

Book Review: The Constitutional Protection of Freedom of Expression, by Richard Moon

Jamie Cameron

Osgoode Hall Law School of York University, jcameron@osgoode.yorku.ca

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Book Review

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I. A NEARLY IMPOSSIBLE TASK

That freedom of expression should not be confused with its constitutional protection is the central message of Richard Moon's recent book, *The Constitutional Protection of Freedom of Expression*. The author identifies a tension between the two assumptions that animate the jurisprudence under section 2(b) of the *Canadian Charter of Rights and Freedoms*.³ In defining the *Charter's* guarantee of expressive freedom, the Supreme Court of Canada portrays individuals as rational and autonomous beings capable of choosing between good and bad messages. Yet in considering limits under section 1 of the *Charter*, the Court assumes that individuals are powerless to resist the influence of messages that may be harmful.⁴ Chapter by chapter, *Freedom of Expression* explains how this tension infuses the jurisprudence and how it misconceives the value of the freedom.

More generally, an examination of constitutional adjudication demonstrates that clear answers do not exist, and Moon states forthrightly that he has none to offer.⁵ He considers it nearly impossible for courts to define a reasonably clear space for expressive freedom that does not

¹ [*Freedom of Expression*].

² Professor of Law, Osgoode Hall Law School.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 2 provides that “[e]veryone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion, and expression”

⁴ *Ibid.* Section 1 of the *Charter* states that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁵ *Freedom of Expression*, *supra* note 1 at 4.

depend on agreeing with the message or fearing that it might cause harm.⁶ Not only is reason imperfect and autonomy relative, freedom of expression operates against a “background of communicative inequality that seems to lie outside the domain of constitutional review.”⁷ A further problem, then, is that the “constitutional language of state interference with individual liberty”⁸ cannot ameliorate inequities in the “distribution of communicative resources.”⁹

The author’s final conclusions are less than optimistic. He does not believe that the freedom’s demands can be met within a framework of rights review. Though it is no revelation that courts often misconceive the right of freedom of expression and fumble its applications, Moon challenges the very underpinnings of constitutional adjudication. He laments that, through the process of constitutionalization, “it may become natural to think of the freedom as an individual right against state interference.”¹⁰ Unfortunately, in his view, that conception advances a crabbed and limited understanding of expression’s social value.

Freedom of Expression offers a collection of insights on issues such as the regulation of advertising, pornography, and racist expression; access to state-owned property; and compelled expression. Written over a period of years, these chapters are introduced by two essays that develop the central themes of the book.¹¹ This review comments on these themes, highlighting the nature of the right to freedom of expression and the ways in which its exercise may cause harm, before providing a few remarks in conclusion.

II. A RELATIONSHIP OF COMMUNICATION

Any discussion of expression must begin by asking what freedom means and why it is worth protecting. On this, Moon is quick to reveal his dissatisfaction with the traditional explanation of freedom of expression as an individual right that is enforceable against the state. He contends that

⁶ *Ibid.* at 6.

⁷ *Ibid.* at 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* at 219.

¹¹ *Ibid.* The two introductory essays, “Truth, Democracy, and Autonomy” and “The Constitutional Adjudication of Freedom of Expression,” make up chapters 1 and 2 of *Freedom of Expression*.

“as long as the court views freedom of expression through an individualist lens it will be unable to account for the value or the harm of expression.”¹² Instead, the author proposes that the purpose of expression is to protect or create a “relationship of communication between two or more persons.”¹³ Yet, the Court has been unwilling or unable to embrace a social understanding of freedom, with the result being that the freedom’s “distributive demands ... and its relational character” are suppressed.¹⁴

The section 2(b) jurisprudence is built on a contradiction. In defining the entitlement, the Court assumes that individuals will respond rationally to the content of messages; however, in determining limits under section 1, the Court treats the same individuals as irrational, vulnerable, and easily manipulated. The text’s separation of rights and limits unquestionably played a role in creating a dysfunctional jurisprudence of expressive freedom. Even so, nothing in the *Charter* forced the Court to adopt a bald contradiction between the simultaneously rational and irrational individual.

In commenting on this contradiction, Moon points out that the Court cannot have it both ways at once. On the one hand, if individuals are rational, then it should be impossible for expression to cause harm, and the freedom’s protection should be unconditional. In other words, the power of reason should render irrational messages ineffective.¹⁵ On the other hand, if individuals are irrational, impressionable, and manipulable, limits on expression should be routinely permitted, and the value of expression should be called into question.¹⁶ What rationality is, and whether it has been displaced by an irrational response, are matters of perception. As the author notes, an “ideal condition of pure reason and perfect independence” does not exist, nor is it possible to identify “clear deviations from the proper and ordinary conditions of free choice.”¹⁷ Moon concludes that if reason and choice are not the norm, then “we may have to acknowledge that freedom of expression rests on less solid ground than we once supposed.”¹⁸

Moon’s point can be taken further. Any claim that the state can

¹² *Ibid.* at 56.

¹³ *Ibid.* at 37.

¹⁴ *Ibid.* at 33.

¹⁵ *Ibid.* at 56.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 74.

¹⁸ *Ibid.*

limit expression when there is a risk that some listeners might respond irrationally is illogical. The prediction that members of the public will behave irrationally must also extend to those within the political arena. Individuals in government will be no less irrational in choosing which messages to permit and which to prohibit than individuals not in government, who choose between competing messages in the public domain. It is worth noting that the government's power in parliamentary democracies is not contingent on any requirement that it be exercised reasonably or rationally.

However, the rational/irrational dichotomy may not be as central as *Freedom of Expression* suggests. Explicit references to rationality in the *Charter* jurisprudence are few and far between.¹⁹ Under section 2(b), the content of the message is irrelevant in defining the right, whether rational or irrational.²⁰ Under section 1, the Court did not uphold limits because the message or listener was irrational but, instead, because the content of the expression was deemed valueless.²¹ Though overlap between the two is undeniable, valueless expression need not be irrational, and irrational expression may not be valueless in all cases.²²

Insofar as rationality appears in the rhetoric of expressive freedom, the term is used conceptually rather than literally, to explain that on a calculation of risks, freedom should prevail over fear.²³ With freedom there is always a chance that irrational or valueless ideas might be an incitement or provocation to harm. However, regulation is not risk free. When the state imposes its own definition of value or rationality, public debate will be stifled. Unless demonstrably harmful, freedom must prevail, and whether a message is valueless or irrational is of no consequence.

¹⁹ See *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 at 37 (citing the Cohen Committee) and at 49 (cautioning that the role of rationality should not be overplayed) (S.C.C.) [*Keegstra*]. See also *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at 949 (declaring that Canadian voters can be assumed to have a certain amount of maturity and intelligence).

²⁰ That is, in part, because the Court was determined that, in the case of section 2(b), the question of limits would be decided under section 1. See *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 at 766.

²¹ See *Keegstra*, *supra* note 19; *R. v. Butler*, [1992] 1 S.C.R. 452; and *R. v. Lucas*, [1998] 1 S.C.R. 439.

²² See *Keegstra*, *ibid.* at 62. Racial stereotypes which are based on statistics are not irrational but may nonetheless be deemed valueless and harmful. By the same token, false statements may be irrational but have value if they promote debate and thereby confirm and solidify the truth. See *R. v. Zundel* (1992), 75 C.C.C. (3d) 449 at 508-09 (S.C.C.).

²³ *Whitney v. California*, 274 U.S. 357 (1927) (juxtaposing the power of reason with the silence coerced by law).

Moon attributes the rational/irrational dichotomy he sees in the jurisprudence to individualist values. Under his conception of expressive freedom, the entitlement is social, not individual, and relational, not autonomous in nature. The book's two-way process of communication contemplates a relationship of interdependence between the speaker and the listener, in which each participates as the equal of the other. The question for Moon is whether and in what circumstances the speaker has abused the relationship.

In his view, the interests of both parties should inform the definition of the right, and abuses of the relationship should not be protected under section 2(b).²⁴ To the extent that Moon assumes only the speaker can abuse the relationship, he should be reminded of the case law on hostile audiences and the heckler's veto.²⁵ It would also be helpful to know how Moon would evaluate a breakdown in the relationship of communication. Whether the breakdown is perceived subjectively or objectively, and from whose perspective, are fundamental issues. Implicitly, if not explicitly, the author's proposal to define freedom of expression in relational terms rests on an assumption of equality between the speaker and listener. Unfortunately, it remains unclear how a relational approach would change and improve the jurisprudence. Constitutional adjudication addresses the relationship between a speaker and the state; it is an adversarial relationship in which individuals challenge the state's authority to impinge their freedom of expression. *Freedom of Expression* suggests that the relationship of communication should be the focus of the analysis, but does not indicate how that conception of the freedom could be incorporated into the analytical structure that is required to determine the reasonableness of the state's actions.

III. NOT A NEUTRAL STANDARD

When, and to what degree, expression "causes" harm is an enduring imponderable. Under the *Charter*, though, expression is presumptively free unless the state can establish a harm that it is entitled to prohibit. As for the Court, the evidence available may not provide answers but decisions must still be made. In Moon's words, the Court "listens for the crack of the billiard balls," but the social science evidence of the causal link between

²⁴ *Freedom of Expression*, *supra* note 1 at 42-49.

²⁵ See e.g. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Feiner v. New York*, 340 U.S. 315 (1951).

expression and harm “does not yield a crisp and clear sound.”²⁶ As a result, he observes, causation is anything but a “neutral standard.”²⁷ To avoid retreating from the traditional conception of the freedom, the Court assumes that individuals can be influenced by irrational or manipulative messages. This enables the Court to uphold limits under an attenuated version of the causal link between expression and harm.

The nature of the harm and the limits of constitutional adjudication are themes that connect the chapters on advertising, pornography, and racist expression. Moon explains that rights adjudication seeks to enforce the freedom, and therefore is poised to identify particular exceptions to the general rule in favour of the freedom. By fixing attention on the discrete circumstances of expressive activity, decision makers avoid grappling with the systemic integrity of the freedom. Though the courts may be busy addressing “discrete and limited problems, just beneath the surface of their decisions is a challenge to the assumptions that underlie our commitment to freedom of expression.”²⁸ As long as the systemic imperfections persist, expression will not be free.

The examples of advertising, pornography, and racist expression demonstrate that the problems of “free” expression are systemic. In the case of advertising, public discourse is dominated by the commercialization of culture, and it matters little whether the content is political or commercial.²⁹ Likewise, pornography forms part of a larger culture that is predicated on sexual and sexist images.³⁰ And, by the same token, racial insults, slurs, and stereotypes are commonplace and pervasive.³¹ *Charter* interpretation does not attempt to protect or create relationships of communication which are truly free and bilateral; rather, the object is to identify the isolated circumstances in which section 2(b)’s protection has been compromised. Rather than undertake to fix or change what he sees as wrong in this, Moon closes the discussion by observing that constitutional adjudication leaves the larger problem of securing a free public discourse unaddressed. At the same time, the Court places the protection of all expression on unstable ground.³²

²⁶ *Ibid.* at 39.

²⁷ *Ibid.* at 62.

²⁸ *Ibid.* at 104.

²⁹ *Ibid.*

³⁰ *Ibid.* at 124-25.

³¹ *Ibid.* at 138.

³² *Ibid.* at 147.

The chapters on access to state-owned property and compelled expression return to the book's introductory theme of inequality in the distribution of communicative resources. Once again, the discussion concentrates mainly on the underlying principles and assumptions of the jurisprudence. For instance, it would help readers to know how this author would restructure the doctrine on access to state-owned property. Moon's views do emerge more clearly in his discussion of compelled expression. He maintains that when the state compels private parties to speak or to grant access to their resources to others, freedom of expression interests are served by enlarging the range of publicly expressed views. He concludes that the freedom should not protect individuals from being compelled to support or to provide communicative resources to other members of the community.³³

Freedom of Expression does not provide a strong conclusion on the flaws in an individualist conception of freedom of expression, but closes on a skeptical note about the ability of constitutional adjudication to transcend an individualist conception of the freedom. In summary, individualist values and a misguided assumption that individuals are rational are the formative elements in the Court's definition of the freedom. Having observed that individuals are not perfectly rational, the Court adopted a behavioral rationale to uphold limits under section 1. Not only is there a contradiction between the two parts of the analysis, the construct is conceptually unsound. Though the harm of expression may be greater than the courts acknowledge, an adjudicative model that addressed its systemic effects could lead to blanket censorship. At the same time, its consequences may be less serious than the Court claims when it upholds limits, despite gaps in the evidence of a causal link between expression and harm.

The *Charter's* system of constitutional rights is not equipped to address the systemic shortcomings of public discourse. The courts do not understand that the freedom is not an individual entitlement but a relationship of communication; nor does adjudication recognize that its potential can only be realized by eliminating inequalities in access to communicative resources. The true challenges, for this author, are to restore balance between the two parties to that relationship and to promote access to communicative opportunities.

IV. CRACKING THE BILLIARD BALLS

Moon should be congratulated for tackling the difficult task of

³³ *Ibid.* at 202.

stripping section 2(b)'s guarantee of expressive freedom to its fundamentals. Twenty years after the *Charter*, there are few books of this kind. What follows, then, is more in the spirit of comment than critique.

Essentially, *Freedom of Expression* has two objectives: one is to explain the flaws of an individualist conception of the freedom, and the other is to introduce an alternative conception based on a relationship of communication and access to communicative opportunities. In the end, neither part of the project is as well-developed or as concrete as readers might like. For example, Moon's analysis of the jurisprudence is insightful and thought-provoking, but inconclusive. Likewise, in the absence of a definition or outline, his relational and distributive aspirations for freedom of expression remain fuzzy. Indeed, the author lays the groundwork for his own critique when he says that cracking the billiard balls should produce a sound that is clear and crisp.

Two further points can be made. The first returns, again, to the question of rationality. Expressive freedom is not and should not be protected because individuals are likely to choose "right" messages over "wrong" messages. Instead, it is protected because the principle of equality demands that all individuals be free to express their views, no matter how reprehensible or idiotic. Such views are a valid part of public discourse, unless and until they threaten a harm that is concrete enough to outweigh the value of freedom. What *Freedom of Expression* overlooks in its account is the value of dissent. Section 2(b)'s entitlement belongs to the voices of dissent, as much as to any others, because expressive freedom is a fundamental element of self-governance. It is the freedom, in and of itself and without regard to the content of the message, that has value. In other words, the rational/irrational dichotomy is a red herring for the author, as well as for the courts.

A second comment is that, although freedom suffers when the state interferes with it, the state is all but invisible in *Freedom of Expression*. Moon's conception of the freedom is preoccupied, instead, by the relationship between speakers and listeners, as well as by the plight of those who are without resources. It cannot be forgotten that when the government places limits on expressive freedom, it exercises its coercive authority to censor or purge certain messages. There is a substantial risk of error when limits are placed on expressive freedom, the opportunities for communication decrease, and public discourse unavoidably narrows. Moon is surely right that present culture tolerates and even promotes undesirable messages whose influence and impact cannot be discounted. At the same time, parliamentary supremacy is systemically and deeply ingrained in Canada's political culture. With all of its shortcomings, section 2(b) does place a constitutional check on the government's power to decide what

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freedom of expression means and who will be entitled to exercise it.