense, the judgment is based on facts. But, it is not just a factual judgment because it is concerned with the impact of expression, in a particular context, on agency. The impact of expression on individual behaviour can never be entirely predictable.

In deciding that a particular instance of expression "causes" harm, and does not deserve protection, the Court is, in effect, deciding that individual judgment is so constrained by contextual factors that it cannot be considered autonomous and the expression cannot be seen as valuable or worthy of protection. This is a relative judgment. There will always be some dispute concerning how much "protection" individuals (in this case children) should be given from the affects or influence of advertising, and how much space they should be given or guaranteed to hear and assess the communication of others, even though some members of the audience will not recognize the persuasive character of the communication.

In the leading freedom of expression cases, the Court is not simply making "value" judgments—determining the appropriate balance between competing values. Nor is the Court simply making factual determinations. The judgment the Court must make concerns the relative autonomy of the individual in the social and economic circumstances of the community. At the limitations stage, the issue is whether the expression in this factual context contributes to judgment, insight, and reflection or affects behaviour without conscious recognition by the audience. The Court looks to social science evidence that a particular form of expression, such as advertising or pornography, is manipulative or appeals to the irrational. This evidence is ambiguous and does not clearly make the case that the restricted expression is harmful, and so the Court defers to the legislature's "reading" of it or relies on "common sense"—the Court's response to the merger of factual and value considerations.

It is difficult to predict the impact of expression not just because we are unskilled at gathering evidence about human behaviour. These studies are bound to be ambiguous or inconclusive because they seek to measure the impact of expression on human agents. This ambiguity rests on the presence of human agency in the causal process. The Court tries sometimes to cover this over by discussing risk and probability.

However, the problem is not simply lack of predictability in the causal process. A commitment to free expression means respecting or trusting individual autonomy, reflection, and judgment. In these cases, the Court must ask what space should be given to individual agents to make their own judgments and whether the form and context of the expression constrain or erode autonomous judgment to such a degree that the individual should be protected from its manipulative impact or irrational appeal.

Critics are uncomfortable with judicial deference in these cases. They see it as a refusal by the Court to perform its constitutional role. They also note that the Court seems to defer to legislative judgment selectively, without any clear explanation of when deference is or is not appropriate. Yet perhaps deference should be understood as a reasonable response by the Court to the complex and relative question of the impact of expression on human agency within the social and economic circumstances.<sup>81</sup>

#### B. *Context*

The contextual approach involves a lowering of the standard of justification for limits on “non-core” expression. The Court recognizes that a broad and inclusive definition of the scope of a right such as freedom of expression means that there may be significant variation in the value of different instances of the protected activity. According to the Court, a less substantial or significant competing interest may support the restriction of a less valuable form of expression. At least in theory, a court may lower the standard of justification under section 1, without also deferring to the legislature’s judgment that this standard has been satisfied. This seems to be the position of Justice McLachlin who argues that the contextual approach does not, or at least should not, involve any lowering of the standard of proof—the requirement that the state establish the factual basis for limitation.<sup>82</sup>

Justice McLachlin also argues that the value of the restricted expression is relevant only at the final “balancing” stage of the proportionality analysis.

---

<sup>81</sup> This may explain why deference applies to legislation that protects the interests of a vulnerable group, particularly when the judgment rests on contested social science evidence. Perhaps when the Court talks about “vulnerable” groups what it means is vulnerable to manipulation.

<sup>82</sup> *Lucas*, *supra* note 34.

She takes issue with the majority view in cases such as *Ross*<sup>83</sup> and *Thomson*<sup>84</sup> that the lesser value of the restricted expression affects all steps of the *Oakes* test and, in particular, supports greater flexibility in the application of the rational connection and minimal impairment steps. According to Justice McLachlin, the balancing of competing interests is left to the final step of the proportionality analysis. If the rational connection and minimal impairment parts of the *Oakes* test are concerned only with the effectiveness of the law in advancing its pressing and substantial purpose and are to be applied without any kind of balancing of competing interests, then the relative value of the restricted expression has no role in their application.<sup>85</sup>

However, these tests do not simply involve an assessment of the effectiveness of means, divorced entirely from any judgment about the significance of the law's purpose or the value of the restricted activity. The rational connection test must require something more than that the law's means not be wholly irrational to its ends, or wholly ineffective to achieve those ends. Indeed, it would be difficult to attribute to a law a purpose which seemed unconnected to its provisions. Instead, the rational connection test must involve some sort of effectiveness threshold—the law must *reasonably* advance the pressing and substantial purpose for which it was enacted.

In the leading freedom of expression cases, the Court must decide whether the restrictive measure achieves the purpose of preventing a particular harm, such as the spread of hatred or an increase in acts of sexual violence. The question becomes: does the expression, which is subject to restriction, cause harm?<sup>86</sup> And, as noted above, this is a relative judgment about the way in which the expression does or does not engage the audience. When we say that expression “causes” harm it is because we have concluded that the space for agency or independent judgment is significantly limited by contextual factors or, in empirical terms, that the “risk” of harm is too great. If rationality/effectiveness is a relative judgment, there will be plenty of space for other factors, such as the importance of the law's objective and the relative value of the restricted activity, to affect the Court's judgment that the law is or

---

<sup>83</sup> *Supra* note 41.

<sup>84</sup> *Supra* note 15.

<sup>85</sup> Justice McLachlin in *Lucas*, *supra* note 34 at 487: “At the rational connection stage, the focus is on whether there is a link based on reason or logic between the objective and the limitation of the right. Here the value of the expression at issue is of no assistance.”

<sup>86</sup> I recognize that a restriction may be ineffective in advancing the law's purpose (*e.g.* preventing the spread of hatred) for other reasons. We may decide that a restriction on hate promotion is “irrational” (does not advance the law's purpose of preventing the spread of hatred) even though hate promotion “causes” hatred. For example, in *Keegstra*, *supra* note 2, Justice McLachlin (dissenting) held that the ban on hate promotion would be counter-productive (ineffective) because criminal prosecution would give even greater publicity to hatemongers.

is not sufficiently effective or rational in advancing its purpose.

The question of whether the value of the restricted expression should or should not play a role in the rationality or minimal impairment analyses rests on the idea that the limitations process is about assessing and balancing competing interests. In the leading freedom of expression cases, the Court's judgment about rational connection, and the law's effectiveness in advancing its substantial and compelling purpose, focuses on whether the expression causes "harm" (for example, whether the restricted hate promotion leads to greater hatred or to acts of racial violence, or whether pornographic imagery leads men to view women differently or to behave towards them in a violent or discriminatory way). The restriction is ineffective in advancing its end (of preventing the spread of racist ideas or the growth of sexist thought and action) if the restricted material does not have this impact on its consumers. But if, as was argued earlier, value and harm are two sides of the same question then the judgment that expression is harmful (and that the restriction is effective) is also a judgment that the expression is of limited value. Or, to reframe the point, asking whether certain forms of expression are of lesser value (are less directly connected to the values underlying the freedom) is the same as asking whether the restriction prevents harm. It follows that the lesser value of the protected expression (and the contextual approach) is as relevant at the rational connection step as it is at the final "balancing" step of the analysis—not because the Court is balancing competing values at these first steps but because it is making a contextual judgment about the contribution of expression to agency.

The "value" of the restricted expression is no less relevant at the minimal impairment stage. To say that a law is over-broad (does not minimally impair the right) is to say that it is in part irrational or ineffective. While the law overall may be rationally connected to its purpose, if it restricts more expression than is "necessary" to advance its important end, it can be described as partly irrational or ineffective. In *RJR-Macdonald*,<sup>87</sup> the Court found that the law banning tobacco advertising was over-broad because it restricted forms of advertising that did not lead audience members to smoke, or at least had not been shown to "cause" greater smoking.

It will be very rare that an alternative measure that is less rights-restrictive will advance the law's substantial and compelling purpose as completely or effectively. A law will fail the minimal impairment test when the Court considers that a small or debatable decrease in the law's effectiveness in achieving its substantial and pressing purpose will significantly reduce its interference with the protected right. More importantly, in a case like *RJR-Macdonald*, the Court's judgment that a law is irrational or ineffective, in whole

---

<sup>87</sup> *Supra* note 14.

or in part, rests on its assessment of the relative value/harm of the restricted expression—for example, that informational or brand preference tobacco advertising contributes, or appeals, to autonomous judgment, or, in empirical terms, does not involve a substantial risk of harm. If value and harm are really two sides of the same issue, then the lesser value the Court has attributed to commercial advertising will be relevant to the application of the minimal impairment test.

The rational connection and minimal impairment tests do not simply involve an instrumental judgment about efficiency. Nor do they involve the balancing of separate interests or rights. In its section 1 analysis, the court must address the single but complex issue of the contribution of expression to human agency or to independent judgment within the social and economic context. The fact that judgments about rational connection and minimal impairment involve an assessment of the relative value/harm of expression may explain why the final “balancing” step of the *Oakes* test seldom plays anything more than a formal role in the court’s section 1 analysis.

## V. CONCLUSION: THE INTEGRITY OF THE *OAKES* TEST

The structure of *Charter* adjudication is built on the idea that entrenched rights protect different aspects of individual liberty from state interference. The Court must define the scope of the protected right, and determine whether the state has interfered with its exercise. Since these rights may sometimes conflict with other valuable interests, the Court must also determine the proper and just balance between these competing interests. The *Oakes* test provides the framework for this judicial balancing.

Yet freedom of expression does not simply protect individual “autonomy” (understood as independence from others). Instead, it protects the individual’s freedom to interact with others. It rests on a recognition that human agency or autonomy is a capacity that is realized in communicative interaction. Our dependence on expression means that words have an impact on us. Our identity is shaped by what we say and by what others say to us and about us. Human reflection and judgment are dependent on socially created languages, which give shape to thought and feeling. Expression can cause fear, harass, and undermine self-esteem. It can also be deceptive or manipulative.

Understood in this way, freedom of expression fits awkwardly within the two-step adjudicative model. I believe that this awkward fit is the reason the *Oakes* test has become increasingly vague and flexible, or, as the critics see it, eroded or undermined. The *Oakes* test provides a structure for the balancing of competing interests—the interests of the individual, on the one hand, and the interests of other individuals or the collective, on the other. However, in freedom of expression cases, the Court is not simply balancing separate

interests and giving priority to one value or right over another. Rather, it is making a complex judgment about the realization of individual agency and identity in community life. It is seeking to draw a line between expression that appeals to conscious reflection or autonomous judgment and expression that seeks to manipulate. But there is no bright line to be drawn. Where the Court draws the line will depend on contextual factors and their impact on individual judgment. The strain on the *Oakes* test, as the Court attempts to fit freedom of expression into the adjudicative structure (that distinguishes between the definition of the protected activity and the justification of limits on that activity), manifests itself in the broad definition of the freedom's scope and the deferential approach to limits under section 1.

I doubt that freedom of expression is exceptional. Other constitutional rights may be seen as relational or social in character, protecting some dimension of the individual's interaction or connection with others, and so may not fit well into the structure of constitutional rights adjudication. Certainly, it is difficult to see the right to equality under section 15 as simply a liberty or a freedom from external interference. The state breaches section 15 when it fails to show the individual the respect or recognition that he or she is owed as a member of the community.<sup>88</sup> The right to equality rests on the social character of individual identity.<sup>89</sup> It rests on a recognition that the individual's identity, self-esteem, and dignity depend on how that person is regarded and treated by others in the community. The state does not discriminate or interfere with individual dignity simply because it withholds a benefit or imposes a burden on a particular individual or group. Nor does it discriminate simply because it has made something less than a fully rational policy choice. In *Law v. Canada*,<sup>90</sup> the Court held that when determining whether a state act is "discriminatory," it must ask whether the act rests on stereotypes or contributes to systemic exclusion or disadvantage. These are questions about larger social practices or circumstances—about the context of the particular state act.<sup>91</sup>

Given the relational character of the right to equality and the requirement that the courts look to the larger context to determine whether an act is discriminatory or interferes with human dignity, it is not surprising that the courts have struggled to develop a coherent approach to section 1 limits on

---

<sup>88</sup> Charles Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at 225: "[O]ur identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back a confining or demeaning or contemptible picture of themselves."

<sup>89</sup> *Ibid.* at 230.

<sup>90</sup> [1999] 1 S.C.R. 497.

<sup>91</sup> *Ibid.* at 531: "[I]t is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant."

equality rights. In equality cases, the Court's section 1 analysis repeats, in a fairly perfunctory way, the considerations that led to its decision that the state act is discriminatory contrary to section 15. While the significant analysis by the Court in freedom of expression cases takes place at the section 1 stage, the focus of the Court's analysis in equality cases is at the first stage of the adjudication, the issue of whether the right has been breached. In both cases, the analysis takes place at one stage of the adjudication because the Court is addressing a single, complex question about the individual's connection with the community. It is not simply balancing separate and competing interests, as contemplated by the two-step structure of adjudication.<sup>92</sup>

In *Oakes*, the Court sought to establish a rigorous test for the assessment of limits on all *Charter* rights. This generic approach rests on the idea that the rights protected in the *Charter* have the same basic structure, each right representing a zone of individual privacy or independence that should not be interfered with by the state except in very special circumstances. I have tried to show why this understanding of rights, and their limitation, does not apply to freedom of expression, and perhaps to other rights as well. However, I want to be clear that I am not suggesting an alternative "general" approach to the "limitation" of rights, a rewriting of the *Oakes* test, or a redesign of the structure for the adjudication of all *Charter* rights. Even if all or most *Charter* rights do not fit the individual liberty model that underlies the two-step structure of adjudication and are better understood as social or relational in character, there can be no single approach to limits or rights analysis. If the rights protected by the *Charter* are diverse in character, representing different aspects of human flourishing or dignity within community, then the form or character of "limitations" on these rights may differ in significant ways. A "limit" on freedom of religion is bound to be very different from a limit on the right to equality. Or, better perhaps, the issues and questions that must be addressed in the adjudication of a religious freedom claim will be different from those that must be addressed in a sex discrimination case. While it may be possible to develop a reasonably clear set of standards or tests for the definition and limitation of particular rights, the effort to develop standards applicable to all *Charter* rights will lead inevitably to ambiguity and inconsistency. But I should quickly add that in the case of freedom of expression adjudication, I am skeptical that it is even possible to develop a clear set of standards. If the central issue for the Court in freedom of expression cases is the impact of expression on socially situated agents, deference may be the inevitable judicial response.

---

<sup>92</sup> *Ibid.* at 530: "Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups, within Canadian society." There are not two distinct issues—two interests that must be balanced against each other. Instead there is a single but complex question about the recognition that is owed the individual by the larger community.

Finally, this understanding of freedom of expression and constitutional adjudication has some implications for the debate about the legitimacy of judicial review. Most modern defences of judicial review regard constitutional rights as basic conditions of individual autonomy or citizenship that should be protected from the give and take of ordinary preference-based politics. Because it is insulated from direct political pressure, the Court can serve as a “forum of principle,” a place where issues of principle or basic value can be debated and resolved. However, if constitutional rights protect something more than individual liberty, if they protect the individual’s connection or relationship with others, and are about the realization of self within community, judgments about their scope and limits may involve complex social and economic considerations. I have argued that judgments about the value/harm of expression must look to the social and economic conditions of the community. On this account of rights, *Charter* adjudication does not involve the resolution of discrete and abstract questions of principle that stand outside ordinary politics above the messy world of social and economic contest.

Once we see rights adjudication as political (as responding to, and dealing with, the social and economic conditions of community life), we can understand the motivation behind recent defences of judicial review that emphasize the Court’s “dialogue” with the elected branches of government, and point to the flexibility of judicial review and the leeway it gives legislatures to pursue their goals.<sup>93</sup> In contrast to the “forum of principle” defence, which emphasizes the distinction between the Court’s role as adjudicator of basic values and the legislature’s role as the maximizer of preferences, the dialogical defence rests on a recognition that what courts do may not be so very different from what legislatures do. Because rights issues are complex and open to a range of reasonable responses, which courts may find difficult to evaluate, the legitimacy of the judicial role depends on courts not always acting with final authority on these issues.

---

<sup>93</sup> See Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 75 and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).