Twelve Angry (White) Men: The Constitutionality of the Statement of Principles

Joshua Sealy-Harrington

THIS PAPER ANALYZES the constitutionality of the Law Society of Ontario's (now repealed) Statement of Principles requirement. First, this paper conducts a statutory analysis of the requirement. It explains how the requirement merely obligated that licensees acknowledge extant professional and human rights obligations, rather than creating novel obligations. Second, this paper conducts a theoretical analysis of the requirement. It applies a critical race theory lens to unveil the ways in which liberty claims relating to free speech obscured how significant resistance to the requirement's modest obligation was galvanized by opposition to diversity and denial of systemic racism. Third, this paper conducts a constitutional analysis of the requirement. It explains why the requirement did not violate freedom of conscience or freedom of expression. In contrast with prior scholarship, this paper argues that the Statement of Principles requirement failed every stage of the legal test that designates state activity as compelled speech. Specifically, the requirement failed to compel an expression with non-trivial meaning (Step 1) and failed to control free expression in Canada, when such control is properly construed through a purposive rather than colloquial lens (Step 2). This paper concludes by noting how the requirement's self-drafted structure provided an innovative opportunity for licensees to reflect on their perhaps unwitting participation in systemic racism.

CET ARTICLE ANALYSE la constitutionnalité de la déclaration de principes (maintenant abrogée) du Barreau de l'Ontario. D'abord, cet article fait une analyse statutaire de cette exigence. Il explique que cette exigence ne créait pas de nouvelles obligations, mais obligeait simplement les titulaires de licence à reconnaître les obligations professionnelles et en matière de droits de la personne existantes. Ensuite, l'article procède à une analyse théorique de cette exigence. Il applique la lentille de la « critical race theory » pour dévoiler comment les revendications de liberté relatives à la liberté d›expression ont masqué la manière dont une résistance significative à la modeste obligation de l›exigence a été galvanisée par l›opposition à la diversité et le déni du racisme systémique. Finalement, l'article présente une analyse constitutionnelle de l'exigence. L'article explique pourquoi l›exigence ne va pas à l'encontre de la liberté de conscience ou de la liberté d›expression. Contrairement à la doctrine juridique antérieure, cet article soutient que l›exigence de la déclaration de principes a échoué à chaque étape du critère juridique qui désigne les activités de l'État comme un discours forcé. Plus précisément, l›exigence n›a pas réussi à imposer une expression ayant une signification non triviale (1re étape) et n'a pas réussi à contrôler la liberté d'expression au Canada quand ce type de contrôle est correctement interprété grâce à une approche intentionnelle plutôt que

familière (2e étape). L'article conclut en soulignant que la structure d'auto-rédaction de l'exigence a fourni aux titulaires de licence une occasion novatrice de réfléchir à leur participation, peut-être involontaire, au racisme systémique.

CONTENTS

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> The other thing that disturbs me about this, and I suppose this is a consequence of my experience with delving deeply into the history of places like the Soviet Union in its early stages of development is that there's a class-based guilt phenomena that's lurking at the bottom of this, which is also absolutely, I would say, terrifying.
>
> —Jordan Peterson[1]

> My first instinct was to check my passport. Was I still in Canada, or had someone whisked me away to North Korea, where people must say what officials want to hear?
>
> —Bruce Pardy[2]

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1 Jordan B Peterson, "A Call to Rebellion for Ontario Legal Professionals" (10 October 2017), online (video): *YouTube* <youtube.com/watch?v=YGC3y1BPzwA>.

2 Bruce Pardy, "Law Society's New Policy Compels Speech, Crossing Line That Must Not Be Crossed", *National Post* (3 October 2017), online: <nationalpost.com/opinion/bruce-pardy-law-societys-new-policy-compels-speech-crossing-line-that-must-not-be-crossed> [Pardy, "Law Society's New Policy"].

> This is the cultural enemy that has arisen within, after Western civilization routed the largely external and outright evils of Nazism and international Communism…the law society is conferring capricious dictatorial powers on its own administration…
>
> —Conrad Black[3]

> The chilling Orwellian language bears repeating…Forcing lawyers to subscribe to a particular worldview for regulatory purposes is an unacceptable intrusion into a lawyer's liberty and promotes significant harm to the public.
>
> —Arthur Cockfield[4]

> [A] breed of hyper-progressive social activists who feel justified in co-opting the prerogatives of a regulatory monopoly as a means to force white-collar workers to lip-sync doctrinaire liberalism. It's creepy. It's coercive. It's presumably unconstitutional. And it's an embarrassment to the law society.
>
> —Jonathan Kay[5]

> Now the Law Society is demanding that I openly state that I am adopting, and will promote, and will implement "generally" in my daily life, two specific and pretty significant words or "principles," words that are quite vague but sound important. When I first read that a year ago I was completely floored. What is going on here? This sounds like I'm supposed to sign up to some newly discovered religion, or some newfangled political cult.
>
> —Murray Klippenstein[6]

> [T]here is one reason above all others why Ontario lawyers should not only refuse to sign on to the Law Society's "progressive agenda" but they should send the current Society's head office packing. That is the principle of "merit." Because most lawyers believe that a person should be hired,

3 Conrad Black, "Law Society Confers Capricious Dictatorial Powers on Its Own Administration", *National Post* (13 October 2017), online: <nationalpost.com/opinion/conrad-black-lawyers-are-a-pestilence-on-society-and-theyre-predictably-turning-on-their-own>.

4 Arthur Cockfield, "Why I'm Ignoring the Law Society's Orwellian Dictate", *The Globe and Mail* (17 October 2017), online: <theglobeandmail.com/opinion/why-im-ignoring-the-law-societys-orwellian-dictate/article36599997> [Cockfield, "Orwellian Dictate"].

5 Jonathan Kay, "Law Society's Inflated View of Lawyers' Importance Leads It to Compel Speech", *National Post* (26 October 2017), online: <nationalpost.com/opinion/jonathan-kay-law-societys-inflated-view-of-lawyers-importance-leads-it-to-compel-speech>.

6 Murray Klippenstein, "Open Letter to the Treasurer and Benchers of the Law Society, Dated Nov. 2, 2017" (4 March 2018), online: *StopSOP* <stopsop.ca/resources/your-letters-to-the-law-society/open-letter-to-the-treasurer-and-benchers-of-the-law-society>.

> evaluated, and promoted solely on merit, and not on superficial criteria like ethnic origin, race, or gender, this view places these professionals in contravention to the "progressive agenda" of their professional association. To the Society, everything is about race and gender. That is simply wrong.
>
> —Brian Giesbrecht[7]

> Special interest groups have gained a foothold in convocation. They seek to erase our history, mandate ideological training and implement discriminatory race and sex-based quotas. I will stand up to special interest groups to defend our profession's proud traditions and values.
>
> —Nicholas Wright[8]

> [T]his Initiative by the LSO is profoundly disturbing…It has certainly awoken the spirit of vigilance in me. In my view, it requires all lawyers of conscience to oppose this initiative in order to maintain and protect the cherished independence and liberties lawyers have inherited and to which they have been entrusted.
>
> —Michael Menear[9]

> If the requirement that I hold and promote values chosen by the Law Society is not repealed or invalidated, I will cease being a member of the legal profession in Ontario. This is not an outcome I desire…However, I simply cannot remain a member of the legal profession in Ontario if to do so would violate some of my most deeply held conscientious beliefs.
>
> —Leonid Sirota[10]

> The requirement is…the result of political ideology, rather than any evidence-based process, and…deeply offensive to me personally in terms of its clear implication that I and my profession and society are racist.
>
> —Alec Bildy[11]

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7 Brian Giesbrecht, "A Progressive Agenda is Being Forced on All Ontario Lawyers", *Toronto Sun* (16 February 2019), online: <torontosun.com/opinion/columnists/giesbrecht-a-progressive-agenda-is-being-forced-on-all-ontario-lawyers>.

8 Nicholas Wright, "Bencher Election Candidate Profiles" (2019), online: *StopSOP* <stopsop.ca/bencher-election/candidate-profiles/nicholas-wright>.

9 Michael Menear, "EDI Initiative of the Law Society of Ontario", *The Middlesex Law Association Snail* (December 2017) at 33, online (pdf): <middlaw.on.ca/News/2017December-JanuaryFinal.pdf>.

10 Leonid Sirota, "Affidavi" (29 January 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/01/29/affidavi> [Sirota, "Affidavi"].

11 Alec S Bildy, "Annual Report Submission re Statement of Principles" (30 March 2018), online: *StopSOP* <stopsop.ca/resources/your-letters-to-the-law-society/annual-report-submission-re-statement-of-principles-1-2>.

> As Shawn Richard, one of the architects of the Law Society's policy, asked: "What are you conscientiously objecting to?"... It's easy to forget that decades of progress can be wiped out in an instant. Citizens who belong to religious groups subjected to significant persecution—especially those who have recently arrived as refugees from totalitarian states—can easily imagine the dangerous consequences of a values test compelled by forced speech... I hope that as a *cranky old white man* I can make myself useful by defending their rights.
>
> —Ryan Alford[12]

I. INTRODUCTION

The twelve impassioned quotes above concern a requirement that Ontario lawyers annually draft a statement reflecting on their professional and human rights obligations pertaining to diversity. Equality, it seems, is a divisive ideal; so divisive, in fact, that while the requirement was in force during the drafting and peer-review of this article, it was repealed on the same day my final revisions were due to the *Ottawa Law Review*. The evasive rationale behind opposition to this requirement was, most often, freedom of speech. I explain below, principally, how the requirement does not violate freedom of speech, and secondarily, how its opposition was not really about freedom of speech in any event.

The Law Society of Ontario (LSO) previously required all lawyers to "adopt and to abide by a statement of principles."[13] The sole requirement of any Statement of Principles (SOP) was that it must acknowledge the lawyer's "obligation to promote equality, diversity and inclusion."[14] Two lawyers—Ryan Alford and Murray Klippenstein—applied to judicially review the SOP requirement (Application).[15] That Application alleged that the SOP requirement, among other things, violated lawyers' constitutional

12 Ryan Alford, "An Arm of the State Should Not Be Forcing Lawyers to Declare Their Values", *CBC News* (25 November 2017), online: <cbc.ca/news/opinion/law-society-statement-1.4418125> [emphasis added].

13 Law Society of Upper Canada, "Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions" (November 2016) at 2, online (pdf): <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf> [LSUC, "Report"].

14 *Ibid*.

15 See *Alford v The Law Society of Upper Canada* (19 October 2018), Toronto, Ont Div Ct No 510/18 (fresh as amended notice of application) [*Alford* Application]; *Alford v The Law Society of Upper Canada*, 2018 ONSC 4269 at para 50 [*Alford*].

right to free speech by "compel[ling] licensees to communicate political expression."[16] This paper explains why, to the contrary, the SOP requirement does no such thing.[17] While there was active public debate regarding the merits of the SOP requirement, there was relatively less substantive constitutional analysis: to date, there are three articles published by Omar Ha-Redeye,[18] Arthur Cockfield,[19] and Justin P'ng.[20] I dispute aspects of the constitutional analysis in all three articles, and think each gives underserved credit to the constitutional significance of privately acknowledging extant legal obligations.

My analysis proceeds in three parts. First, I conduct a statutory analysis, including an explanation of the background to the SOP requirement. This statutory analysis is an essential antecedent inquiry to interpreting and resolving the SOP controversy. Two ships cross paths in this dispute as to the proper statutory interpretation of the SOP requirement: a right-bound ship requiring that lawyers *value* equality (SOP opponents) and a left-bound ship requiring that lawyers *acknowledge* existing equality law obligations (SOP proponents). We cannot assess the SOP critically or constitutionally without first choosing which ship best reflects the enacted text. And as I explain below, the left-bound ship better reflects the text, context, and purpose of the SOP requirement. Second, having chosen the left-bound ship, I then interpret the SOP controversy through a critical race theory lens. I explain how liberty claims—here, "free speech"—obscure the apparent motivation for sustained resistance to the modest SOP requirement, namely, opposition to diversity and denial of systemic racism. Third, I assess the SOP requirement's constitutionality. After briefly explaining why the SOP requirement respects freedom of conscience (since brief voluntary reflection about following the law trivially impacts freedom of conscience), I then explain why the SOP requirement respects freedom of expression by: (1) clarifying the purposive scope of free expression; (2) distilling the legal test for unconstitutional compelled speech; and (3) applying that test to

16 *Alford* Application, *supra* note 15 at para 37.

17 My analysis will refer to lawyers, though I acknowledge that the SOP requirement applies to all "licensees" (i.e. lawyers and paralegals). See LSUC, "Report", *supra* note 13 at 2.

18 See Omar Ha-Redeye, "My Friends Muddy the Waters: How a Statement of Principles Became a Public Fiasco" (15 December 2017), online: *Ethics Primer at King Law Chambers* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3091758> [Ha-Redeye, "Muddy the Waters"].

19 See Arthur J Cockfield, "Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech" (2018) *Queen's Law Research Paper Series* No 2018-100 [Cockfield, "Lawyer Liberty"].

20 See Justin P'ng, "The Gatekeeper's Jurisdiction: The Law Society of Ontario and the Promotion of Diversity in the Legal Profession" (2019) 77:2 UT Fac L Rev 82.

the SOP requirement. I conclude that the SOP requirement does not violate free expression under Canadian constitutional law because it does not seek to convey meaning, nor does it—in purpose or effect—control free expression. It follows that, while the SOP requirement is now repealed, the motivation for that repeal—protecting speech (text) and resisting equality (subtext)—was doctrinally flawed.

II. STATUTORY ANALYSIS

A. Why the SOP Was Adopted

Systemic racism is a problem in Canada,[21] despite views to the contrary.[22] Articles abound illustrating systemic racism's reach within Canada's justice system,[23] and similarly, the legal profession.[24] With this concern

21 See e.g. House of Commons, *Taking Action Against Systemic Racism and Religious Discrimination Including Islamophobia: Report of the Standing Committee on Canadian Heritage* (February 2018) (Chair: Hedy Fry), online (pdf): <ourcommons.ca/Content/Committee/421/CHPC/Reports/RP9315686/chpcrp10/chpcrp10-e.pdf> [House of Commons, "Systemic Racism"]. For detailed discussion on the impact of systemic racism in the United States, see generally Kimani Paul-Emile, "Blackness As Disability?" (2018) 106:2 Geo LJ 293.

22 Peterson, *supra* note 1. Klippenstein, *supra* note 6.

23 See Jennifer Roy, "Racism in the Justice System", online: *Canadian Race Relations Foundation* <crrf-fcrr.ca/images/stories/pdf/ePubFaShRacJusSys.pdf> [CRRF, "Justice System"].

24 See e.g. *Law Society of Upper Canada v Selwyn Milan McSween*, 2012 ONLSAP 0003 [*McSween*] (see majority at para 55 and dissent at paras 68–79); Hadiya Roderique, "Black on Bay Street: Hadiya Roderique Had It All. But Still Could Not Fit In", *The Globe and Mail* (22 October 2018), online: <theglobeandmail.com/news/toronto/hadiya-roderique-black-on-bay-street/article36823806>; Mai Nguyen, "The Untold History of the Legal Profession", *Precedent Magazine* Winter 2018 (4 December 2018), online: <lawandstyle.ca/law/cover-story-the-untold-history-of-the-legal-profession>; Sandra Rosier, "Too Many Lawyers Have to Conceal Their True Identities at the Office", *Precedent Magazine* Winter 2018 (4 December 2018), online: <lawandstyle.ca/law/opinion-too-many-lawyers-have-to-conceal-their-true-identities-at-the-office>; Atrisha Lewis, "How Unconscious Bias Holds Back Racialized Lawyers", *Canadian Lawyer* (14 January 2019), online: <canadianlawyermag.com/author/atrisha-lewis/how-unconscious-bias-holds-back-racialized-lawyers-16698> [Lewis, "Unconscious Bias"]; Joshua Sealy-Harrington, "In Their Shoes: Diverse Stories From the Legal Profession", *Law Matters* (10 November 2016), online: <cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Fall-2016/In-Their-Shoes> [Sealy-Harrington, "In Their Shoes"]; Omar Ha-Redeye, "Stamping Out Systemic Discrimination in the Legal Professions", *Slaw* (14 February 2016), online: <slaw.ca/2016/02/14/stamping-out-systemic-discrimination-in-the-legal-professions> [Ha-Redeye, "Stamping Out"]; Mark Mancini, "The Statement of Principles" (14 February 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/02/14/the-statement-of-principles>; Ha-Redeye, "Muddy the Waters", *supra* note 18 at 2–4; Fred Wu, "Statement of Principles is a Good Thing to Do", *Law Times* (11 March 2019), online: <lawtimesnews.com/article/statement-of-principles-is-a-good-thing-to-do-16964>.

in mind, the LSO established a Working Group on Challenges Faced by Racialized Licensees (Working Group)[25], which "studied the experience of racialized licensees" and found they faced "widespread barriers."[26]

After "broad consultation within the legal profession and with the general public," the Working Group produced a report titled "Working Together for Change: Strategies for Addressing Issues of Systemic Racism in the Legal Profession" (Report).[27] That Report made 13 recommendations, including the introduction of the SOP requirement.[28] The LSO (then named the Law Society of Upper Canada)[29] ultimately adopted all 13 recommendations.[30] One commentator labeled this a "hurried and flawed process" rife with "bullying tactics."[31] However, given the absence of any alleged link between this process and the SOP requirement's impugned constitutionality, I do not respond to these claims here.

The LSO incrementally introduced the SOP into its regulatory scheme. In September 2017, the LSO "notified all licensees that they would be required to confirm that they had adopted a [SOP] in their [annual report]."[32] In November 2017, the LSO published a "Guide to the Application of Recommendation 3(1)"[33] (the Guide), meant to assist licensees in fulfilling their SOP obligations.[34] That same month, the LSO advised licensees that there would be no sanctions for failing to comply with the SOP requirement in annual reports for 2017.[35] During the SOP's abbreviated life cycle, the LSO never imposed or signalled any intent to impose sanctions for non-compliance with the SOP requirement, and simply indicated that licensees who failed to comply "will be advised of their obligations in writing."[36]

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25 LSUC, "Report", *supra* note 13 at 5.

26 P'ng, *supra* note 20 at 84. See also LSUC, "Report", *supra* note 13 at 11.

27 *Alford*, *supra* note 15 at para 5; LSUC, "Report", *supra* note 13 at 5.

28 *Alford*, *supra* note 15 at para 6; LSUC, "Report", *supra* note 13 at 2.

29 *Alford*, *supra* note 15 at para 1, n 1.

30 *Alford*, *supra* note 15 at para 8. See generally Cockfield, "Lawyer Liberty", *supra* note 19 (for extensive discussion of the bencher debates regarding the SOP).

31 Cockfield, "Lawyer Liberty", *supra* note 19 at 15–16.

32 *Alford*, *supra* note 15, at para 9.

33 See Law Society of Upper Canada, "Guide to the Application of Recommendation 3(1)" (2017), online (pdf): *Jurisource* <jurisource.ca/prj/phpe7rTLf1551195791.pdf> [LSUC, "Guide"].

34 *Alford*, *supra* note 15 at para 10.

35 *Alford*, *supra* note 15 at para 11.

36 Law Society of Ontario, "Frequently Asked Questions" (last visited 28 February 2019), online: <web.archive.org/web/20190228222925/lso.ca/about-lso/initiatives/edi/frequently-asked-questions> [LSO, "FAQ"]. See also Mancini, *supra* note 24 (who calls the SOP requirement "toothless"). *Contra* Klippenstein, *supra* note 6 (who consider it "likely" that those who fail to meet the SOP requirement will be suspended, imperiling their "livelihood").

B. What the SOP Required

According to the LSO's materials, the SOP was simply an *acknowledgement* of *extant obligations*—that "[t]he requirement will be satisfied by licensees acknowledging their…existing legal and professional obligations."[37] In stark contrast, the Applicants characterize the SOP as a *creator* of *novel obligations*.[38] In my view, the former characterization best reflects the text, context, and purpose of the SOP requirement. In turn, as the SOP was anchored in extant legal obligations, analogizing it with values tests divorced from such obligations is inapt.[39] It was, however, strategic for SOP opponents to mischaracterize the SOP's regulatory scope to advance a narrative of regulatory overreach. Indeed, a quirk of the SOP controversy is how both sides never reached agreement on the scope of the SOP, and thus, never meaningfully engaged with each other on the SOP's constitutionality. As I explain below, I interpret the SOP to be a mere regulatory acknowledgment. Accordingly, anti-SOP advocates, it seems, manufactured a phantom SOP requirement, and then leveraged that mythology for rhetorical purposes. In my understanding, *no one* argued in favour of regulating licensees' thoughts about equality; yet *most*, if not *all* anti-SOP advocates, presupposed such thought regulation to justify their constitutional posturing. They were thus, ironically, the architects of their own contrived oppression.

To interpret the SOP requirement, we must begin, of course, with its text, described by Cockfield as "chilling Orwellian language."[40] In his analysis, Cockfield isolates the phrase "statement of principles" when interpreting the scope of the SOP requirement.[41] This truncated analysis, however, deviates from established principles of statutory interpretation.[42] The *full* text of the requirement reads as follows: "The Law Society will…require every licensee to adopt and to abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public."[43] Three points follow from the plain text of the

37 LSUC, "Guide", *supra* note 33 at 1. See also P'ng, *supra* note 20 at 106.
38 *Alford* Application, *supra* note 15 at paras 37–40.
39 See generally Cockfield, "Lawyer Liberty", *supra* note 19.
40 Cockfield, "Orwellian Dictate", *supra* note 4.
41 Cockfield, "Lawyer Liberty", *supra* note 19 at 21.
42 See *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [*Rizzo*].
43 LSUC, "Report", *supra* note 13 at 2.

SOP requirement: (1) it was mandatory, not optional ("require");[44] (2) it was an ongoing, not intermittent, obligation ("adopt" and "abide"); and (3) it was an acknowledgement of extant obligations, rather than a creator of novel obligations ("acknowledging their obligation").[45]

That the SOP requirement was explicitly framed as an "acknowledgement" does not end the discussion. For example, if the SOP requirement mandated lawyers to conduct activities clearly outside existing obligations—*e.g.* to "acknowledge their obligation to discriminate against female articling students"—few scholars would respond that it is simply administrative. Indeed, such an acknowledgment would run directly counter to lawyers' obligations *not* to discriminate in their employment practices.[46] But, on a textual basis, the SOP requirement appears to have been an acknowledgment of extant legal obligations. And, as I will explain, given that the subject of the acknowledgment—obligations "to promote equality, diversity and inclusion"—fell within the scope of extant professional and human rights obligations, the strongest interpretation of the SOP requirement is that it did not modify those obligations. Put differently, if there are two reasonable textual interpretations of the SOP requirement—one that links the requirement to extant obligations, and one that links the requirement to novel obligations—then the former interpretation is stronger because it is more logical for an *acknowledgment* to relate to *existing* obligations.

The Guide reinforces the characterization of the SOP requirement as a mere acknowledgment. While I recognize that the Guide, unlike the SOP requirement, is not the product of Convocation, it is cited extensively by the Applicants and their supporters and thus warrants some discussion.[47]

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44 Though, as I discuss below, only a trivial sanction—being reminded of the SOP obligation—is used to "enforce" the SOP. And, as I also explain below, while the SOP provides an opportunity for reflection, it in no way requires it.

45 See Renatta Austin's remarks during the Interview of Bruce Pardy, Renatta Austin & Janet Leiper by Anna Maria Tremonti (12 October 2017) on *The Current*, "Law Society's Diversity Policy 'Most Egregious' Violation of Freedom of Speech: Professor", online: *CBC Radio* <cbc.ca/radio/thecurrent/the-current-for-october-12-2017-1.4349930/thursday-october-12-2017-full-episode-transcript-1.4352417#segment1> [Tremonti, "The Current"].

46 See *Rules of Professional Conduct*, 2000, ch 6.3.1-1, online: *Law Society of Ontario* <lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [LSO, *Rules*].

47 In this regard, I agree with Leonid Sirota that "the explanation is not the requirement", but question why he simultaneously relies on that non-binding (and now revised) explanation to critique the SOP's practical impact. See Leonid Sirota, "John Finnis and the Law Society" (10 January 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/01/10/john-finnis-and-the-law-society/> [Sirota, "Finnis"]. Cockfield similarly cites these materials, despite acknowledging that they are non-binding (Cockfield, "Lawyer Liberty", *supra* note 19 at 7, 33–34). Given all this discussion, I briefly discuss these materials here.

The Guide repeatedly affirms the view that the SOP requirement created no new obligations, but instead, acknowledged existing ones: that it "reinforces existing obligations in the *Rules of Professional Conduct*";[48] that it pertains to "human rights laws in force in Ontario";[49] that it "does not create any obligation…[but] will be satisfied by licensees acknowledging their obligation to take reasonable steps to cease or avoid conduct that creates and/or maintains barriers for racialized licensees or other equality-seeking groups";[50] that "[t]he reference to the obligation to promote equality, diversity and inclusion generally refers to existing legal and professional obligations in respect of human rights";[51] and that "[t]he content of the Statement of Principles does not create or derogate from, but rather reflects, professional obligations."[52] This remains, of course, the LSO's framing. However, it is difficult to fathom the LSO seeking to impose novel obligations originating with the SOP—the Applicants' central concern[53]—when the LSO has repeatedly and expressly opined to the contrary, and in a manner that could presumably be used in legal defense against the imposition of any such novel requirements in the future.

That the SOP requirement pertained to licensees' obligations in terms of *conduct*, not *thought*, follows from the requirement's phrasing. It referred to an "obligation to promote equality, diversity and inclusion generally, and *in their behaviour* towards colleagues, employees, clients and the public."[54] On a truncated reading, one could argue that requiring lawyers to "promote equality" *per se*, demanded that they advocate for equality in their free time. But, when read as a whole, the emphasized language above—"in their behaviour"—suggests that the requirement to "promote equality" referred to ways in which one's "behaviour" (*e.g.* sexually harassing female colleagues) can impede (*i.e.* not promote) equality.[55]

48 LSUC, "Guide", *supra* note 33 at 1.

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 *Ibid* at 2.

53 *Alford* Application, *supra* note 15 at para 34.

54 LSUC, "Report", *supra* note 13 at 2 [emphasis added].

55 In response, one could argue that the conjunctive phrasing of the requirement—i.e. requiring licensees to promote equality "generally *and* in their behaviour"—limits the behavioural qualification to the latter half of the conjunction. But such an interpretation disregards how the more logical dichotomy drawn by the requirement's use of "and" is between obligations in general spaces ("equality, diversity and inclusion generally") and professional spaces ("in their behaviour towards colleagues, employees, clients and the public"), not between non-behavioural and behavioural requirements (*ibid*) [emphasis added].

In this sense, the SOP requirement was more performative than declaratory; it required an acknowledgment of each licensees' obligation to *act* in accordance with extant obligations (in the hiring and treatment of employees, the provision of legal services, *etc.*), not that licensees *think* anything preordained about those obligations.

Lastly, the principle that absurd interpretations should be rejected[56] favours an interpretation of the SOP requirement that does not extend to proselytizing equality. For example, Leonid Sirota writes that, on his interpretation of the SOP requirement, he is obligated to "devote [his] scholarship to the promotion of equality."[57] But it would be absurd to think that the LSO—with a view to serving the "public interest"[58]—created the SOP requirement, not only to ensure that all academic writing on equality adopted a homogenous position, but further, that all academic writing on any topic was directed exclusively towards advancing progressive equality principles. Surely the public interest is best served through diverse academic discourse on a range of topics, including those that have nothing to do with equality. Yet that is precisely what follows from the interpretation adopted by its critics. Indeed, those critics openly admit that the interpretation they advance "leads to a variety of absurdities."[59] Their analysis is, thus, self-defeating. Similarly, if the interpretation of the SOP advanced by its critics prohibits lawyers from zealously advocating for their clients—an ethical obligation with constitutional significance[60]—that is all the more reason to reject this interpretation, not accept it.

The mechanics of the SOP attenuated—if not eliminated—any residual concerns about its "vaguely authoritarian" nature.[61] Unlike lawyers' Required Oath, which has prescribed content,[62] the SOP was individually drafted by each licensee. While the LSO provided two sample templates

56 *Rizzo*, *supra* note 42 at para 27. While *Rizzo* pertains to the interpretation of legislation, the author doubts that absurd interpretations are any less acceptable in the context of regulations.

57 Leonid Sirota, "Lawless Society of Upper Canada" (12 October 2017), online (blog): *Double Aspect* <doubleaspect.blog/2017/10/12/lawless-society-of-upper-canada> [Sirota, "Lawless"]. See also Sirota, "Finnis", *supra* note 47.

58 *Law Society Act*, RSO 1990, c L.8, s 4.2(3) [*LSA*].

59 Cockfield, "Lawyer Liberty", *supra* note 19 at 24.

60 *Ibid* at 29.

61 *Ibid* at 2.

62 See Law Society of Ontario, "By-Law 4" (2019) at s 21(1), online (pdf): <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/by-law-4.pdf> ["Required Oath"].

to assist licensees,[63] those licensees "[were] not limited to these templates and [were] not required to adopt either of them."[64] This was clear in the text of the SOP requirement itself, requiring that each licensee "adopt and to abide by *a* statement of principles,"[65] not one drafted or authorized by the LSO. Even further, the SOP was modestly enforced. While the SOP was in effect, abstainers, at worst, received a reminder letter from the LSO.[66]

In sum, the SOP requirement mandated nothing more than "acknowledging" one's extant professional and human rights obligations.[67] The following, then, would have met the requirement: "I acknowledge my existing professional and human rights obligations."[68] That is what this controversy boils down to—the textual equivalent of checking a box next to an identical administrative phrase in an annual reporting form. However, one could go even further. While the SOP "need not include any statement of thought, belief or opinion,"[69] it certainly *could*[70]—and that statement could have been as critical of the SOP, or equality rights generally, as the author desired.[71] As noted, the SOP requirement only demanded that every SOP include an acknowledgment of existing regulatory obligations,

63 See Law Society of Ontario, "Statement of Principles—Templates" (last visited 1 March 2019), online: <web.archive.org/web/20190301000648/https://lso.ca/about-lso/initiatives/edi/statement-of-principles/templates>; LSUC, "Guide", *supra* note 33 at 1.

64 *Ibid* at 1–2.

65 LSUC, "Report", *supra* note 13 at 2 [emphasis added].

66 LSO, "FAQ", *supra* note 36. Cockfield notes that some benchers had raised the possibility of stricter enforcement at the deliberative stage of the SOP (Cockfield, "Lawyer Liberty", *supra* note 19 at 7, 31–32). For now, my analysis relies on how the requirement was actually enforced when it was in force. To be clear, though, if the SOP requirement had been enforced by suspending licensees who fail to complete an SOP, I would still uphold its constitutionality based on the remainder of my analysis. My only point here is that, without stricter enforcement, the Applicants concerns seem particularly disproportionate and premature.

67 P'ng, *supra* note 20 ("the broad parameters of the Statement of Principles requirement do not require any specific language, and indeed permit the advancing of an interpretation that meets the bare minimum of acknowledging pre-existing obligations" at 105).

68 See e.g. Wu, *supra* note 24 ("a simple sentence affirming…existing obligations is a compliant SOP").

69 LSUC, "Guide", *supra* note 33 at 1.

70 P'ng, *supra* note 20 ("[a] mandatory acknowledgement of a general obligation…does not inherently preclude dissent, nor is there any basis for interpreting the requirement as giving rise to this restriction" at 105).

71 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 18.

not that it exclude any other content.[72] Accordingly, the following statement would have also met the SOP requirement:

> I hate equality. I hate diversity. And I hate inclusion. The only thing our legal profession should care about is merit. And reverse discrimination initiatives that are founded on the Statement of Principles' ideology tokenize minorities, alienate broad coalitions, and punish white men (including Jewish men) for the sole fact of their birth.
>
> The tyrannical Statement of Principles is a useless half-assed attempt at PC thought control that is intolerable in a liberal society. The Law Society of Ontario should be ashamed for buying into the misguided far-left zeitgeist.
>
> I begrudgingly acknowledge my existing professional and human rights obligations, but only because I am compelled to, and in no way out of a sincere belief that diversity—whatever that means—is important, or something the Law Society has any business concerning itself with in any event.

It follows that near limitless protest can be built into any given SOP should its author—in "good conscience"[73]—so desire. In the words of Annamaria Enenajor, even a "closet neo-nazi" could draft an acceptable SOP.[74] Further, the LSO does not scrutinize SOPs.[75] There is no obligation on any lawyer to publicize their SOP, or to even disclose it to the LSO;[76] lawyers need only "confirm its existence."[77] Therefore, while the SOP had a modest requirement (*i.e.* acknowledging extant obligations), the LSO provided no substantive oversight. The Applicants claimed that meeting the SOP requirement—drafting virtually whatever statement they wanted, which no one would ever read—forced them "to cease practicing law."[78] Given the wide latitude afforded to licensees in meeting this modest requirement, abandoning legal practice strikes me as disproportionate.[79] At a minimum, if this dispute had ever reached the justification stage of the constitutional

72 As I explain below, this is one of many distinguishing traits between the SOP controversy and *National Bank of Canada v Retail Clerks' International Union*, [1984] 1 SCR 269, 9 DLR (4th) 10 [*National Bank*], which SOP critics routinely invoke.

73 *Alford* Application, *supra* note 15 at para 40.

74 See Annamaria Enenajor, "I think I can draft a set of principles vague enough to conform to the LSUC requirement that a closet neo-nazi lawyer could get down with" (13 October 2017 at 16:28), online: *Twitter* <twitter.com/AEnenajor/status/918981913607659520>.

75 See Janet Leiper's comments on Tremonti, "The Current", *supra* note 45.

76 LSUC, "Guide", *supra* note 33 at 2.

77 *Ibid*.

78 *Alford* Application, *supra* note 15 at para 40.

79 *Contra* Cockfield, "Lawyer Liberty", *supra* note 19 (who describes the SOP requirement as a "tall order" at 11).

analysis—which, as I argue below, it should not—I strain to think of a more trivial incursion on free expression (which, in turn, strongly favours that incursion's demonstrable justification in a free and democratic society).[80] In Ha-Redeye's words: "[i]f that's not minimal impairment, I'm not sure what is."[81]

C. Whether the SOP Reflected Extant Obligations

Still, the question remains: even if the SOP requirement was a mere acknowledgement of pre-existing obligations, are those obligations truly extant?[82] In other words, do alternate instruments actually require lawyers to "promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public"? A review of the relevant human rights and regulatory instruments confirms that this is indeed the case. Justin P'ng provides a compelling argument for how *the LSO* has diversity promotion obligations within its regulatory mandate,[83] and I agree with his points. In contrast, my analysis below clarifies how *licensees*, too, have diversity promotion obligations—the very obligations acknowledged by the SOP requirement.

The scheme of human rights and regulatory instruments applicable to licensees imposes requirements for promoting equality both "generally" and in "professional" behaviour. I will address these two settings below. That said, my thesis in respect of both is the same: reasonable mindfulness of barriers to equality-seeking groups is an established legal obligation. The Applicants rely on a strawman: that these equality promotion obligations require all lawyers to shout their love for minorities from the

80 Two aspects of the justification analysis under section 1 of the *Charter* are informed by the extent of the impugned violation: (1) minimal impairment, which concerns whether "the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective"; and (2) balancing, which concerns "the overall effects of the *Charter*-infringing measure". See *Frank v Canada* (*Attorney General*), 2019 SCC 1 at paras 66, 76.

81 Omar Ha-Redeye, "Equality, Diversity and Inclusion Are Components of Competence" (15 October 2017), online: *Slaw* <slaw.ca/2017/10/15/equality-diversity-and-inclusion-are-components-of-competence>.

82 See Alice Woolley, "Ontario's Law Society: Orwell's Big Brother or Fuller's Rex?" (31 October 2017), online (blog): *ABlawg* <ablawg.ca/2017/10/31/ontarios-law-society-orwells-big-brother-or-fullers-rex> [Woolley, "Ontario's Law Society"] ("it surely goes without saying that no state actor can make a person agree to abide by legal rules that it has not created").

83 P'ng, *supra* note 20 at 89–98.

rooftops.[84] However, this attack disregards the positive scope of pre-existing human rights obligations in Canada.

One word—"promote"—seems to be what concerns free speech advocates most.[85] They accept that lawyers cannot discriminate in practice[86] (though some anti-SOP advocates even consider this overreach),[87] but balk at the state requiring equality promotion, which they interpret broadly as requiring active equality campaigning. I acknowledge that, when read in isolation, "promote" connotes actively encouraging acceptance of progressive equality ideals.[88] But this word must be read, as I explained above, in the context of the full by-law and the setting of legal regulation. With this in mind, I have three responses to the claim that the SOP requirement's use of "promote" should be read so broadly. First, as the Guide explains: "[e]quality, diversity and inclusion are promoted (in other words, advanced) by addressing discrimination in all of its forms."[89] Thus, even on a purely negative liberty conception of Canadian equality rights, prohibiting overt discrimination is a means of equality promotion.[90] Second, promotion can simply mean to "support."[91] The Canadian conception of non-discrimination is expansive enough to include "support" (*e.g.* accommodation) of minorities and not just restrictions on overt and targeted formal discrimination, a diluted understanding of discrimination.[92] SOP

84 Sirota, "Lawless", *supra* note 57. See also Sirota, "Finnis", *supra* note 47.

85 See e.g. *Alford* Application, *supra* note 15 at para 38. See also Cockfield, "Lawyer Liberty", *supra* note 19 at 21.

86 *Alford* Application, *supra* note 15 at para 23.

87 Black, *supra* note 3 ("[i]f a senior partner at a law firm wants to hire only beautiful blonde women or only overweight bald men, there is nothing wrong with that, and it does not mean that the individual dislikes people who do not meet those descriptions, who can work at other firms").

88 Cockfield, "Lawyer Liberty", *supra* note 19 at 21.

89 LSUC, "Guide", *supra* note 33 at 1.

90 In this sense, whether the SOP seeks to "improve the plight of racialized lawyers" (Cockfield, "Lawyer Liberty", *supra* note 19 at 6) does not undermine its interpretation as a recognition of extant obligations. Enhancing compliance with non-discrimination obligations *does* improve that plight.

91 *Oxford English Dictionary*, sub verbo "promote", online: <oed.com>. See also Alice Woolley, "Law Society's Statement of Principles May Be Useless, But It Does Not Compel Speech", *National Post* (16 November 2017), online: <nationalpost.com/opinion/the-law-societys-statement-of-principles-may-be-useless-but-its-critics-are-wrong> [Woolley, "Useless"].

92 For human rights law, see *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 55, 62–68, 176 DLR (4th) 1 [*BCGSEU*]. For constitutional law, see *Quebec (Attorney General) v Alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux*, 2018 SCC 17 at para 25 [*Alliance*]. For academic exploration, see Sandra Fredman, *Discrimination Law*, 2nd ed (New York: Oxford University Press, 2011).

critics claim that the state cannot justifiably impose positive obligations *per se*.[93] But unless those same critics are willing to challenge, for example, reasonable accommodation standards in human rights and employment law[94]—an unequivocally positive obligation[95] that is "a core and transcendent human rights principle"[96]—they cannot escape that their opposition to the SOP is predicated on an antiquated conception of equality rights, not a strident defence of free speech.[97] Third, the word "promote" must be interpreted in context. For example, Cockfield draws on judicial interpretations of "promote" in hate speech case law.[98] But there, as here, a purposive analysis must be employed. Indeed, as Chief Justice Dickson explained in *R v Keegstra*: "[*g*]*iven the purpose of the provision* to criminalize the spreading of hatred in society, I find that the word 'promotes' indicates active support or instigation."[99] In stark contrast, the purpose of proactive regulatory compliance here demands a narrower purposive interpretation of "promote" to align that interpretation with the relevant context.

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93 Cockfield, "Lawyer Liberty", *supra* note 19 at 21.

94 See e.g. *BCGSEU*, *supra* note 92 at para 62. One could argue that only employers, not individual licensees, have obligations in terms of reasonable accommodation. But making lawyers proactively acknowledge equality obligations is a reasonable strategy for increasing the likelihood that the decisions of legal employers—originating, of course, with the decisions of individual lawyers—will comply with these obligations. Further, since preventing individual cases of discrimination and harassment advances equality, individual acknowledgments remain relevant as a regulatory tactic, especially with the Court's recent recognition that employment discrimination can, at least under the BC *Human Rights Code*, be committed by non-employers. See *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62.

95 If the reasonable accommodation standard could not demand positive obligations, there would be no basis for the "undue hardship" component of the reasonable accommodation test; that hardship stems, in the regular course, from the burdens of positive obligation. See e.g. *Quebec* (*Commission des Normes, de L'équité, de la Santé et de la Sécurité du Travail*) *v Caron*, 2018 SCC 3 ("the undue hardship threshold means an employer will always bear some sort of hardship" at para 29) [*Caron*], citing *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at paras 125–28.

96 *Caron*, *supra* note 95 at para 20.

97 The author acknowledges that human rights jurisprudence has rejected the use of distinguishing "positive" and "negative" equality obligations (and, relatedly, distinguishing direct and adverse effects discrimination). See e.g. *BCGSEU*, *supra* note 92 at paras 19–24. However, the author engages with these dichotomies because: (1) anti-SOP advocates have used them to explain their opposition to the SOP; and (2) the author nevertheless thinks these ideas can do productive conceptual work, even if they may be ill-suited to governing legal standards.

98 Cockfield, "Lawyer Liberty", *supra* note 19 at 22, n 88.

99 [1990] 2 SCR 697 at 776, 114 AR 81 [emphasis added] [*Keegstra*].

Having explained why "promote" warrants a narrow interpretation in the context of the SOP requirement, I now explain how licensees have extant equality promotion obligations in professional and general spaces.

1. *Professional Obligation to Promote Equality, Diversity, and Inclusion*

Lawyers are obligated to promote equality, diversity, and inclusion in their professional conduct, a point at least partially conceded by the Applicants.[100] The relevant human rights instrument for Ontario lawyers is the Ontario *Human Rights Code* (the *Code*).[101] It requires equality, diversity, and inclusion promotion. Specifically, the *Code* prohibits lawyers from discriminating based on protected grounds in their provision of legal services,[102] in the preparation of a contract,[103] and in their employment decisions[104] (including harassment of employees).[105] "Discrimination" prohibits action or inaction resulting in or failing to address formal or substantive inequality.[106] In other words, non-discrimination obligations include duties that are both negative (*i.e.* an employer cannot sexually harass employees)[107] and positive (*i.e.* an employer must, within reasonable bounds, promote an inclusive environment in their workplace).[108] That Canada's conception of equality is substantive rather than formal is clear, from the Supreme Court's first equality decision,[109] to its most recent.[110] Demanding reasonable accommodation is not an unlawful positive obligation; rather, it is a recognized human rights duty cognizant of the inevitable substantive inequality that follows in its absence.

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100 *Alford* Application, *supra* note 15 at para 45(c).

101 RSO 1990, c H.19 [*Code*].

102 *Ibid*, ss 1, 9. Though, the provision of services has been interpreted by adjudicators as being limited to certain services falling in the relevant jurisdiction. See *Zaki v McCall Dawson Osterberg Handler LLP*, 2016 HRTO 1129 [*Zaki*] ("the Tribunal does not have the power to inquire into claims of discrimination about every relationship or interaction. The Tribunal's jurisdiction is limited to the social areas set out in the *Code*" at para 19).

103 *Code*, *supra* note 101, ss 3, 9.

104 *Ibid*, ss 5(1), 9.

105 *Ibid*, ss 5(2), 9.

106 See *Ontario Human Rights Commission v Ontario* (1994), 19 OR (3d) 387, 117 DLR (4th) 297 (CA).

107 *Code*, *supra* note 101, s 7.

108 See *Keays v Honda Canada Inc* (2006), 82 OR (3d) 161 at paras 58, 90, 274 DLR (4th) 107 (CA); Law Society of Ontario, "Definitions—Equality, Diversity, and Inclusion" (last visited 7 November 2019), online: <lso.ca/about-lso/initiatives/edi/definitions>.

109 See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

110 *Alliance*, *supra* note 92, at para 25.

The *Rules of Professional Conduct* (*Rules*)[111]—which prescribe lawyers' ethical obligations in Ontario—similarly require the promotion of equality, diversity, and inclusion. The *Rules* are enacted under the *Law Society Act*, which requires the LSO to "maintain and advance the cause of justice and the rule of law,"[112] "facilitate access to justice for the people of Ontario,"[113] and "protect the public interest."[114] The Supreme Court has interpreted these provisions as prescribing an "overarching objective of protecting the public interest,"[115] which can be promoted through means other than maintaining the competence of licensees.[116] Indeed, "[a]s a public actor, the [LSO] has an overarching interest in protecting the values of equality and human rights in carrying out its functions."[117]

With this broad mandate, the LSO prescribes various rules for lawyers which pertain to promoting equality, diversity, and inclusion. In particular, the *Rules*—viewed in conjunction with their associated commentary—note that lawyers have special responsibilities by virtue of their privilege as a lawyer, including: (1) recognizing Ontario's diversity and protecting the dignity of individuals;[118] (2) honouring the obligation not to discriminate, including respecting the dignity and worth of all persons;[119] and (3) ensuring that service provision and employment practices comply with human rights obligations.[120]

Moreover, in *Trinity Western*, the Court held that it is open to the LSO to interpret "diversity within the legal profession" as serving "the public interest" and safeguarding the "public *perception*"[121] of the administration of justice.[122] Indeed, the Court expressly linked diversity, equality, and inclusion to the administration of justice: "[a]ccess to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse

111 LSO, *Rules*, *supra* note 46.

112 *LSA*, *supra* note 58, s 4.2(1).

113 *Ibid*, s 4.2(2).

114 *Ibid*, s 4.2(3). For a description of how the LSO's mandate has evolved to include the public interest, see P'ng, *supra* note 20 at 85–88.

115 *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 14 [*Trinity Western*]. See also P'ng, *supra* note 20 at 89–92.

116 *Trinity Western*, *supra* note 115 at para 14.

117 *Ibid* at para 21.

118 LSO, *Rules*, *supra* note 46, ch 2.1-1, commentary 4.1.

119 *Ibid*, ch 6.3.1-1, commentary 1.

120 *Ibid*, ch 6.3.1-2, 6.3.1-3.

121 *Trinity Western*, *supra* note 115 at para 20 [emphasis in original].

122 *Ibid* at para 19.

needs."[123] Accordingly, there is clear precedent for interpreting the SOP's equality promotion mandate as coming within the scope of the LSO's statutory obligations.

Does complying with the many obligations described above promote equality, diversity, and inclusion in professional spaces? Undoubtedly, yes. The analytical flaw in SOP criticisms is that they invert the analysis. The SOP is not a free-standing obligation to promote equality *in every fathomable way* (from slam poetry to documentary film-making).[124] Instead, the SOP requires that lawyers acknowledge their obligation to promote equality *in the ways already required.* To claim that there is no existing obligation to promote equality is to claim that abstaining from discrimination and harassment and failing to provide a reasonably inclusive workplace do not promote (*i.e.* support) diversity in the workplace. Clearly, they do. It follows that lawyers, contrary to the views of the Applicants, do have extant obligations to promote equality, diversity, and inclusion in their practice.[125]

2. General Obligation to Promote Equality, Diversity, and Inclusion

Lawyers are also obligated to promote equality, diversity, and inclusion in their general conduct. This is not totalitarian; rather, it is a consequence of the privileged position occupied by lawyers in society. Just as judges have special obligations in terms of partisan advocacy,[126] lawyers have special obligations to the administration of justice. Specifically, while the *Code* only imposes human rights obligations in specific settings,[127] the *Rules* extend to a lawyer's "public life."[128] They require that lawyers "encourage public respect for and try to improve the administration of justice," and

123 *Ibid* at para 23.

124 Leonid Sirota asserts, for example, that the SOP will require him, as an academic, to "devote [his] scholarship to the promotion of equality, diversity, and inclusion" (Sirota, "Lawless", *supra* note 57). In this regard, some commentary appears to suggest that the SOP requirement may require some equality "advocacy". See e.g. Paula Ethans, "Here's Why Lawyer's Should Advocate for Greater Diversity in their Profession", *Ottawa Citizen* (30 March 2018), online: <ottawacitizen.com/opinion/columnists/ethans-heres-why-lawyers-should-advocate-for-greater-diversity-in-their-profession>. Though, to be fair to Ms. Ethans, she later clarifies that she limits her understanding of the SOP requirement to conduct that is "discriminatory".

125 *Contra*, Woolley, "Ontario's Law Society", *supra* note 82.

126 See e.g. Sean Fine, "Judge Cleared of Allegations of Partisan Activity, Improper Fundraising on Behalf of Black-Advocacy Group", *The Globe and Mail* (30 November 2018), online: <theglobeandmail.com/canada/article-judge-cleared-of-allegations-of-partisan-activity-improper>.

127 *Zaki*, *supra* note 102.

128 LSO, *Rules*, *supra* note 46, ch 5.6-1, commentary 1.

the commentary notes that lawyers' obligations in this regard are "not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community."[129]

The commentary to the *Rules* notes that licensees are required—as individuals who wield power and privilege in society—to "encourage public respect for and try to improve the administration of justice." The phrasing in the commentary is unambiguously positive. Accordingly, the positive nature of these obligations is not in question, only whether that obligation extends to the interests of "diversity"[130] or "equality and human rights,"[131] the promotion of which the Supreme Court of Canada has already confirmed improve the administration of justice. It follows that—in both professional and public settings—lawyers have equality promotion obligations, even if "the Rules are *mainly* [*i.e.* not *exclusively*] directed at regulating lawyer…conduct within law practice."[132]

D. Conclusion: The SOP Is a Regulatory Reminder

The foregoing discussion clarifies the true nature of the SOP. It is not a "Loyalty Oath"[133] enforced by the "thought police";[134] it is not a "quota";[135] it does not "mak[e] it harder for members of the public to identify impartial and independent-minded lawyers and judges";[136] or force lawyers to violate their ethical "duty of loyalty" to their clients;[137] it does not mandate that Canadian law professors endorse current equality jurisprudence;[138] and it *certainly* does not "place[] vulnerable and marginalized people at risk."[139] Rather, the SOP is a modest step towards enhancing regulatory compliance. It "calls on licensees to reflect on their professional context

129 *Ibid*, ch 5.6-1, commentary 1.
130 *Trinity Western*, *supra* note 115 at paras 19–20, 23.
131 *Trinity Western*, *supra* note 115 at para 21.
132 Cockfield, "Lawyer Liberty", *supra* note 19 at 24 [emphasis added].
133 *Ibid* at 26.
134 Pardy, *supra* note 2; Cockfield, "Lawyer Liberty", *supra* note 19 at 2 (the SOP "forc[es] all lawyers to agree with government-prescribed values").
135 Klippenstein, *supra* note 6.
136 Cockfield, "Lawyer Liberty", *supra* note 19 at 2, 25.
137 Cockfield, "Lawyer Liberty", *supra* note 19 at 28. See also Gerard Charette, "Stop SOP Bencher Election—Candidate Profiles" (2019), online: *StopSOP* <stopsop.ca/bencher-election/candidate-profiles/gerard-charette>.
138 Cockfield, "Lawyer Liberty", *supra* note 19 at 25.
139 *Ibid* at 31.

and on how they will uphold and observe human rights laws"[140] to "ensure that licensees do not lose sight of regulatory obligations in the scramble of keeping a practice running."[141] In this sense, I agree with Cockfield regarding the intent of the SOP requirement to promote "reflect[ion] on racism within law practice."[142]

By reminding lawyers of their professional and public obligations—but not creating novel obligations—the LSO seeks to combat systemic discrimination *proactively*,[143] which existing instruments are already directed towards addressing *reactively*; "shift[ing] the focus from individuals to systems and from ad hoc human rights liability to the promotion of an inclusive and diverse professional culture."[144] A proactive approach is, indeed, particularly critical in the context of racial discrimination given how difficult it is to detect its "subtle" scent[145]—a critical point for those who view the SOP requirement as an unnecessary redundancy.[146] Indeed, as critical race theorist Alan Freeman instructs, "affirmative efforts" directed towards changing the "conditions" of systemic hierarchy are a necessary ingredient in combatting racial discrimination.[147] In then Professor (now Justice) Woolley's words:

> Compliance-based regulation depends on regulated parties—and in particular on regulated entities—acknowledging regulatory obligations, creating strategies for accomplishing those obligations and reporting on the success of those strategies. Compliance-based regulation aims not to punish lawyers for doing things wrong, but to help lawyers create structures and strategies for getting it right. Doing that requires lawyers acknowledging

140 LSUC, "Guide", *supra* note 33.

141 Woolley, "Ontario's Law Society", *supra* note 82.

142 Cockfield, "Lawyer Liberty", *supra* note 19 at 8.

143 P'ng, *supra* note 20 at 93–94.

144 Jennifer Quito, "Correcting the Record on LSUC Diversity Statement", *Law Times* (23 October 2017), online: <lawtimesnews.com/author/jennifer-quito/correcting-the-record-on-lsuc-diversity-statement-14815>.

145 See *Basi v Canadian National Railway* (1988), 9 CHRR D/5029 at D/5038 (Canadian Human Rights Tribunal). Indeed, empirical studies on race discrimination cases demonstrate their greater statistical likelihood of failure. See e.g. EEOC, "Color-Based Charges FY 1997–FY 2017" (last modified 2018), online: *US Equal Employment Opportunity Commission* <eeoc.gov/eeoc/statistics/enforcement/color.cfm>.

146 Cockfield, "Lawyer Liberty", *supra* note 19 at 14. Further, it is hard to reconcile the anti-SOP positions that the SOP requirement is, simultaneously, a redundancy and oppressive; seemingly an instance of anti-SOP advocates seeking to have their cake and eat it too.

147 See Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 Minn L Rev 1049 at 1052–53.

> what they need to do, creating strategies for doing it, and monitoring how those strategies work…It aims to achieve and support good practices, rather than occasionally and haphazardly punishing the bad.[148]

I acknowledge that the SOP is not immune to critique. One might criticize whether such acknowledgments are effective at improving compliance with regulatory obligations,[149] whether they should target institutions rather than individuals,[150] whether they should be optional,[151] or whether they go far enough.[152] One might also criticize the name of the requirement—Statement of Principles—which, I will readily concede, connotes aspects of speech ("statement") and conscience ("principles"),[153] although "Reminder of Regulatory Obligations" has less ring to it. One could doubt that anyone will actually reflect on their equality obligations,[154]

148 Woolley, "Ontario's Law Society", *supra* note 82. See also P'ng, *supra* note 20 at 106.

149 See e.g. Mancini, *supra* note 24. See also Cockfield, "Lawyer Liberty", *supra* note 19 at 26, where he quotes Bencher Vespry who invoked the authority of The Simpsons and Bart Simpson's repetitive blackboard writing ("I will not be a bad boy again") in supposed support of the SOP requirement's ineffectiveness. *Contra* Woolley, "Ontario's Law Society", *supra* note 82 ("law societies require such acknowledgments for good reason, particularly as they move toward compliance regulation. In compliance regulation, law societies alert lawyers to their duties…make them explicitly acknowledge that the duties exist, and require them to develop systems to ensure compliance…Evidence from other jurisdictions suggests that compliance regulation produces better lawyer conduct than the existing reactive disciplinary model. The law society's requirement that lawyers acknowledge the duty to promote equality is thus not some bonkers PC foray into compelled speech; it is rather part of a larger effort to increase the effectiveness of lawyer regulation"). Similarly, Fernando Garcia views the SOP as promoting "a new culture within law firms" that promotes greater regulatory compliance. See Fernando Garcia, "Statement of Principles Critics: Stop Fighting Against Us", *Canadian Lawyer* (18 December 2017), online: <canadianlawyermag.com/author/fernando-garcia/statement-of-principles-critics-stop-fighting-against-us-15092>; Ha-Redeye, "Muddy the Waters", *supra* note 18 at 23.

150 Woolley, "Ontario's Law Society", *supra* note 82. On the topic of *individualizing* racism issues demanding *systemic* responses, see Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 148–49 ["CRT Primer"].

151 Cockfield, "Lawyer Liberty", *supra* note 19 at 9–11. On this point, while I agree that "fallout" *may* have been reduced by an optional SOP requirement, those lawyers who "conscientiously object" to drafting a sentence about diversity are probably those most in need of reflection to promote regulatory compliance.

152 See Atrisha Lewis, "A Personal Reflection on the Statement of Principles Resistance", *Canadian Lawyer* (15 January 2018), online: <canadianlawyermag.com/author/atrisha-lewis/a-personal-reflection-on-the-statement-of-principles-resistance-15173> [Lewis, "SOP Resistance"].

153 Cockfield, "Lawyer Liberty", *supra* note 19 at 21.

154 Mancini, *supra* note 24.

though there is anecdotal evidence to the contrary.[155] Lastly, one might note that certain non-binding explanatory materials disseminated by the LSO—though not formally enacted by it—supported the Applicants' interpretation of the SOP as violating freedom of conscience.[156] Specifically, an earlier version of a "Key Concepts" document explained that the SOP's intention "is to demonstrate *a personal valuing of* equality, diversity, and inclusion,"[157] which would extend the SOP beyond a simple "reporting requirement."[158] However, that document was revised—wisely[159]—and then simply provided what a statement of principles "may consist of."[160] Notably, none of these critiques establish that the SOP *as enacted* created new equality promotion obligations or violated free speech. Further, none of these critiques offer an alternative as to how to better promote proactive compliance with human rights obligations.

III. CRITICAL ANALYSIS: LIBERTY VEILS AND EQUALITY TALES

Having clarified the SOP requirement's modest imposition of annual self-directed journaling, I now take a theoretical detour from my doctrinal analysis to make a brief observation in the tradition of critical race theory. In my view, free speech is a "smokescreen"[161] in this case—an example of what Patricia Williams describes as "power abuses that may lurk behind the 'defense' of free speech"[162] (indeed, "liberty" claims are an age-old

155 See Louis Century, "Young Advocates Speak Up" (April 2018) at 6, online (pdf): *Keeping Tabs* <advocates.ca/Upload/Files/PDF/Keeping_Tabs/KT_April_2018.pdf>.

156 P'ng, *supra* note 20 at 103.

157 Law Society of Ontario, "Key Concepts of a Statement of Principles" (last visited 26 April 2019), online: <web.archive.org/web/20190426203217/lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/k/key-concepts-statement-principles.pdf> [LSO, "Key Concepts"] [emphasis added]. Cockfield argues that other background documents (not enacted by the LSO), the "hasty manner in which the SOP was adopted"—and the democratic decision to vote on all 13 recommendations together—further this interpretation (Cockfield, "Lawyer Liberty", *supra* note 19 at 5–16). I consider this analysis largely distracting from the core doctrinal inquiry, in addition to infantilizing for those Benchers who Cockfield claims only supported the SOP due to overwhelming "bullying".

158 *Alford* Application, *supra* note 15 at para 34. See also Cockfield, "Lawyer Liberty", *supra* note 19 at 32.

159 Woolley, "Useless", *supra* note 91.

160 LSO, "Key Concepts", *supra* note 157.

161 Ethans, *supra* note 124.

162 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 112.

rhetorical technique to resist equality measures).[163] Specifically, broader factual considerations—that some would consider irrelevant to the technical legal resolution of the SOP controversy—corroborate this perspective.[164] There has been significant debate surrounding whether the SOP opponents are "good faith constitutional objectors."[165] Of course, I cannot divine whether each of the objectors is subjectively acting in good faith, and, following the wise words of W.E.B. Du Bois, do not want to "inveigh indiscriminately"[166] against the mass of SOP opponents who, publicly or privately, range from apprehension to antipathy. But the circumstances surrounding the SOP controversy strongly call into question the extent to which it is accurately characterized, on the whole, as a debate pertaining to free speech, not equality. Limited criticism has been levied at the more obtrusive Required Oath, which has existed for over a century,[167] or the LSO's other speech regulations, such as those pertaining to lawyer advertising.[168] In comparison, the SOP has received significant and sustained resistance, including: (1) Bencher Troister's motion seeking to vote on the SOP separately from the Working Group's other recommendations,[169] in

163 See generally Sheila McIntyre, "Backlash Against Equality: The 'Tyranny' of the 'Politically Correct'" (1993) 38 McGill LJ 1. Likewise, Patricia Williams calls "overgeneralization"—i.e. exaggerating the stakes in a particular dispute by bluntly saying "free speech matters" in response to a particular incursion on speech—"an ancient tactic of irresponsibility" (Williams, *supra* note 162 at 141).

164 I say "corroborate" rather than "demonstrate" because, in my view, subject position often informs, but is not dispositive of, argument scrutiny. See e.g. Thomas McLaughlin & Joshua Sealy-Harrington "Arguments Should Not Be Silenced Because of Their Author's Race or Sex", *The Globe and Mail* (14 April 2014), online: <theglobeandmail.com/opinion/arguments-should-not-be-silenced-because-of-their-authors-race-or-sex/article17956547>. Indeed, many white men, such as Lorne Sossin, have used their privilege to advance, not undermine, efforts at greater substantive equality in the legal profession. See Lorne Sossin, "Slouching Towards Inclusion: The Law Society's Statement of Principles" (24 October 2017), online (blog): *Dean Sossin's Blog* <deansblog.osgoode.yorku.ca/2017/10/slouching-towards-inclusion-the-law-societys-statement-of-principles>.

165 Mancini, *supra* note 24. See also Gillian Hnatiw, "I don't." (16 February 2019 at 8:49), online: *Twitter* <twitter.com/gillianhnatiw/status/1096813949083967489>.

166 W.E.B. Du Bois, *The Souls of Black Folk* (New York: Penguin Random House LLC, 1903) at 50.

167 See Melissa Kluger, "Whose Oath Is It Anyway?", *Precedent* (2 December 2008), online: <lawandstyle.ca/law/whose_oath_is_it_anyway>.

168 LSO, *Rules*, *supra* note 46, s 4.2-1. Indeed, the commentary to this rule provides as an example "of marketing practices that may be inconsistent" with the rule "language or statements that are violent, racist or sexually offensive", which is overt content-dependent speech regulation (unlike the SOP, which is self-drafted and unscrutinized).

169 See Law Society of Upper Canada, "Convocation in Public Session" (2 December 2016) at 36, online (pdf): *Transcript of Debates* <http://lx07.lsuc.on.ca/view/action/singleViewer.do?dvs=

part, because he considered the SOP problematic;[170] (2) Bencher Groia's motion seeking to permit conscientious objection to the requirement;[171] (3) multiple scathing critiques against the SOP requirement;[172] (4) the Application seeking a declaration of the SOP's unconstitutionality;[173] (5) the creation of a StopSOP Bencher slate, dedicated to reversing the SOP requirement,[174] which they consider "the most urgent issue facing the legal profession in Ontario";[175] and (6) the SOP requirement's ultimate repeal.[176] Of course, the incongruity between opposition against the Required Oath and the SOP requirement does not directly respond to any substantive concerns regarding the latter.[177] But when a public state-drafted oath demanding that licensees "champion" (*i.e.* publicly and militantly support)[178] the "rule of law" goes virtually unchallenged for over a century, and a private self-drafted journal entry alluding to "diversity" raises instant fury,[179] it is suspect to claim that this controversy has nothing to do with diversity. In fact, by the final stages of peer-review for this article, the anti-SOP benchers twice voted *against* making the SOP a voluntary requirement, instead

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1573836653519~206&locale=en_US&VIEWER_URL=/view/action/singleViewer.do?&DELIVERY_RULE_ID=10&application=Staff&frameId=1&usePid1=true&usePid2=true> [LSUC, "Convocation Dec 2016"].

170 See Alex Robinson, "LSUC to Consider Statement of Principles Exemption", *Canadian Lawyer* (20 October 2017), online: <canadianlawyermag.com/legalfeeds/author/alex-robinson/lsuc-to-consider-statement-of-principles-exemption-14812>.

171 *Ibid*. See also Ha-Redeye, "Muddy the Waters", *supra* note 18 at 9.

172 See pages 197–200, *above*, for the quoted critiques.

173 *Alford* Application, *supra* note 15.

174 See Anita Balakrishnan, "Group Against LSO Statement of Principles to Launch Bencher Election Bloc", *Canadian Lawyer* (13 February 2019), online: <canadianlawyermag.com/legalfeeds/author/anita-balakrishnan/group-against-statement-of-principles-to-launch-bencher-election-bloc-16862> [Balakrishnan, "Group Against LSO"]. See also Klippenstein, *supra* note 6.

175 See e.g. John Fagan, "Bencher Election 2019" (2019), online: <lsobencher.com/john-fagan>. See also Ryan Alford, "Bencher Election 2019" (2019), online: <lsobencher.com/ryan-alford>.

176 See Paola Loriggio, "Ontario Law Society Repeals Rule Requiring Members to Commit to Promoting Diversity", *Global News* (11 September 2019), online: <globalnews.ca/news/5888140/ontario-law-society-revoke-rule-requiring-promoting-diversity>.

177 See Leonid Sirota, "One's Own Self, Like Water" (17 October 2017), online (blog): *Double Aspect* <doubleaspect.blog/2017/10/19/ones-own-self-like-water>.

178 *MacMillan Dictionary*, sub verbo "champion", online: <www.macmillandictionary.com/us/dictionary/american/champion_2>; *Merriam-Webster*, sub verbo "champion", online: <www.merriam-webster.com/dictionary/champion>. Cockfield claims that the Required Oath does not include any references that go as far as "promotion" (Cockfield, "Lawyer Liberty", *supra* note 19 at 21). But, based on their plain meaning, I would argue that "championing" a cause demands more than "promoting" it.

179 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 7.

seeking its outright repeal.[180] Those benchers shifted from seeking to prevent compelled speech (which is satisfied by a voluntary SOP), to seeking to prevent "virtue signalling"[181] and "political correctness"[182] (only satisfied by a repealed SOP). It seems, therefore, that their opposition was not motivated by speech, but rather, diversity.

That this controversy is "pro speech *in form*, but anti-diversity *in substance*,"[183] is corroborated by two further considerations: the demographics of the SOP debate, and many of its opponents' openly admitted disdain for diversity. The homogeneity of those who oppose the SOP requirement is anecdotally notable; they are predominantly—though not exclusively[184]—white men. And, as multiple racialized commentators have observed, such a demographic may "misunderstand the issues because they cannot see them from the perspective of minority lawyers"[185] and "may not experience the same kind of discrimination that some of us in the profession who are racialized…experience."[186] More perniciously, their motivation to deny the existence of systemic racism may be its corollary—that they, as white people, are unjustly enriched by the racial privileges systemic racism bestows on them (especially, perhaps, for "those individuals whose positive perceptions of themselves were more fragile").[187] Just as "[i]t is instructive that the chief proponents for sanctioning people who inflict [racist speech] injuries are women and people

180 For the first vote against a voluntary SOP, see Anita Balakrishnan, "StopSOP Reveals Why It Rejected Voluntary Statement of Principles", *Law Times* (28 June 2019), online: <lawtimesnews.com/resources/professional-regulation/stopsop-reveals-why-it-rejected-voluntary-statement-of-principles/266924> [Balakrishnan, "StopSOP Reveals"]. For the second vote against a voluntary SOP, see Loriggio, *supra* note 176.

181 Balakrishnan, "StopSOP Reveals", *supra* note 180.

182 Loriggio, *supra* note 176.

183 Joshua Sealy-Harrington, "Confusing Equality with Tyranny: Repealing the Statement of Principles" (26 June 2019), online (blog): *Ablawg* <ablawg.ca/2019/06/26/confusing-equality-with-tyranny-repealing-the-statement-of-principles> [emphasis in original].

184 For examples of authors, who are not white men, criticizing the SOP, see e.g. Elias Munshya, "Why I Don't Support the Statement of Principles", *Canadian Lawyer* (26 June 2019), online: <canadianlawyermag.com/author/elias-munshya/why-i-dont-support-the-statement-of-principles-17053>; Barbara Kay, "Ontario Law Society to Police 'Thought Crimes' of Its Members", *The Post Millennial* (2017), online: <web.archive.org/web/20180525213332/https://www.thepostmillennial.com/ontario-law-society-police-thought-crimes-members>.

185 Lewis, "SOP Resistance", *supra* note 152.

186 Tremonti, "The Current", *supra* note 45.

187 CRT Primer, *supra* note 150 at 154; Michael M Unzueta & Brian S Lowery, "Defining Racism Safely: The Role of Self-Image Maintenance on White Americans' Conceptions of Racism" (2008) 44:6 J Experimental Soc Psychology 1491.

of colour,"[188] it is instructive that the chief proponents of diversity in the legal profession are, similarly, women and people of colour.[189] In my view, it is difficult—if not wilfully blind—to disregard the optics of this demographic divide, and to not interrogate whether the real target of this fury is diversity, not speech. In other words, the *content*, not *compulsion*, of the SOP is its real controversy.

But why speculate? Sure, overwhelmingly white resistance to the SOP and notably racialized support for it[190] can support the inference that this controversy was triggered by disagreement over equality, not speech. Thankfully, though, no such inference is needed in this case. Indeed, many SOP opponents have, by open admission, made their disdain for equality initiatives clear: that diversity is vacuous ("whatever that means"[191]); is a misguided trend ("faddish and jargonistic concepts"[192] or "fashionable ideological causes"[193]); overlooks how racialized people are simply disinterested in the law ("[w]hat if there are many reasons why different groups of people [] choose different paths?"[194]); is a fiction predicated on the myth of "systemic racism";[195] and even is anti-Semitic ("the Law Society is telling us that there are, in effect, too many white Jewish

188 Charles R Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" (1990) Duke LJ 431.

189 See e.g. Roderique, *supra* note 24; Nguyen, *supra* note 24; Rosier, *supra* note 24; Lewis, "Unconscious Bias", *supra* note 24; Sealy-Harrington, "In Their Shoes", *supra* note 24; Ha-Redeye, "Stamping Out", *supra* note 24; Ha-Redeye, "Muddy the Waters", *supra* note 18; Wu, *supra* note 24.

190 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 8.

191 Cockfield, "Orwellian Dictate", *supra* note 4.

192 Black, *supra* note 3.

193 Klippenstein, *supra* note 6.

194 Giesbrecht, *supra* note 7.

195 Peterson, *supra* note 1. Similarly, the Applicants have filed an expert report by Rodney Clifton, which holds that "the conclusion that disparities exist between racialized and non-racialized licensees is *not* supported". See *Alford v Law Society of Upper Canada*, [2018] Court File No. CV-510/18 (ONSC Divisional Court) (Evidence, Rodney Clifton's expert opinion on the research methodologies of the Law Society of Upper Canada), online (pdf): <theccf.ca/wp-content/uploads/2019/02/Clifton-Expert-Report.pdf?fbclid=IwAR2FT9UaY1HScbahiVS0SJZc3p7-_9Pd9a4VRNi9GHgAX3GsYWNxhA179cs> [emphasis in original]. *Contra* Jennifer Quito, "Correcting the Record on LSUC Diversity Statement", *Law Times* (23 October 2017), online: <lawtimesnews.com/author/jennifer-quito/correcting-the-record-on-lsuc-diversity-statement-14815> ("I can attest that the recommendations, including the statement, have their genesis in robust quantitative and qualitative research, as well as widespread stakeholder consultation and agreement").

lawyers").[196] Bencher Goldstein went even further, quoting—with admitted "common sense" approval[197]—an online comment claiming that the underrepresentation of racial minorities in law is, in "large part," credited to their lack of "a culture of learning" (a tweet he has since deleted).[198] This admitted contempt for equality, diversity, and inclusion (or worse, this open admission of racist beliefs) in publications specifically directed towards resisting the SOP requirement illustrates that the *real* reason for the forceful opposition to the SOP is precisely the rationale for its imposition: insufficient awareness of systemic discrimination in Canadian legal practice, which, in turn, can meaningfully impair the profession's ability to proactively redress that discrimination. The protest against the SOP, ironically, illustrates its importance.[199]

So what is the SOP controversy *really* about? It's about a system of oppression that certain largely privileged licensees are unwilling to acknowledge, and who, through their rejection of that system, demonstrate its sustained force.

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196 Klippenstein, *supra* note 6. See also Cockfield, "Lawyer Liberty", *supra* note 19 at 15, n 45. On this point, I must address the perversion of "intersectionality" employed by certain SOP opponents. For example, Cockfield claims that the SOP requirement pays "a lack of attention to intersectionality" by disregarding how promoting racial diversity mandates exclusion of Jewish lawyers (Cockfield, "Lawyer Liberty", *supra* note 19 at 16). I have three responses: (1) the SOP requirement is not a quota, it mandates nothing of the sort; (2) the SOP requirement merely acknowledges general human rights obligations, including those regarding the protection of religious minorities, and so only reinforces protections against anti-Semitism; and (3) this critique fundamentally misconstrues intersectionality. Intersectionality is a theoretical framing that unearths the "multidimensionality" of an individual's experience, which is predicated on multiples axes of identity, in contrast "with the single-axis analysis that distorts these experiences". See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139 at 139. It follows that (a) supposedly overlooking Jewish lawyers is not an "intersectional" argument, it rests on one axis of identity, not multiple, and (b) the SOP is itself an intersectional instrument. Promoting mindfulness of how multiple axes of identity—e.g. race, gender, sexual orientation, and religion—suffer from systemic discrimination combats intersectional discrimination, rather than exacerbating it. If *anyone* overlooks intersectionality, it's the SOP opponents that deny the existence of systemic discrimination itself, intersectional or otherwise.

197 Jay Ashree, "Here you go @AEnenajor" (14 June 2019 at 9:29), online: *Twitter* <twitter.com/jay_ashree/status/1139525207813742592?s=20>.

198 Jay Ashree, "Justifying lack of representation on the basis of 'cultural' differences summed up as a 'culture of learning' is a pithy definition of racism. This tweet, now deleted, highlights a low point in the history of @LawSocietyLSO. Gloves, they say, hide dirty hands" (13 June 2019 at 13:24), online: *Twitter* <twitter.com/jay_ashree/status/1139221963392593921>.

199 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 31.

IV. CONSTITUTIONAL ANALYSIS

The SOP requirement mandated that lawyers acknowledge their existing legal obligations, nothing more. While this rendered the Application largely moot—since the Application sought a declaration that "[t]he requirement shall not be interpreted as imposing any new obligation"[200]—it was still open to the Applicants to argue that acknowledging extant obligations, in itself, coerces speech. In my view, however, Canadian constitutional law does not countenance such a trivial understanding of free expression.

That said, I begin with brief remarks rejecting the claim that the SOP requirement violated freedom of conscience, followed by a more detailed analysis of why the SOP requirement failed to undermine Canada's democratic commitment to free expression.

With respect to both freedoms, I note at the outset that to the extent there was never any coercive mechanism in place to enforce compliance with the SOP requirement—abstainers simply received a reminder letter[201]—one could question whether the SOP "requirement" actually compelled anything at all in terms of thought or speech. This calls into question whether any freedom was plausibly violated in these circumstances (or, at least, severely attenuates any constitutionally significant impact from the SOP's imposition for purposes of justification under section 1).

A. The SOP Did Not Violate Freedom of Conscience

The Applicants alleged that the SOP requirement violated section 2(a) of the *Charter*.[202] But such an infringement requires state action that impacts—or at least seeks to impact—one's thoughts, beliefs, opinions, *etc*.[203] To the extent the SOP incidentally grazed one's thoughts, it did so in a constitutionally permissible manner.

First, the SOP requirement did not prescribe thoughts, beliefs, or opinions (which would constitute a clear violation of free conscience). As discussed above, the requirement simply required acknowledgement of extant obligations. Accordingly, the Applicants' core freedom of conscience claim—that the SOP forced lawyers to "personally adopt…a

200 *Alford* Application, *supra* note 15 at para 8(d).

201 LSO, "FAQ", *supra* note 36.

202 *Alford* Application, *supra* note 15 at paras 37–38.

203 See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, 18 DLR (4th) 321 [*Big M*]. See also *R v Morgentaler*, [1988] 44 DLR (4th) 385 at 388, 37 CCC (3d) 449, Wilson J.

particular set of values"[204]—was predicated on a flawed interpretation of the SOP requirement.[205] The constitutional scrutiny of government measures cannot hinge on the consequences that follow from a plaintiff's unreasonable misinterpretation of those measures.[206] In this way, the SOP requirement bears no analogy to historical scenarios where, for example, prior expressions supportive of the Communist Party (or membership therein) were disqualifying for membership within the legal profession.[207]

Second, to the extent the SOP encouraged—but in no way required—lawyers to "take a moment and reflect"[208] on human rights obligations, this is a trivial limitation on freedom of conscience. To be clear, I interpret the SOP as an exercise which, through optional "self-reflection,"[209] gestures towards greater compliance with human rights obligations. This undoubtedly implicates *thought* insofar as it involves lawyers *thinking* about their human rights obligations. But (modestly) enforced reflection is not policed thought.[210] Moreover, states ubiquitously encourage thinking about compliance with established law, without actually "regulating"[211] one's thoughts. In fact, the state can constitutionally use means far more severe than the SOP requirement to encourage lawful behaviour. For example, the Canadian *Criminal Code* permits the imposition of sentences that "deter the offender and other persons from committing offences."[212] Do criminal sentences infringe free conscience by seeking to deter offenders not only from committing crimes, but from wanting to commit crimes? This is where the Applicants' logic takes us.[213]

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204 *Alford* Application, *supra* note 15 at para 38.

205 See P'ng, *supra* note 20 at 103.

206 *R v Khawaja*, 2012 SCC 69 at para 82 [*Khawaja*].

207 See Thomas I Emerson, "Towards a General Theory of the First Amendment" (1963) 72 Yale LJ 877 at 942.

208 Lewis, "SOP Resistance", *supra* note 152.

209 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 7. See also Sossin, *supra* note 164. I say "optional" because, while drafting an SOP is mandatory, participating in the associated reflection intended through that drafting is not enforced.

210 This is what Cockfield argues, when he collapses "regulating a licensee's thoughts and beliefs" with "reflect[ing] on barriers facing racialized lawyers" (Cockfield, "Lawyer Liberty", *supra* note 19 at 5–6).

211 *Contra* Cockfield, "Lawyer Liberty", *supra* note 19 at 5. Cockfield thinks that any encouraged reflection amounts to an unconstitutional violation of free conscience.

212 RSC 1985, c C-46, s 718(b).

213 In fact, the *Criminal Code* goes even further and permits sentences that influence offender mindsets; e.g. that "promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims" (*ibid*, s 718(f)).

If promoting a favourable outlook on lawful conduct through sentencing considerations does not violate freedom of conscience, then, in my view, the SOP requirement can hardly be said to do so. Put differently, if it is appropriate for the state to promote compliance with criminal law through *incarceration*, it is appropriate for the state to promote compliance with human rights law through *administration*. A criminal sentence undoubtedly constitutes graver encouragement than a reminder letter. And the pressure exerted by the SOP requirement—as it stands, the "tyranny"[214] of snail mail from the LSO—pales in comparison to the undisputed legal and financial consequences of failing to meet one's human rights obligations. This point cannot be overstated. Cockfield, for example, argues that the SOP requirement violates free thought by pointing to Bencher Anand's description of its end goal of "culture change."[215] But the end goal of legal compliance with human rights obligations (what "culture change" means in this context) is an intrinsic objective in *any* functioning legal system.

It is critical, therefore, to comprehend the scope of a finding that the state encouraging compliance with existing law violates freedom of conscience. Laws, inherently, encourage compliance; their violation triggers sanctions. If freedom of conscience extends from the freedom to hold any beliefs, to the freedom to never experience pressure—no matter how slight—against certain actions, and in turn, pressure against wanting to commit those actions (the only point at which free conscience is implicated here), the state will cease to function. To be clear, I am not endorsing laws which mandate agreement with existing laws. Clearly such laws would violate freedom of conscience, and would be antithetical to democracy and the dialectical negotiation of our laws.[216] Rather, I am endorsing the existence of a legal system which, by its very nature, encourages compliance with that system and, indirectly, a desire—in one's conscience—to so comply. That is all the SOP requirement does: not mandate agreement with human rights obligations, but proactively promote compliance with them.

Alternatively, Leonid Sirota alleges that the violation of free conscience in this case follows from the fact that "promoting values requires [one] to hold them."[217] However, this argument—which is predicated on the SOP requirement requiring that all licensees proselytize diversity—has already been rejected above. And since this argument is based on

214 Klippenstein, *supra* note 6.

215 Cockfield, "Lawyer Liberty", *supra* note 19 at 7.

216 Emerson, *supra* note 207.

217 Sirota, "Affidavi", *supra* note 10.

an unreasonable misunderstanding of the SOP requirement, it is constitutionally irrelevant.[218]

B. The SOP Did Not Violate Freedom of Expression

The Applicants claimed that the SOP requirement violated section 2(b) of the *Charter*. In their words, it was coerced speech "alien to Canada's political traditions and the traditions of all free states"[219] that would have a "chilling effect" on free expression.[220] The Applicants went so far as to claim that they "will be forced to cease practicing law."[221] Indeed, one Applicant now claims that opposing the SOP requirement has already "destroy[ed] the career and law firm [he] had built."[222]

The SOP requirement does not violate free expression. I will explain why in three steps: (1) outlining the purposes underlying constitutional protection of "free expression"; (2) distilling the leading test from *Irwin Toy* (speech generally) and *Lavigne* (compelled speech); and (3) applying that test to the SOP requirement.

1. The Purposive Scope of Free Expression

Any discussion of free expression must start from the premise that we are not actually "free" to express ourselves however we wish. For example, there is relatively limited opposition to the following general expression limitations: defamation;[223] perjury;[224] fraud;[225] bribery;[226] yelling "fire" in a crowded theatre;[227] intellectual property (*e.g.* copyright and trademarks);[228]

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218 *Khawaja*, *supra* note 206 at para 82. Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2016), at 43-20; P'ng, *supra* note 20 at 102.

219 *Alford* Application, *supra* note 15 at para 37.

220 *Ibid*.

221 *Ibid* at para 40. See also Sirota, "Affidavi", *supra* note 10.

222 Klippenstein, *supra* note 6.

223 Emerson, *supra* note 207 at 922–24. Of course, criminal defamation laws raise distinct concerns for free expression (*ibid* at 923–24).

224 Hogg, *supra* note 218 at 43-11.

225 *Ibid*.

226 See Lawrence Lessig, "On the Legitimate Aim of Congressional Regulation of Political Speech: An Originalist View" in Lee C Bollinger & Geoffrey R Stone, eds, *The Free Speech Century* (New York: Oxford University Press, 2018) 95 at 96.

227 Emerson, *supra* note 207 at 932. See also *Irwin Toy Ltd v Quebec* (*AG*), [1989] 1 SCR 927 at 1009, 58 DLR (4th) 577, McIntyre J, dissenting [*Irwin Toy*].

228 Regarding copyright, see Robert C Denicola, "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression" (1980) 67:2 Cal L Rev 283 at 290–91.

staging a rock concert at 2:00 am;[229] unregulated parades,[230] lobbying,[231] advertising,[232] media,[233] broadcasting,[234] campaign financing,[235] and campaign literature;[236] speeding in a car to express masculinity;[237] influencing active jurors;[238] page limits on court filings;[239] publishing the biographical details of sexual assault victims;[240] publishing classified information;[241] violently threatening people;[242] and directly inciting violence.[243] And some of these examples are not even conceived of as limits on free expression under section 1 of the *Charter*. Rather, they are understood as forms of expression beyond the scope of constitutional protection, since an absolutist position of free expression is "obviously untenable."[244]

It follows that, before we critique the SOP requirement, we must appreciate what "free expression" actually entails in a democratic context. Clearly, the many examples above are forms of expression (*i.e.* ways of conveying meaning).[245] It is clear, therefore, that constitutional free

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Regarding trademarks, see e.g. *Matal v Tam*, 582 US __ (2017) at 6 (Kennedy J, concurring): "It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners".

229 Emerson, *supra* note 207 at 927–28. See also *Irwin Toy*, *supra* note 227 at 976–77.

230 Emerson, *supra* note 207 at 940, 947.

231 *Ibid* at 948.

232 In Canada, see *Canada (AG) v JTI-MacDonald Corp*, 2007 SCC 30 [*JTI*]. In the United States, see *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 US 626 (1985).

233 Emerson, *supra* note 207 at 953.

234 *Ibid* at 954.

235 *Ibid* at 949. See also Hogg, *supra* note 218 at 43-57.

236 See *McIntyre v Ohio Elections Commission*, 514 US 334 (1995).

237 The author would like to thank Professor Vincent Blasi at Columbia Law School for this comical (and insightful) example.

238 Emerson, *supra* note 207 at 925.

239 See Kathleen M Sullivan, "The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights" (1998) 67:2 Fordham L Rev 569 at 569.

240 *Canadian Newspaper Co v Canada (Attorney General)*, [1988] 2 SCR 122 at 133.

241 See *Snepp v United States*, 444 US 507 (1980).

242 Emerson, *supra* note 207 at 932. See also *Irwin Toy*, *supra* note 227 at 970; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 588, 33 DLR (4th) 174; and *Khawaja*, *supra* note 206 at para 70.

243 Emerson, *supra* note 207 at 932.

244 *Ibid* at 914. I acknowledge that Emerson's article pertains to the First Amendment to the US constitution. Regardless, it is a germinal paper on freedom of speech, described by the Supreme Court of Canada as "consonant" with the Canadian approach in its leading freedom of expression decision (*Irwin Toy*, *supra* note 227 at 970).

245 *Irwin Toy*, *supra* note 227 at 968; see also *Oxford English Dictionary*, sub verbo "expression", online: <oed.com>.

expression cannot be defined *colloquially*,[246] but instead must be defined *purposively*.[247] By this, I mean that any workable understanding of free expression must take meaning from the democratic purposes it serves.[248] Simply put, "freedom of expression is primarily a process…for reaching other goals."[249] And, more specifically, its "root purpose" is "to assure an effective system of freedom of expression in a democratic society."[250] Only with this democratic framing in mind can we conduct a proper free expression analysis. That the statement of principles involves a statement, therefore, is only the tip of the free expression iceberg; and SOP opponents whose analysis boils down to the SOP requirement involving a compelled statement, thus, paint an incomplete constitutional picture.

The purposes underlying the protection of free expression can be grouped into four broad categories:[251] (1) *individual self-fulfilment* (*i.e.* free expression is good for individuals because it facilitates their development of ideas, mental exploration, and self-affirmation[252]); (2) *pursuit of truth* (*i.e.* free expression is good for society because dialectic processes optimize knowledge advancement and truth discovery, even with 'bad' ideas, since they compel "rethinking and retesting" accepted truths[253]); (3) *participation in social and political decision-making* (*i.e.* free expression empowers all members in society—whether elite or marginalized—to participate in the building of our culture, and in turn, in holding the state accountable

246 Cockfield makes this error when he says that the SOP's nature as a "statement" in itself proves that the requirement is a form of unconstitutional coerced speech (Cockfield, "Lawyer Liberty", *supra* note 19 at 20).

247 See e.g. *Keegstra*, *supra* note 99 at 726. See also Hogg, *supra* note 218 at 36-30.

248 Emerson, *supra* note 207 at 908. See also DFB Tucker, *Law, Liberalism and Free Speech* (Totowa: Rowman & Allanheld, 1985) at 35; *Irwin Toy*, *supra* note 227 at 971; Hogg, *supra* note 218 at 43-7. The democratic role of free speech was similarly recognized in pre-*Charter* jurisprudence. See e.g. the reasons of both Rand J and Abbott J in *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 305, 326, 7 DLR (2d) 337.

249 Emerson, *supra* note 207 at 907.

250 *Ibid* at 916.

251 *Ibid* at 878.

252 *Ibid* at 879. See also Hogg, *supra* note 218 at 43-8.

253 Emerson, *supra* note 207 at 881–82. Indeed, free expression is the medium through which our evolving consensus not only of free speech rights—but all rights—are negotiated. See *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at 1336–37, 64 DLR (4th) 577 [*Edmonton Journal*]. As John Stuart Mill astutely observed: "all silencing of discussion is an assumption of infallibility". See John S Mill, *On Liberty and Considerations on Representative Government*, ed by RB McCallum (Oxford: Basil Blackwell, 1948) at 15. See also Hogg, *supra* note 218 at 43-8. For elaboration on this principle—i.e. the marketplace of ideas—see e.g. *Abrams v United States*, (1919) 250 US 616 at 630 (Holmes J, dissenting); Vincent Blasi, "Holmes and the Marketplace of Ideas" (2004) Sup Ct Rev 1.

to democratic will[254]); and (4) *maintenance of the balance between stability and change in society* (*i.e.* free expression is good because it strikes a better balance than censorship between "healthy cleavage and necessary consensus"[255] by promoting authentic cohesion rather than "superficial conformity"[256]). These are the purposes served by maintaining a viable system of free expression.[257] With all these laudable purposes in mind, I echo those who criticize the SOP requirement insofar as they affirm the critical importance of free speech to a liberal and democratic society.

Absent a purposive framing, we devalue free expression. Freedom of expression holds fundamental importance in our society[258]—some even consider it the most important right in our society[259]—precisely because of the critical purposes it serves. That fundamental importance is trivialized by the claim that any "expression," no matter how remote its relationship to these purposes, ought to be protected.[260] For example, one could not credibly argue that aimlessly screaming in a residential neighbourhood at 4:00am deserves constitutional protection. Such an example is precisely what Peter Hogg describes as "behaviour that is outside the purpose [of the right] and unworthy of constitutional protection."[261]

Furthermore, purposive framing clarifies "the governing principle of the Supreme Court of Canada's definition of expression":[262] content

254 Emerson, *supra* note 207 at 883.

255 *Ibid* at 884.

256 *Ibid* at 884, citing Walter Bagehot, "The Metaphysical Basis of Toleration" in Forrest Morgan, ed, *The Works of Walter Bagehot,* vol 2 (Hartford: The Travelers Insurance Company, 1891) 339 at 357.

257 Similar categories are listed in *Irwin Toy*, *supra* note 227 at 976. See also *Ford v Quebec (AG)*, [1988] 2 SCR 712 at 764, 54 DLR (4th) 577 [*Ford*]; *Keegstra*, *supra* note 99 at 727–28; Hogg, *supra* note 218 at 43-9.

258 See *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 265, 81 DLR (4th) 545, Wilson J [*Lavigne*]; the majority and dissent in *Irwin Toy*, *supra* note 227 at 969, 1007; *Big M*, *supra* note 203 at 346.

259 *Edmonton Journal*, *supra* note 253 at 1336. See also *Palko v Connecticut*, 302 US 319 (1937) (where the Supreme Court of the United States described free speech as "the matrix, the indispensable condition, of nearly every other form of freedom" at 327). While I agree with the importance of free speech in democratic society, I also note that its *fetishization* can result in its *weaponization*—i.e. not in its mobilization to *support* genuine discourse, but instead, to *undermine* other legal and political rights. See e.g. Adam Liptak, "How Conservatives Weaponized the First Amendment", *New York Times* (30 June 2018), online: <www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

260 See e.g. *Lavigne*, *supra* note 258 at 269, Wilson J. See also *Rumsfeld v Forum for Academic and Institutional Rights, Inc*, 547 US 47 (2006).

261 Hogg, *supra* note 218 at 36-30.

262 *Ibid* at 43-12.

neutrality.[263] Indeed, without content neutrality, many of the purposes listed above would be undermined. In this case, content neutrality means that our assessment of the SOP requirement cannot turn on our endorsement—or rejection—of the human rights status quo to which that requirement relates. With this in mind, a Rawlsian approach is instructive.[264] As I explained above, the SOP requirement simply mandates that all licensees acknowledge their extant professional and human rights obligations. Currently, those obligations include duties to not perpetuate adverse effects discrimination—a laudable objective, in my view (and in the view of many progressive human rights thinkers). But, in the interest of content neutrality, let's assume that future Canadian jurisprudence pivoted regressively by following the American model that holds, for example, that discrimination must be intentional to be actionable under the Equal Protection clause.[265] In turn, the SOP requirement would no longer mandate acknowledgement of obligations with respect to adverse effects discrimination, but instead, to intentional discrimination only. Many progressive scholars may oppose such a narrow acknowledgment; just as certain conservative thinkers oppose the positive obligations recognized by contemporary equality jurisprudence. That said, the question with respect to free speech (a putatively content neutral exercise) remains the same in either scenario: whether a state-mandated acknowledgment of status quo obligations—whatever those may be—amounts to unconstitutional compelled speech. Following this logic, the constitutionality of the SOP requirement is doctrinally coterminous with the constitutionality of a requirement that lawyers acknowledge their "mortgage fraud avoidance obligations."[266] I will now explain why, no matter the obligation at issue, acknowledging their existence does not violate free expression.

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263 See e.g. *Irwin Toy*, *supra* note 227 at 968. Though I note that the universality of content neutrality is, at times, overstated in free speech discourse given the many accepted forms of speech regulation that are undeniably content-dependent, e.g. copyright laws. Viewed this way, content neutrality is more *aspirational* than *essential* to free expression. See e.g. *Iancu v Brunetti*, 588 US __ (2019) at 5 (Breyer J, concurring in part and dissenting in part). Indeed, conceptualizing content neutrality as a rigid requirement in free expression is best understood as a legal fiction—i.e. an example of how the legal profession is prone to "the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black", or, in this case, content neutral/dependent (Williams, *supra* note 162 at 8).

264 By Rawlsian, I mean, in this context, an approach that is ignorant with respect to the particular legal obligation the individual is compelled to acknowledge. See generally John Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999).

265 *Washington v Davis*, 426 US 229 (1976).

266 LSUC, "Convocation Dec 2016", *supra* note 169 at 163.

2. The Governing Test for Free Expression

Section 2(b) guarantees "freedom of…expression" to "everyone."[267] I will navigate the leading decisions—principally, *Irwin Toy* (the general test) and *Lavigne* (the test for compelled speech)—to distill the test that governs here. I will then apply that governing test to the SOP requirement.

a. General Expression Test (*Irwin Toy*)

Irwin Toy is the germinal free expression decision,[268] and in Ontario—the jurisdiction of the SOP litigation—it remains the leading precedent.[269] In *Irwin Toy*, the Court unanimously held that certain prohibitions against television advertising directed at children violated free expression.[270] The dissent abstained from articulating the scope of section 2(b), since it considered the violation in that case "evident."[271] In contrast, the majority laid out a detailed test. It provides what I would describe as a two-step engagement/control test, best understood as a series of rules and exceptions delineating the protective scope of section 2(b).[272] I describe that test below, with qualifications and clarifications emanating from the Court's subsequent jurisprudence.

It is helpful to have a bird's eye view of the test's operation. To violate free expression, a state measure must engage protected speech (Step 1) and control that speech either in purpose (Step 2(a)), or effect (Step 2(b)). There is no requirement that Steps 2(a) and 2(b) both be met for a free speech violation.[273]

I will call Step 1 "engagement." The Majority describes this step as an inquiry into whether the plaintiff's activity was within the sphere of

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267 *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

268 See e.g. Hogg, *supra* note 218 at 43-10–11.

269 See *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at para 69 [*McAteer*]. *Cf* Hogg, *supra* note 218 at 43-19. To be fair, *McAteer* is not without its critics. See Léonid Sirota, "True Allegiance: The Citizenship Oath and the Charter" (2014) 33 NJCL 137 at 139 [Sirota, "True Allegiance"]; Department of Justice, "Section 2(b)—Freedom of Expression" (17 June 2019), online: *Charterpedia* <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2b.html>. However, these critics do not question *Irwin Toy*'s status as a leading precedent.

270 See the majority and dissenting opinions in *Irwin Toy*, *supra* note 227 at 979, 1005–06. The Court split, however, on whether that violation was justified under section 1; where the majority upholds the limitation under section 1, the dissent rejects the limitation (*ibid* at 1000, 1009).

271 *Ibid* at 1006.

272 *Ibid* at 978–79.

273 *Ibid* at 973.

conduct protected by freedom of expression, but I prefer engagement as an abbreviation. Engagement involves a rule (content) and an exception (form).[274] I will address each in turn. If Step 1 is met—*i.e.* if free expression is engaged—I will call the activity "protected speech." Only protected speech proceeds to Step 2 of the analysis. In contrast, the state is free to limit unprotected speech without restraint from free speech protections under the *Charter*.

The rule for engagement—expressive content—is that free expression is engaged whenever the plaintiff's activity attempts to convey meaning.[275] For example, parking a car *per se* does not engage free expression, whereas parking a car illegally to protest parking regulations would.[276] To be clear, the relevant speaker is the plaintiff, not anyone else. Thus, when a union expends money on its activities, the plaintiff contributors do not "attempt to convey meaning" through dues they "either willingly or unwillingly contribute."[277] This is because "reasonable people" would not hold all contributors "responsible" for the positions taken by those contributors' union.[278] Whether an impugned statement or activity conveys meaning is content neutral, *i.e.* it is constitutionally scrutinized for its *existence*, not its *quality*.[279] This protects all speech, no matter how nefarious.[280] That said, trivial meanings do not engage section 2(b). Paying union dues, for example, conveys compliance with one's collective bargaining agreement. But that does not bring such mandatory payments within the protective scope of free expression.[281]

The exception for engagement—impermissible form—is that even if the plaintiff's activity attempts to convey meaning, that activity will still be excluded from constitutional protection if it takes on an impermissible

274 The Court uses different language, calling the expressive content rule for engagement a *prima facie* case. See *Irwin Toy*, *supra* note 227 at 969. But I find the phrasing of a "rule" and "exception" clearer.

275 *Ibid* at 968. See also *Keegstra*, *supra* note 99 at 729; Hogg, *supra* note 218 at 43-10.

276 *Irwin Toy*, *supra* note 227 at 969. See also Hogg, *supra* note 218 at 43-10–11.

277 *Lavigne*, *supra* note 258 at 339–40 (La Forest, with Sopinka and Gonthier JJ, concurring), 342 (McLachlin J, concurring).

278 *Ibid* at 340 (La Forest, with Sopinka and Gonthier JJ, concurring), 342 (McLachlin J, concurring).

279 *Irwin Toy*, *supra* note 227 at 968–69.

280 *Irwin Toy*, *supra* note 227 at 969, 974; See also *Keegstra*, *supra* note 99 at 730. Of course, that nefarious speech is protected by section 2(b) does not guarantee that limits on such speech will fail under section 1.

281 *Lavigne*, *supra* note 258 at 340 (La Forest, with Sopinka and Gonthier JJ, concurring), 342 (McLachlin J, concurring).

form.[282] The Court does not exhaust the list of impermissible forms, but describes "violence" as a "clear" example on the list, and leaves the door open to other impermissible forms.[283] This exception excludes other trivial claims, such as claiming that murder (conveying hatred) or rape (conveying dominance) are constitutionally protected free expression.[284] It has also excluded threats of violence[285] and harassment[286] from constitutionally protected expression. The Court has even held that "keeping a common bawdy house" is an unprotected form of free expression,[287] though it did so in "very short shrift."[288] The Court has yet to describe the "precise ambit" of the impermissible form exception.[289] However, it has explained that any impermissible "form" of expression cannot be defined by the "content" of its message *e.g.* hate speech.[290]

I will call Step 2 "control." It concerns "whether the purpose or effect of the impugned governmental action was to control" protected speech.[291] It therefore contains two sub-steps: Step 2(a) (purpose) and Step 2(b) (effect).

Step 2(a)—purpose—involves a rule (expressive purpose) and exception (physical purpose). I will, again, address each in turn. Step 2(a) concerns the state's purpose; it seeks to ascertain the "mischief" targeted by

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282 *Irwin Toy*, *supra* note 227 at 970.

283 *Ibid*. I would note that, presumably, such violence is meant to be limited to non-consensual violence, so as to maintain free speech protection over, for example, actors performing a violent scene.

284 *Ibid* at 969–70. See also Hogg, *supra* note 218 at 43-11.

285 *Khawaja*, *supra* note 206 at para 70.

286 *Irene Bremsak v The Professional Institute of the Public Service of Canada, et al*, 2014 FCA 11 at para 27.

287 See *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1206, 68 Man R (2d) 1.

288 *Lavigne*, *supra* note 258 at 269, Wilson J. Such a holding strikes me as more complicated than the Court lets on. In particular, as ordinary legislation is subordinate to the *Charter*, it strikes me as inappropriate to hold, as the Court seemingly did in *Reference re ss. 193 and 195.1(1)(c)*, that criminalized expression is undeserving of constitutional protection, particularly given that what is subject to criminal sanction depends on parliamentary whim. Indeed, the Court has dialed back this position in subsequent jurisprudence. See e.g. *Keegstra*, *supra* note 99; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202; Hogg, *supra* note 218 at 43-11.

289 *Khawaja*, *supra* note 206 at para 70.

290 *Keegstra*, *supra* note 99 at 733. In the author's view, the *form* of a threat is inseverable from its *content*, making the content/form dichotomy conceptually difficult. Exploring that difficulty is, however, beyond the scope of this paper, and unnecessary for this paper's analysis. Though I will note, in passing, that this is yet another example of the artificial dichotomies that oversimplify our socio-legal reality. See *supra* note 263.

291 *Irwin Toy*, *supra* note 227 at 972. See also Hogg, *supra* note 218 at 43-6.

the state's measure.[292] If the state's purpose is invalid then it violates free expression, and the analysis proceeds to justification under section 1 of the *Charter*,[293] without consideration of the law's effects. In contrast, if the state's purpose is valid, then it does not yet violate free expression, and the law's incidental effects are then constitutionally scrutinized (per Step 2(b)).[294]

The rule—expressive purpose—is that if the purpose of the state's measure is to control protected speech, then that purpose is invalid.[295] That purpose, though, must be carefully identified: an overly objective test (*i.e.* whether expression is factually controlled) is overinclusive, whereas an overly subjective test (*i.e.* whether the government admits it sought to control expression) is underinclusive.[296] There is "inherent difficulty" in labelling any given limitation of expression as being directed towards controlling expression *per se*.[297] This is because "[e]xpression in itself is not normally harmful, and the objective of the limitation is not normally to suppress the communication as such" but rather "to forestall some anticipated effect of expression."[298] Similarly, as Elena Kagan remarks: "it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm—or at a bare minimum, that could not reasonably be described as harmful."[299] Indeed, most speech limits have an *intermediate* purpose (limiting speech) and an *ultimate* purpose (preventing the consequences of that speech), such that the state's ultimate purpose will rarely target speech itself: either robbing

292 *Irwin Toy*, *supra* note 227 at 976.

293 In my view, justification for the LSO's free speech violation would be analyzed under what is, effectively, the *Oakes* standard, even though the LSO is an administrative actor. See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 82 (the majority endorses a proportionate balancing approach which has "analytical harmony" with *Oakes*, and indeed, employs the final two stages of *Oakes*, i.e. "minimal impairment and balancing"), para 112, McLachlin CJ, concurring (explicitly endorses justification under section 1 of the *Charter*), para 199, Rowe J, concurring (explicitly endorses justification under section 1 of the *Charter*), and para 304, Côté and Brown JJ, dissenting (explicitly endorses justification under section 1 of the *Charter*). While the majority did not explicitly include the rational connection step in its justificatory analysis, that step is arguably incorporated at the stage of jurisdiction (*ibid* at para 114, McLachlin CJ, and para 204, Rowe J).

294 *Irwin Toy*, *supra* note 227 at 973.

295 *Ibid* at 973. See also *Keegstra*, *supra* note 99 at 729.

296 *Irwin Toy*, *supra* note 227 at 973.

297 Emerson, *supra* note 207 at 889.

298 *Ibid*.

299 Elena Kagan, "Regulation of Hate Speech and Pornography After RAV" (1993) 60:3/4 U Chicago L Rev 873 at 880.

Step 2(a) of any protective force (if the Court happens to select the ultimate purpose);[300] or, alternatively, guaranteeing an invalid purpose (if the Court happens to select the intermediate purpose).[301] Despite these concerns, the Court's approach in *Irwin Toy* strives to identify state limitations with the purpose of limiting free expression.[302]

The exception—physical purpose—is that even if the state seeks to limit free expression, that purpose remains constitutionally sound if the measure is a good faith restriction on protected speech with direct physical consequences[303] (*e.g.* littering).[304]

Lastly, Step 2(b)—effect—similarly involves a rule (factual effect) and exception (purposive effect).[305] As this step is only reached if the state's purpose is not to control protected speech, this step concerns the *incidental* effects of state limits, not their *purposeful* effects (which violate free expression earlier in the test under Step 2(a)).[306]

The rule—factual effect—is that if the state's measure has the incidental effect of controlling protected speech, it has an unconstitutional effect.[307] The threshold of such control is uncertain. Clearly, not *any* control qualifies as a factual effect. For example, paying taxes limits everyone's available resources for speech—and compels everyone to financially support various state initiatives they may oppose[308]—but would not be construed as a limit on free expression resulting in a factual effect.[309] Jurisprudentially, it would appear that a plaintiff's "capacity to express his views" must be "impaired" for a factual effect to be made out.[310] At a minimum, a "chilling effect" on expression—which, one would think,

300 *Lavigne*, *supra* note 258 at 271–72, Wilson J.

301 See e.g. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 62 [*Whatcott*].

302 *Irwin Toy*, *supra* note 227 at 973–74.

303 *Ibid* at 974–75.

304 *Ibid* at 975.

305 While the Court does not articulate Step 2(b) in this bifurcated rule/exception form, I find it helpful analytically. For example, if a plaintiff claimed that their free expression was violated because the government of their small township failed to build an arena in which the plaintiff could proselytize, this would not constitute a violation. While such preaching certainly serves the purposes underlying free speech, no violation could be found as no factual effect originating from a state measure plausibly exists in those circumstances in the first place.

306 See e.g. *Lavigne*, *supra* note 258 at 272, Wilson J.

307 *Irwin Toy*, *supra* note 227 at 976.

308 *Lavigne*, *supra* note 258 at 280, Wilson J.

309 Emerson, *supra* note 207 at 941.

310 *Lavigne*, *supra* note 258 at 273.

falls below overt censorship—appears sufficient to meet the factual effect threshold.[311] What is clear, though, is that the origin of the impugned effect must be the state measure itself, not an unreasonable misunderstanding of that measure. So, for example, an anti-terrorism law that sanctions expression relating to ideologically-motivated violence—but not relating to ideology *per se*—cannot chill ideological expression, because that chill would only follow from an unreasonable misunderstanding of the law's scope.[312]

The exception—purposive effect—is that even if the state's measure incidentally controls protected speech, that measure remains constitutionally sound if the protected speech in question fails to serve "at least one of" the purposes underlying the importance of free expression (*e.g.* truth, participation, and self-fulfillment).[313] Specifically, the plaintiff must "at least identify" the meaning of their protected speech and how it relates to the purposes underlying free expression.[314] This ensures that "unintended effects do not receive constitutional protection unless they strike at the heart of section 2(b)."[315]

b. Compelled Expression Test (*Lavigne*)

Lavigne is the Court's leading decision on compelled expression.[316] The Court unanimously held that the mandatory payment of public service union dues for certain purposes outside collective bargaining does not violate free expression by coercing speech.[317] The Court also unanimously endorsed *Irwin Toy* as the governing legal test,[318] despite the fact that *Irwin Toy* dealt with negative speech regulation (*i.e.* the government preventing speech) whereas *Lavigne* addressed positive speech regulation (*i.e.* the government compelling speech).[319] The Court was not unanimous in all respects, however, warranting further comment here.

First, I address the test for coerced speech. A majority of the Court (La Forest with Sopinka, Gonthier, and McLachlin concurring) simply endorse

311 *Khawaja*, *supra* note 206 at para 84.
312 *Ibid* at para 82. See also Hogg, *supra* note 218 at 43-20.
313 *Irwin Toy*, *supra* note 227 at 976. See also *Lavigne*, *supra* note 258 at 272; *Keegstra*, *supra* note 99 at 729–30.
314 *Irwin Toy*, *supra* note 227 at 977.
315 *Lavigne*, *supra* note 258 at 267.
316 Hogg, *supra* note 218 at 43-19.
317 *Lavigne*, *supra* note 258 at 344.
318 *Ibid* at 266–67, 339.
319 *Ibid* at 266.

Irwin Toy, without modifying the governing legal test.[320] In contrast, a minority of the Court (Wilson with L'Heureux-Dubé and Cory concurring)[321] affirm *Irwin Toy*, but re-articulate the test in the context of compelled speech by using positive rather than negative phrasing.[322] For example, regarding Step 1, Justice Wilson notes that compelled expression, where an individual seeks to remain silent, can in "special circumstances" violate section 2(b).[323] Similarly, at Step 2, rather than inquire into whether the state measure "restrict[s] attempts to convey a meaning"[324] (for negative limits), the question becomes whether the state measure "put[s] a particular message into the mouth of the plaintiff" (for positive limits).[325] Otherwise, Wilson holds that *Irwin Toy*'s "interpretive approach" for restricted speech "readily lends itself" to the context of compelled speech.[326]

Second, I address the Court's holding. Despite unanimously endorsing *Irwin Toy*, the Court divided on its application in *Lavigne*. A majority of the Court held that mandatory union dues spent on union-related activities other than collective bargaining lack expressive content,[327] a minority of the Court held that such dues contain expressive content (Step 1),[328] but do not control speech in either purpose (Step 2(a))[329] or effect (Step 2(b)).[330] This divide, though, does not displace *Irwin Toy* as the governing legal test for the instant analysis. Rather, it simply qualifies the proper approach to Step 1: it must be the plaintiffs themselves whose expression conveys non-trivial meaning.[331] *Irwin Toy*, therefore, remains the governing legal test for state controls on speech, whether by limitation or compulsion.[332]

That said, a chain of compelled speech cases reveals particular factors relevant to Step 2(a) of the test in the context of positive speech obligations. Specifically, two "purpose factors" are relevant: (1) "public identification" (*i.e.* if a plaintiff is forced to publicly identify with a particular

320 *Ibid* at 339–42.
321 *Ibid* at 222, 342.
322 *Ibid* at 266–67.
323 *Ibid* at 270–71. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1080, 59 DLR (4th) 416 [*Slaight*]; *JTI*, *supra* note 232.
324 *Irwin Toy*, *supra* note 227 at 973.
325 *Lavigne*, *supra* note 258 at 267.
326 *Ibid*.
327 *Ibid* at 339–40.
328 *Ibid* at 271.
329 *Ibid* at 271–72, 280–81.
330 *Ibid*.
331 *Ibid* at 339–40, 342.
332 *McAteer*, *supra* note 269 at para 69.

message, it suggests an invalid state purpose);[333] and (2) "opportunity to disavow" (*i.e.* if a plaintiff is denied the opportunity to disavow a particular message, it suggests an invalid state purpose).[334] These factors are similarly recognized in leading Ontario jurisprudence concerning compelled speech.[335] Both purpose factors relate to the specific harm of the state seeking to force an individual to be associated with views they do not hold.[336] In this sense, the latter purpose factor (opportunity to disavow) informs whether or not the plaintiff can clarify this misunderstanding, whereas the former purpose factor (public identification) informs the scope of misunderstanding the plaintiff is exposed to.

Indeed, it is not forced expression *per se* that the Court in *National Bank* described in *obiter* as "totalitarian."[337] Rather, more precisely, the *ratio* of the unanimous Court in *National Bank* was concerned with a state agent compelling the *distribution* of a "humiliating" and "punitive" letter,[338] whereas the "type of penalty" criticized by the Court's plurality was forced expression "which may be misleading or untrue."[339] Specifically, the impugned order in *National Bank* required the Chairman and CEO of National Bank to circulate a six-paragraph letter "to all employees, including management personnel"[340] ghostwritten by the Canada Labour Relations Board and voicing his supposed "commitment" to the "principle" of collective bargaining.[341] The Board further ordered that the letter be distributed without "any alteration of the text or the addition of any other document."[342] As such, "the letter [was] open to the interpretation that [it] result[ed] from an initiative taken by the National Bank of Canada, and reflect[ed] the views and sentiments of the Bank and its president, in particular their approval of the *Canada Labour Code*," despite there being

333 *Lavigne*, *supra* note 258 at 278. See also *Slaight*, *supra* note 323 at 1050.

334 *Lavigne*, *supra* note 258 at 278–79. See *Slaight*, *supra* note 323, Beetz J, dissenting ("one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon an even criticizing the rulings of the deciding board or court" at 1063). See especially *ibid* at 1075, Lamer J, dissenting in part; Ha-Redeye, "Muddy the Waters", *supra* note 18 at 18.

335 *McAteer*, *supra* note 269 at paras 76–77.

336 *National Bank*, *supra* note 72 at 295.

337 *Ibid* at 296.

338 *Ibid* at 294–95.

339 *Ibid* at 296.

340 *Ibid* at 292.

341 *Ibid* at 294.

342 *Ibid* at 295.

"nothing to show that such were in fact their views and sentiments."[343] These passages make clear that the Court in *National Bank* was concerned with the purpose factors, which no doubt influenced its abhorrence for the Board's obvious overreach in that case.

Given the above, I find it best to conduct the expressive purpose analysis—in the context of coerced speech—not by attempting to identify the state's ultimate purpose (an often-semantic exercise, as discussed earlier),[344] but rather by considering whether the state's measure unreasonably forecloses discussion or risks misrepresentation, with reference to the two purpose factors. Two further cases illustrate how the Court has followed this approach in the context of compelled expression.

In *Slaight*, an adjudicator's order under the *Canada Labour Code* required a former employer to disclose a prescribed reference letter, and nothing more, in response to inquiries from future employers about an employee who was wrongfully dismissed.[345] Clearly, the ultimate purpose of this limitation was to prevent harm to the employee's future job prospects. Nevertheless, the Court held that the government's purpose was to prevent the former employer from "expressing its opinion," and held that the ultimate "harm" (reputational consequences for the employee) was "only relevant to section 1 analysis."[346] By contrast, in *Lavigne*, while a majority of the Court resolved the appeal at Step 1, the minority held—and the majority neither disputed nor affirmed—that the purpose of mandatory union dues was to "promote industrial peace," not to compel expression (*e.g.* mandatory payment of union dues).[347]

In my view, both cases are similar in terms of the state's purpose. Despite their contrary holdings, both cases involve an *intermediate* purpose of limiting speech (a prescribed reference letter in *Slaight* and a mandatory payment in *Lavigne*) and an ultimate purpose of preventing the consequences of that speech (reputational consequences in *Slaight* and industrial conflict in *Lavigne*). However, both cases can be principally distinguished more helpfully by analyzing whether the state's measure foreclosed discussion or risked misrepresentation, with reference to the two purpose factors. Specifically, *Slaight*—which found a section

343 *Ibid*.
344 Kagan, *supra* note 299 and accompanying text.
345 *Slaight*, *supra* note 323 at 1049.
346 *Ibid* at 1050.
347 *Lavigne*, *supra* note 258 at 271–72.

2(b) violation—triggered both factors.[348] The order prescribing a reference letter identified the employer with the letter's contents to any future employer inquiring about the employee and denied the employer any liberty to disavow its contents. In contrast, *Lavigne*—which found no section 2(b) violation—triggered neither factor. Non-union members could not reasonably be identified with the aims of the union and had complete liberty to dissent from the union's objectives. It follows that, from a jurisprudential standpoint, in the context of compelled expression, a law has an impermissible expressive purpose when that law, based on the purpose factors, seeks to foreclose discussion or risks misrepresentation.

c. Summary of the Governing Test

Given the above, the governing test for determining whether the state unconstitutionally compels speech distills to the following:

- Step 1: Engagement
  - *Rule*: If the state's compelled activity attempts to convey non-trivial meaning, then section 2(b) is engaged.
  - *Exception*: If the state's compelled activity is mediated through an impermissible form (*e.g.* violence), then section 2(b) is not engaged.
- Step 2: Control
  - Step 2(a): Purpose
    - *Rule*: If the state's measure aims to foreclose discussion or risk misrepresentation, then the state's purpose is invalid.
    - *Exception*: If the state's measure addresses direct physical consequences of speech, then the state's purpose is valid.
  - Step 2(b): Effect
    - *Rule*: If the state's measure impairs the plaintiff's capacity for free expression, then the state's measure is unconstitutional.
    - *Exception*: If the plaintiff's activity does not serve any purpose underlying free expression, then the state's measure is constitutional.

3. Applying the Governing Test to the SOP

The SOP requirement does not violate free expression for two discrete reasons: because it fails to convey non-trivial meaning (Step 1) and because

348 In *obiter*, the Court in *National Bank* similarly found a violation of section 2(b), based on a factual setting triggering both purpose factors. See *National Bank*, *supra* note 72 at 295–96.

it fails to control free expression (Step 2). Accordingly, I disagree with existing scholarship considering the SOP. Regarding the Cockfield paper, I disagree with myriad points he advances, and respond to them, where instructive,[349] in my analysis below (though I note at the outset that his analysis is more factual than constitutional and does not contain even a single reference to *Irwin Toy*). In contrast, while I reach the same ultimate conclusion as Ha-Redeye (that the SOP is constitutionally sound), our analysis nevertheless differs greatly, as he finds that the requirement survives Step 1[350] and "could" survive Step 2,[351] thereby requiring justification under section 1.[352] Lastly, while I agree with P'ng's constitutional conclusions (that the SOP does not infringe free expression), I reach that conclusion at Step 1, whereas he reaches it at Step 2.

a. The SOP Requirement Fails to Convey Meaning (Step 1)

In my opinion, the SOP requirement does not engage free expression at Step 1 of the test. P'ng, in contrast, assumes that the SOP engages protected speech.[353]

Whether a compelled activity engages free expression depends on if that activity attempts to convey meaning.[354] In my view, any meaning conveyed by the SOP requirement is trivial and is thus unworthy of constitutional protection. Cockfield argues that any compelled statement, *per se*, constitutes unconstitutional compelled speech.[355] But there is no doctrinal support for such a capacious and non-purposive conceptualization of free speech. The requirement to sign the back of one's driver's license is a similarly trivial example of coerced speech in Cockfield's approach. Written

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349 I say "where instructive" because Cockfield advances many other arguments that I consider largely distracting, from a constitutional standpoint. For example, I do not consider "quite a few benchers…argu[ing] in the strongest terms possible that the SOP coerces speech" relevant to the SOP's substantive constitutionality (Cockfield, "Lawyer Liberty", *supra* note 19 at 12). I similarly do not consider it constitutionally relevant whether "the public concluded the SOP coerces speech" (*ibid* at 28), setting aside the fact that his "public" primarily consists of Christie Blatchford, Jonathan Kay, and Margaret Wente (*ibid* at 30).

350 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 11.

351 *Ibid* at 14.

352 *Ibid* at 19. I do not conduct a section 1 analysis in this paper because, in my view, the SOP requirement does not infringe section 2 of the *Charter*. That said, the trivial impact, if any, of the SOP requirement on purposive free expression (or free conscience) militates strongly in favour of the requirements justifiability (P'ng, *supra* note 20 at 104–06).

353 P'ng, *supra* note 20 at 100.

354 *Irwin Toy*, *supra* note 227 at 968.

355 Cockfield, "Lawyer Liberty", *supra* note 19 at 20.

death threats, too, would be protected by Cockfield's conception of free speech, and clearly lack constitutional protection.[356]

First, it is critical to isolate the meaning that is *conveyed* (*i.e.* transmitted)[357] by the SOP requirement.[358] The Applicants assert that the compelled speech at issue is "political expression."[359] I concede that political speech "is at the core of section 2(b) of the Charter."[360] But one's SOP itself—which may or may not contain political expression—need not be conveyed; only the fact of its appropriate completion is disclosed. In other words, all that need be conveyed to the LSO is that the licensee has written a statement, in their unscrutinised words of choice, that acknowledges extant obligations. This is, I would suggest, constitutionally equivalent to the "meaning" conveyed by checking a box on an online form next to the text: "I acknowledge my obligations under the *Rules* and *Human Rights Code*." Or, as described earlier, the meaning conveyed by checking a box next to text acknowledging a licensee's "mortgage fraud avoidance obligations."[361] This is hardly political expression; it is administrative, akin to the degree of meaning conveyed by a checkmark on the (potentially now mandatory)[362] census indicating one's annual income, or other anodyne disclosures.[363] So, to be clear, the implicated conveyance of the SOP requirement, in terms of compelled speech, is not the body of the SOP itself, but the fact of its existence.[364]

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356 *Khawaja*, *supra* note 206 at para 70.

357 *Oxford English Dictionary*, sub verbo "convey", online: <oed.com>.

358 *Contra* Sirota, "Lawless", *supra* note 57. Sirota writes: "I do not think that whether or not the Law Society wants to see our statements changes anything to the analysis".

359 *Alford* Application, *supra* note 15 at para 37.

360 Hogg, *supra* note 218 at 43-8.

361 LSUC, "Convocation Dec 2016", *supra* note 169 at 163.

362 See Dean Beeby, "StatsCan Planning to Ask Gender Questions in 'Pilot' Census—and Answering is Mandatory", *CBC News* (21 December 2018), online: <cbc.ca/news/politics/census-statistics-canada-arora-bains-mandatory-pilot-sex-gender-1.4952288>.

363 Emerson, *supra* note 207 at 944.

364 Ha-Redeye reaches a similar conclusion: "to be clear, the actual expression in question is simply the affirmation of completion of *just a* Statement of Principles, not any *particular* Statement of Principles itself" (Ha-Redeye, "Muddy the Waters", *supra* note 18 at 13) [emphasis in original]. I suppose a tyrannical state could require its citizens to, for example, author a pledge of adoration to the current government that is constitutionally suspect despite never requiring that the pledge be disclosed to anyone, including the state. However, I would argue that such a pledge, despite involving a superficial form of "expression" (i.e. drafting a private letter), would be better scrutinized as an attack on freedom of conscience (the ostensible aim of the pledge).

Second, recall that a *licensee's acknowledgment* of their obligations is distinct from the *LSO's endorsement* of those obligations. If a contributor cannot be held responsible for the positions taken by their union, no licensee can be held responsible for the obligations endorsed by their regulator. Accordingly, while the public knows that every licensee "either willingly or unwillingly"[365] drafts an SOP, it would not be reasonable to infer that every licensee endorses the human rights obligations to which that SOP relates.[366]

So, does confirming the completion of an SOP convey meaning? As Peter Hogg observes, constitutional free expression "should be limited to attempts to communicate ideas."[367] And, in my view, there is no meaningful idea compelled through the SOP requirement. Specifically, the SOP conveys an equivalent degree of meaning to the contribution of union dues, and therefore, per *Lavigne*, the SOP does not convey meaning in a manner recognized in the jurisprudence as meeting Step 1. To be fair, it conveys *some* meaning.[368] For example, it notifies the LSO that the licensee has complied with the SOP requirement. But union dues, identically, convey *some* meaning. They, for example, notify the union that the employee has complied with the requirement to pay those dues. Such administrative meaning, however, has already been rejected by a majority of the Court as engaging free expression.[369] I therefore dispute that the SOP requirement "easily falls within this ambit of protected expression."[370] If mandatory health warnings covering half a cigarette package only arguably constitute expressive activity and "might…trivialize the guarantee" of free expression[371]—warnings that are disseminated as broadly as the product itself with the clear intent of dissuading consumption—then drafting a private SOP and confirming its existence to the LSO surely falls short of engaging free expression, even if the SOP itself (and not its confirmed completion) were the relevant constitutional conveyance.

To be clear, my analysis does not depend on my endorsement of the human rights status quo in Canada. In other words, my position is not that because positive human rights obligations are a worthwhile object, compelled speech acknowledging such obligations is constitutionally

365 *Lavigne*, *supra* note 258 at 339–40.
366 *Ibid* at 340, 342.
367 Hogg, *supra* note 218 at 43-9.
368 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 13.
369 *Lavigne*, *supra* note 258 at 340, 342.
370 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 11.
371 *JTI*, *supra* note 232 at para 132.

acceptable. Such reasoning would be impermissibly content-dependent.[372] Rather, my position is that the mere acknowledgment of extant regulatory obligations can never amount to unconstitutional compelled speech. To the extent that the Appellants or their supporters take issue with the current equality consensus, I would suggest their legal battle resides in section 15, not section 2(b).[373]

Lastly, my views on the marginal nature of the compelled speech implicated by the SOP requirement should not be read as a rejection of the SOP requirement's normative merit. Or, put differently, though I have found that an SOP does not convey meaning, that does not mean it is meaningless. While the SOP requirement merely compels administrative acknowledgment, it nevertheless furnishes an opportunity—without obligation—for "individual lawyers to reflect on problems of inequality and exclusion and on their own role in contributing to it."[374] While it is beyond the scope of this paper to address the potential success of this regulatory strategy, I certainly welcome efforts to eradicate systemic racism in Canadian society, and invite SOP critics to offer superior alternatives for promoting mindfulness of systemic discrimination.

I note, parenthetically, that the exception for engagement—impermissible form—is likely not triggered in these circumstances. While the precise ambit of this exception remains undefined, the form at issue (clicking a box on one's annual report confirming completion of an SOP) does not strike me as a form categorically worthy of exclusion from engagement with free expression, like (non-consensual) violence.[375]

b. The SOP Requirement Fails to Control Free Expression (Step 2)

Even if the SOP requirement conveyed sufficient meaning for Step 1, I would conclude that it fails to control free expression at Step 2.

First, the SOP requirement does not control free expression in purpose (Step 2(a)). As discussed, this step considers the two purpose factors to determine whether the state measure aims to foreclose discussion

372 *Irwin Toy*, *supra* note 227 at 968–69.

373 Indeed, one of the SOP's most outspoken critics, Bruce Pardy, has made his opposition to substantive equality principles clear. See Bruce Pardy, "Substantive Equality: Some People Are More Equal Than Others", *Advocates for the Rule of Law* (6 February 2019), online: <ruleoflaw.ca/substantive-equality-some-people-are-more-equal-than-others>.

374 Woolley, "Ontario's Law Society", *supra* note 82. See also Wu, *supra* note 24 (who says that the SOP "encourage[s] reflection and discourse about how we can best conduct ourselves as licensees, irrespective of anyone else's background").

375 *Irwin Toy*, *supra* note 227 at 970.

or risks misrepresentation.[376] Similar to *Lavigne*, where the Court unanimously rejected the plaintiff's free expression claim, neither of the two purpose factors are triggered here. One cannot be publicly identified with their SOP as there is no requirement to publicize it. Further, even if it were publicized, it would not be reasonable to publicly identify licensees with any endorsement of status quo human rights obligations when (1) those licensees are "either willingly or unwillingly"[377] compelled to draft an SOP;[378] and (2) the SOP need not endorse those obligations in any event. Further, as my draft SOP above illustrates,[379] the opportunity to disavow status quo human rights obligations is virtually limitless in one's private SOP and entirely limitless in public dialogue. As a result, there is no concern, here, that the Applicants will be forcibly associated with views they do not hold,[380] cleansing the SOP requirement of any "totalitarian"[381] air. Lastly, the SOP requirement hardly puts "a particular message" in the Applicants' mouths.[382] What is conveyed—confirmation that the SOP has been completed—is a trivial particular message; and what is not conveyed—the SOP itself—is drafted at the sole discretion of each licensee. Admittedly, by requiring licensees to draft a compliant SOP, they are mandated to (at least) draft a statement equivalent to "I acknowledge my existing legal obligations." But that is, again, not the message *conveyed*. And, even if it were, this requirement would demand as much coerced expression as any regulatory disclosure (*e.g.* taxes, the census, *etc.*), none of which compromise free expression in Canada.

A direct comparison with the facts in *National Bank* highlights the marginal oppression wrought by the SOP requirement. In terms of *impact*, the SOP requirement is neither "humiliating" nor "punitive."[383] Further, your SOP (which remains private, which all know is mandated by the LSO, and which every licensee can criticize to their heart's content) cannot be "misleading or untrue"[384] with respect to any licensee's views on human rights or their "initiative" to draft an SOP.[385] In terms of *publication*, to the extent

376 *Slaight*, *supra* note 323 at 1050; *Lavigne*, *supra* note 258 at 278; *McAteer*, *supra* note 269 at paras 76–77.

377 *Lavigne*, *supra* note 258 at 339–40, 342.

378 To the extent the sanction of a reminder letter compels anything, that is.

379 A sample draft SOP is discussed at page 211, *above*.

380 *National Bank*, *supra* note 72 at 295.

381 *Ibid* at 296.

382 *Lavigne*, *supra* note 258 at 267.

383 *National Bank*, *supra* note 72 at 294–95.

384 *Ibid* at 296.

385 *Ibid* at 295.

an SOP reflects a licensee's "views and sentiments,"[386] the SOP need not be disclosed to anyone; unlike the letter in *National Bank*, that was disclosed to "all employees, including management personnel."[387] Lastly, in terms of *autonomy*, the SOP is solely drafted by each licensee, not a ghostwritten six-paragraph letter signed by the licensee and held out as his own[388] that cannot be modified.[389] Simply put, *National Bank* and *Alford* are a night and day judicial comparison, polar opposites in the realm of compelled speech.[390]

I note, parenthetically, that the ultimate objective of the SOP—to the extent that distinguishing intermediate and ultimate objectives is not pure semantics and remains doctrinally relevant[391]—is best understood as promoting regulatory compliance with professional and human rights obligations; not controlling speech. This is clear from the context surrounding the development of the SOP requirement (described at the beginning of this article). Neither Convocation nor the Working Group have sought to chill speech pertaining to the boundaries of equality law, and lawyers remain free to be as critical as they like about equality obligations in Canadian law. Rather, Convocation enacted the SOP requirement because systemic discrimination—a consequence largely of *action*, not *speech*—remains an issue in Canadian society, including in the legal profession.[392] Combating systemic discrimination—not the content or form of debate about the relative merits of various perspectives on equality and human rights[393]—is the "mischief" targeted by the SOP requirement.[394] In Justice Woolley's words:

386 *Ibid*.

387 *Ibid* at 292.

388 *Ibid*.

389 *Ibid* at 293.

390 Leonid Sirota claims that the SOP requirement is no less totalitarian than the arbitrator's letter denounced by a majority of the Supreme Court in *National Bank* (Sirota, "Affidavi", *supra* note 10). As this paragraph explains, I disagree.

391 *Irwin Toy*, *supra* note 227 at 973–74. In this sense, my analysis slightly differs from that provided by Ha-Redeye, "Muddy the Waters", *supra* note 18 at 13 and P'ng, *supra* note 20 at 100. Both authors rely, at least partially, on the SOP's ultimate purpose being divorced from speech regulation.

392 House of Commons, "Systemic Racism", *supra* note 21; *McSween*, *supra* note 24 at paras 55, 68–79; Roderique, *supra* note 24; Nguyen, *supra* note 24; Rosier, *supra* note 24; Lewis, "Unconscious Bias", *supra* note 24; Sealy-Harrington, "In Their Shoes", *supra* note 24; Ha-Redeye, "Stamping Out", *supra* note 24.

393 *Irwin Toy*, *supra* note 227 at 974, 976–78.

394 *Ibid* at 976.

> The argument that the law society compels speech turns, first, on its "acknowledgement" requirement, and, second, on its requirement that lawyers "promote" equality. Provided that this duty exists, however, no meaningful incursion on speech or belief follows from being required to acknowledge its existence. As an active member of the Law Society of Alberta and its outspoken critic, I have many duties that I think are stupid—overbroad or too narrow, poorly expressed or badly enforced. But I still have them, and can be required to acknowledge them as a condition of my license…The law society's requirement that lawyers acknowledge the duty to promote equality is thus not some bonkers PC foray into compelled speech; it is rather part of a larger effort to increase the effectiveness of lawyer regulation.[395]

I do concede, though, that the physical purpose exception under Step 2(a) cannot rescue the SOP requirement if it is found to have an expressive purpose. This is because, to the extent the SOP requirement relates not to speech, but action (*e.g.* discrimination), its relationship with that action is indirect. The SOP requirement is only linked to action insofar as reflection on one's human right obligations may later translate into greater legal compliance. This lacks an immediate link between speech to action like in the case of prohibitions against littering.[396]

Second, the SOP requirement does not control free expression in effect (Step 2(b)). This is because of two discrete reasons: it fails to satisfy the rule at Step 2(b) (factual effect) and, in any event, it meets the exception at Step 2(b) (purposive effect).

On factual effect, requiring that licensees confirm their completion of a compliant SOP seemingly falls short of impairing any licensee's "capacity to express his views."[397] It certainly would not cause any "chilling effect" on expression,[398] other than one caused by an unreasonable misunderstanding of the SOP requirement.[399] In this regard, I am genuinely sympathetic to the initial concerns raised by scholars in response to the LSO's explanatory materials indicating that the SOP's intention "is to demonstrate a personal valuing of equality, diversity, and inclusion."[400] However, as indicated above, those explanatory materials are not the

395 Woolley, "Useless", *supra* note 91.
396 *Irwin Toy*, *supra* note 227 at 975.
397 *Lavigne*, *supra* note 258 at 273.
398 *Khawaja*, *supra* note 206 at para 84.
399 *Ibid* at para 82.
400 LSO, "Key Concepts", *supra* note 157; Cockfield, "Lawyer Liberty", *supra* note 19 at 5.

product of Convocation and, in any event, have now been revised. It is the persistence of these scholars, not the initial concerns they raised, that this paper centrally critiques.

Regardless, on purposive effect, compelling confirmation of an administrative acknowledgment fails to undermine any of the purposes underlying the importance of free expression.[401] Following the approach articulated in *Irwin Toy*,[402] it is not clear to me what "meaning" the Applicants could connect to the SOP requirement; it is, as explained above, an administrative checkbox. Whatever that meaning, though, it could not relate to the purposes underlying free expression.[403] On self-fulfilment,[404] confirming extant obligations does not dampen the development of ideas, mental exploration, or self-affirmation. Further, since the content of the SOP is not conveyed, linking the drafting of one's SOP to "personal fulfillment" would go "too far" in terms of free speech protection because "it does not include a communicative purpose"[405] and would effectively extend constitutional protection to any activity. On pursuing truth,[406] confirming extant obligations in no way undermines Canada's human rights dialectic; indeed, those obligations are as open to critique after the enactment of the SOP requirement as they were before. On participation,[407] confirming extant obligations does not exclude anyone from social and political decision-making. If anything, given the importance of diversity to the LSO's statutory aims,[408] the ultimate objective of promoting human rights compliance expands access to those decision-making processes, thereby furthering the principles animating free expression. Lastly, on balancing stability and change, the SOP requirement does not mandate "superficial conformity."[409] Again, contrary to the Applicants' view, the SOP requirement does not mandate endorsement of the human rights status quo; it only mandates acknowledgment of its existence. Accepting what one must currently do under equality law in no way impairs the "healthy cleavage" needed for our society to progress and evolve.[410] I agree that any functioning system of genuinely free

401 *Irwin Toy*, *supra* note 227 at 976; *Lavigne*, *supra* note 258 at 272.
402 *Irwin Toy*, *supra* note 227 at 977.
403 *Ibid*.
404 Emerson, *supra* note 207, at 879.
405 Hogg, *supra* note 218 at 43-8.1.
406 Emerson, *supra* note 207 at 881–82; *Edmonton Journal*, *supra* note 253 at 1336–37.
407 Emerson, *supra* note 207 at 883.
408 *Trinity Western*, *supra* note 115 at para 23.
409 Emerson, *supra* note 207 at 884.
410 *Ibid* at 884.

expression must be able to accommodate "criticism of the fundamental beliefs and practices of the society,"[411] even those who feel that they must, in "good conscience,"[412] resist modest efforts at promoting equality, despite their otherwise "progressive credentials."[413] But, at the end of the day, licensees are free to be as critical as they wish of current equality norms—and even of the SOP requirement itself—without any fear of sanction. In consequence, the SOP requirement may skim the shoulder of section 2(b), but comes nowhere near striking its "heart."[414] It therefore warrants constitutional immunity. In Justice Wilson's words: "If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied."[415]

As my draft protest SOP illustrates,[416] there is near limitless opportunity for any licensee to critique the SOP requirement and all the regulatory and human rights obligations it is associated with. Further, the SOP cannot "associate one with a message with which one disagrees" because licensees need only *acknowledge* their obligations, not *endorse* them. Thus, more than "not really" depriving licensees of the ability to speak their mind, the SOP does not deprive licensees of such an ability at all; certainly, less than citizenship oaths already held to comply with constitutional free expression.[417] In this regard, I again disagree with Ha-Redeye who finds that "an objection to a checkmark affirming existing professional obligations" could meet Step 2(b) because it has been "broadly construed"[418]—not *this* broadly, in my view.

Recall that free expression is a "cornerstone of democracy."[419] No bedrock principle of constitutional governance prevents acknowledged

411 *Ibid* at 887.

412 *Alford* Application, *supra* note 15 at para 40.

413 Klippenstein, *supra* note 6.

414 *Lavigne*, *supra* note 258 at 267.

415 *Ibid* at 279–80.

416 A sample draft SOP is discussed at page 211 *above*.

417 *McAteer*, *supra* note 269. See Hogg, *supra* note 218 at 43-20. *Contra* Sirota, "True Allegiance", *supra* note 269.

418 Ha-Redeye, "Muddy the Waters", *supra* note 18 at 14. P'ng is also sympathetic to this view: "[t]his is not to unequivocally assert that the low threshold to establish a violation of freedom of expression could not be made out" (P'ng, *supra* note 20 at 102). To be clear, none of my positions are "unequivocal"; they simply reflect what I consider to be the strongest constitutional resolution of the dispute.

419 *Lavigne*, *supra* note 258 at 269.

regulatory obligations, whether by lawyers (the SOP requirement: "do not discriminate") or doctors (the Hippocratic Oath: "do no harm"). To hold otherwise—and to de-constitutionalize all oaths in the process, as they exert far greater control over expression than the *private* and *self-drafted* SOP requirement[420]—would, in my view, trivialize the important objectives anchored in free expression. It is one thing to argue that such pledges are ineffective, and another to argue that they are constitutionally barred in all circumstances.

I end with this. As noted at the beginning, the SOP requirement's only mandated conveyance is literally *checking a box* next to text that reads: "I declare that I abide by a Statement of Principles that acknowledges my obligation to promote equality, diversity and inclusion generally, and in my behaviour towards colleagues, employees, clients and the public." Given my statutory and constitutional analysis above, this is doctrinally coterminous with checking a box next to text reading "I acknowledge my trust obligations." I suspect the Applicants would reject that acknowledging trust obligations by judicially enforced mouse click qualifies as unconstitutional compelled speech. Yet, that is precisely what the SOP requirement amounts to in substance, when viewed through a content-neutral lens. This distils the triviality of the SOP controversy.

V. CONCLUSION

Freedom of speech is one of the most complicated arenas of constitutional debate. Its plain meaning—expressive acts—simultaneously engages conduct most worthy of constitutional protection (*e.g.* political protest) and least worthy (*e.g.* sexual assault). For this reason, context is everything. Protections for free speech must be negotiated through the lens of the values underpinning its critical importance in democratic society. The SOP debate perfectly illustrates how this wise approach filters unmeritorious claims. Further, "free speech" controversies relating to racial justice must be interpreted through the lens of critical race theory to understand the underlying power dynamics motivating those controversies and meaningfully engage with the political forces concealed by purportedly neutral liberty claims. The subtext of the SOP debate—equality, not speech—shows how essential a critical race lens is to a comprehensive understanding of these debates.

420 "The Statement of Principles essentially functions as another oath, whose individual burden and potential interference is further minimized by dispensing with prescribed language in favour of general content objectives" (P'ng, *supra* note 20 at 103).

The SOP pursued a laudable goal: regulatory compliance with human rights obligations. The Applicants did not challenge those underlying obligations—only admitting that they were subject to them. And, contrary to the alarm bells rung by the SOP's most adamant critics, promoting compliance with human rights does not push Canadian society closer to Nazi Germany,[421] North Korea,[422] or Communist Russia,[423] but further.[424]

In *West Virginia State Board of Education v Barnette*,[425] Justice Jackson of the United States Supreme Court famously struck down a compulsory flag salute and pledge of allegiance. Of course, that decision is distinguishable from the SOP requirement in many ways: it pertained to the "affirmation of a belief and an attitude of mind";[426] it resulted in the expulsion of school children rather than a reminder letter to lawyers; and it relates to a distinct constitutional architecture,[427] among other differences. But, for our purposes, what is interesting is how critical Justice Jackson was of the pre-ordained nature of the pledge. Despite seeking to promote national unity, the pledge merely "simulate[d] assent by words without belief and by a gesture barren of meaning."[428] This, I would argue, was the clever innovation of the SOP requirement. No one disputes that lawyers are subject to professional and human rights obligations. And, by requiring a self-drafted SOP, every licensee was given the opportunity to reflect in *their own* words on *their own* beliefs pertaining to those obligations. In this way, the SOP requirement notionally existed between compelled and free expression; it coerced speech just as undergraduate papers do, in a manner arguably more liberating than constraining of thought and expression. Some commentators attacked the requirement for vagueness.[429] But leaving the requirement open-ended allowed licensees to reflect, in their own specific circumstance, on how they could be more mindful of their human rights obligations.

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421 Black, *supra* note 3.

422 Pardy, "Law Society's New Policy", *supra* note 2.

423 See Bruce Pardy, "In the Name of Social Justice, They Are Showing Reformers Their Place", *National Post* (24 June 2019), online: <nationalpost.com/opinion/bruce-pardy-in-the-name-of-social-justice-they-are-showing-reformers-their-place>.

424 Indeed, even Leonid Sirota, one of the SOP requirement's strongest critics, admits that "[t]he circumstances of a free and democratic society such as Canada are hardly comparable to those of the Soviet Union" (Sirota, "Affidavi", *supra* note 10).

425 319 US 624 (1943) [*Barnette*].

426 *Ibid* at 633.

427 Hogg, *supra* note 218 at 43-7.

428 *Barnette*, *supra* note 425 at 633.

429 Cockfield, "Lawyer Liberty", *supra* note 19 at 33–34.

Sure, some would have simply drafted a rote phrase or copied from an LSO template,[430] but not all would have.[431] As a brief narrative aside,[432] I drafted my first SOP in 2017—and I paused. Rather than feel "demeaned and talked down to,"[433] I reflected on what I could do—then, as a law clerk, and now, as an aspiring academic—to be mindful of barriers to equality in the legal profession; barriers that a "colour-blind" approach[434] may fail to detect. How does unconscious bias influence the Court's clerkship recruitment process? How do some pedagogical methods privilege certain learning styles over others? I had considered these questions only abstractly before. But the SOP requirement afforded the concrete opportunity for *me*, to think about what *I* could do to promote equality in my own work. In my view, embracing that opportunity brought me closer to the ideals of free expression—self-fulfillment, truth, and participation—not further.[435] As Frantz Fanon observed long ago, those who have "never paused to reflect" on racism will fail to recognize their—perhaps unwitting—participation in it.[436]

Free speech has let (at least) twelve angry men adamantly protest the Statement of Principles. This paper responds to their many statements, and notes their few principles.

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430 Mancini, *supra* note 24; Cockfield, "Lawyer Liberty", *supra* note 19 at 25–26. As Fred Wu notes: "it can be trivial, if you want it to be" (Wu, *supra* note 24).

431 Century, *supra* note 155 at 6–7.

432 Narrative methodology, I would note, is "a mode of analysis among many employed by critical race theorists". See Robert S Chang & Adrienne D Davis, "The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars" (2006) 39:3 UC Davis L Rev 1189 at 1233.

433 Cockfield, "Lawyer Liberty", *supra* note 19 at 10.

434 For an example of SOP opponents endorsing "colour-blind" politics, see Klippenstein, *supra* note 6. For critiques of "colour-blind" thinking, see generally Neil Gotanda, "A Critique of 'Our Constitution is Color Blind'" in Kimberlé Crenshaw et al, eds, *Critical Race Theory* (New York: The New Press, 1995) 257; Lani Guinier & Gerald Torres, *The Miner's Canary* (Cambridge, Mass: Harvard University Press, 2002) at 32–66.

435 Before her appointment, Justice Woolley questioned whether it is "fair or sensible" to require racialized lawyers to also reflect on how they can promote equality in the profession. But, in my view, no one is immune from privilege. I may be racialized, but I am also cisgender and a man. Further, being racialized does not make me immune from racism, unconscious or otherwise. While I appreciate Justice Woolley's sensitivity to overburdening minorities who already face "inequality and exclusion every day", I think we can all benefit from reflection on our respective roles in furthering diversity in the legal profession (Woolley, "Ontario's Law Society", *supra* note 82). Though, as various quotes opening this paper suggest, some of us would benefit more from reflection than others.

436 Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1952) at 15.