Managing Campus Expression and Equality Rights: Contemporary Considerations for Canadian Universities*

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Is it possible for Canadian universities to transcend the simplistic narrative, presented as a free expression v hate speech polarity, to inspire more nuanced dialogue, deliberation and decision-making in relation to campus speech? The task of reconciling various fundamental rights and freedoms essential to preserving the dignity, equality and liberty of all persons – and thereby preserving the viability of a pluralistic Canadian society – is a complex one, further complicated within a university setting. This paper explores the current Canadian legal terrain in relation to freedom of expression cases. It highlights the juridical ambiguities as well as the distinctive features of the university which create opportunities for reframing the challenge and innovating solutions and it presents several ideas for tools to support university administrators to more successfully manage campus expression and equality rights issues that arise.

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Les universités canadiennes peuvent-elles réussir à transcender le narratif simpliste et polarisé « liberté d'expression contre discours haineux », pour inspirer un dialogue, un débat et une prise de décision plus nuancés en ce qui a trait à l'expression sur le campus. La conciliation des libertés et des droits fondamentaux essentiels pour préserver la dignité, l'égalité et la liberté de toutes les personnes — et dès lors la viabilité du pluralisme de la société canadienne — représente une tâche complexe, et d'autant plus délicate en contexte universitaire. Cet article explore la situation juridique actuelle au Canada quant aux affaires touchant la liberté d'expression. En plus de souligner les ambiguïtés juridiques ainsi que les caractéristiques distinctives de l'université qui créent des occasions de recadrer le problème et de faire ressortir des solutions innovantes, il propose plusieurs outils susceptibles d'aider les administrateurs universitaires à mieux gérer l'expression sur le campus, de même que les problèmes de droits à l'égalité qui en découlent.

I. Introduction

"Abortion is murder".[1] "The residential school system produced benefits".[2] "Islam is a violent religion and promotes theocracy".[3] "Marriage is between a man and a woman".[4] "There was nothing wrong with using the n-word."[5] Within the current Canadian constitutional and statutory legislative landscape, such speech acts – while arguably manifestations of biased attitudes and despite their negative impacts on groups who have historically been denied dignity, equality and liberty – may or may not be protected under the banner of freedom of expression. In the context of Canadian universities, which have recently made more explicit their commitments to equity and inclusion, campus expression and equality rights issues have resurfaced with a whole host of contemporary complexities, inviting a reimagining of contemporary solutions.[6] Pearl Eliadis, a Canadian human rights lawyer and author of *Speaking Out on Human Rights: Debating Canada's Human Rights System*, comments on this contemporary context, drawing on the words of Irwin Cotler, an expert on international and human rights law:

> Today's legal context is very different from anything that John Stuart Mill could possibly have envisaged 150 years ago. There are now constitutional and international norms for rights, and the Internet is both an information thruway and a "superhighway of hate." According to Cotler, "there is, in Canada, a dialectical encounter between the rise in hate speech on the one hand, and a comprehensive legal regime to combat it on the other hand. We probably have one of the most comprehensive legal regimes, including those of a civil and criminal character, as well as of an international character, to buttress it."[7]

The contemporary Canadian university values a sense of belonging, inherent worth and safety for its community members. To that end, universities seek to foster cultures of respect and inclusion and

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1 James Kitchen, Jay Cameron & John Carpay, "Free speech on campus: The pursuit of truth as the purpose of education" (20 February 2018) at 13, online (pdf): *Justice Centre for Constitutional Freedoms* <jccf.ca/wp-content/uploads/2018/03/2018-03-Campus-Free-Speech-The-Pursuit-of-Truth-as-the-Purpose-of-Education-JCCF.pdf> [https://perma.cc/9ZCC-7QYR].

2 *Ibid*.

3 *Ibid*.

4 *Ibid*.

5 *Marceau v Brock University*, [2013] HRTO 569 at para 1 [*Marceau*].

6 "Universities Canada principles on equity, diversity, and inclusion" (26 October 2017), online: *Universities Canada* <univcan.ca/media-room/media-releases/universities-canada-principles-equity-diversity-inclusion/> [perma.cc/FAM9-D36M].

7 Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montreal & Kingston: McGill University Press & Queen's University Press, 2014) at 218.

environments that are free from discrimination, harassment and all forms of violence. While embodying these values, universities are guided by federal and provincial legislation established to safeguard fundamental freedoms and human rights, including expression and equality rights. Section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") describes freedom of expression as the "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication".[8] *Charter* rights and freedoms are not absolute. Section 1 of the *Charter* is referred to as the reasonable limits clause because it states that rights and freedoms are guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[9] A two-part legal test referred to as the *Oakes* Test is used to assess whether any limitation on individual rights is justifiable.[10]

Section 15(1) of the *Charter* describes one's *right to equality*: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[11] The *Canadian Human Rights Act* ("*CHRA*") also contains equality provisions, which seek "to extend the laws in Canada to give effect…to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."[12] Furthermore, similar equality provisions

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

[9] *Ibid*, s 1.

[10] In the well-known 1986 case of *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, the Supreme Court of Canada developed the *Oakes* Test – a test which seeks to reinforce s 1 of the *Charter* to ensure any limits on an individual's rights are reasonable and demonstrably justified. This is accomplished by requiring the government (or for our purposes, a non-governmental entity implementing a specific government program, such as a university implementing a government mandated free speech policy) to demonstrate that the purpose and benefits of their policy/program outweighs any *Charter* rights violation.

[11] *Charter*, *supra* note 8, s 15(1).

[12] *Canadian Human Rights Act*, RSC 1985, c H-6, s 2 [*CHRA*].

can be found in several international human rights instruments,[13] some of which are legally binding in Canada.[14]

On university campuses, when expression, specifically speech, is alleged by any community member to infringe either expression or equality rights and freedoms, its permissibility is scrutinized by identifying whether and how the expression is aligned with institutional commitments. Some of the universities' commitments are informed by aspirational moral values (e.g. a sense of respect, belonging and psychic safety) that are *not* legally binding and other commitments are informed by legally binding obligations (e.g. the right to expression, equality and physical safety). In assessing the allegation and determining the appropriate response, university administrators must be guided by thresholds for hate-motivated crimes outlined in the *Criminal Code*[15] and the thresholds for discrimination and harassment outlined in the appropriate provincial *Human Rights Code*.[16] They must also be guided by guaranteed protections for equality rights and expression freedoms in the *Charter* and for equality of opportunity and freedom from discrimination protections in the relevant provincial *Human Rights Code*. In higher education, the right to academic freedom is also a unique consideration, afforded to scholars to enable the fulfillment of the academic mission, which is to serve "the common good of society, through searching for, and disseminating knowledge, and understanding and through fostering independent thinking and expression in academic staff and students."[17]

The tension between expression and equality rights has long prevailed on university campuses in North America. The difficulty in navigating freedom of expression issues on campuses is not new, "but is newly relevant"[18] as Canadian governments are becoming "more interventionist"[19] in the affairs of universities and as recent freedom of expression cases have

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[13] "The Core International Human Rights Instruments and their Monitoring Bodies" (last visited 9 December 2021), online: *Office of the United Nations High Commissioner for Human Rights* <ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> [perma.cc/4X8L-VKT4].

[14] Ratification Status for Canada, online: *United Nations Human Rights Treaty Bodies* (last visited 9 December 2021), online: <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=EN> [perma.cc/6ALR-GADZ].

[15] *Criminal Code,* RSC 1985, c C-46, s 319 [*Criminal Code*].

[16] See e.g. *Human Rights Code*, RSO 1990, c H.19, s 13 [*Human Rights Code*].

[17] "Academic Freedom" (November 2018), online: *Canadian Association of University Teachers* <caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom> [perma.cc/RC8F-VBPJ].

[18] Keith E Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton: Princeton University Press, 2018) at 3.

[19] Peter MacKinnon, *University Commons Divided: Exploring Debate & Dissent on Campus* (Toronto: University of Toronto Press, 2018) at 3.

sparked discussions across Canadian universities. Namely, the Ontario government has mandated their universities adopt and publicly commit to expression policies that align with American principles of free speech, as articulated by the University of Chicago in 2015. Additionally, the Alberta government has begun conversations on such a mandate for their universities. The Chicago principles[20] state that universities must not "obstruct or interfere with the freedom of others to express their views"[21] regardless of how "offensive, unwise, immoral or wrong-headed".[22] In January 2020, the Alberta Court of Appeal released a verdict stating that the regulation of student expression on campus *is* subject to government intervention – a "controversial"[23] decision which starkly contrasts jurisprudence in other provinces.[24]

In this paper we query whether and how the interpretation, formulation and application of the law may need to improve to better navigate these tensions in the Canadian higher education context. Campus expression and equality rights controversies raise several questions for university administrators to consider: At what point should expression be limited and how should that determination be made and by whom? Should the *context* of the expression be considered when determining its permissibility? For example, does the permissibility of a speech act change if the expression is directed at and differentially affects an identifiable group? What if it is made in a residence setting, if it is communicated by a professor during a class, if it is spray-painted in a bathroom stall, or if it is written on a large mural in an open atrium? What tools can be used to help administrators discern whether and how expression should be prohibited or permitted on campus? These questions barely begin to address the incredibly complex and nuanced challenge that many universities continue to face across North America – a

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[20] See Geoffrey R Stone et al, "Report of the Committee on Freedom of Expression" (2015), online (pdf): *University of Chicago* <provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [perma.cc/PZ5E-MSKC].

[21] Linda McKay-Panos, "Freedom of Expression at Canadian Universities: A Difficult Compromise?" (4 July 2019) at para 1, online: *LawNow* <lawnow.org> [perma.cc/NNX2-55A2].

[22] *Ibid* at para 3.

[23] Daniel Michaluk, "Alberta Appellate Court Renders Significant Decision on University Autonomy and Expressive Rights" (8 January 2020) at para 1, online: *CanLII Connects* <canliiconnects.org/en/summaries/70067> [perma.cc/CY37-UP6Q].

[24] *UAlberta Pro Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta*]. See also Atrisha S Lewis et al, "Free Speech on Campus is Subject to the *Charter* – but Only in Alberta" (15 January 2020), online: *McCarthy Tétrault LLP* <mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/free-speech-campus-subject-charter-only-alberta> [perma.cc/2QQK-PXKQ].

challenge which requires an incredible depth of understanding and continual management.[25]

As provincial governments and courts greatly shape and influence the ways in which freedom of expression matters are managed or *may* be managed in the future on university campuses, this paper comes to fruition at an incredibly relevant sociopolitical and juridical juncture in time. This paper invites a *renewed* dialogue around how to more effectively navigate expression and equality rights on Canadian campuses to reflect contemporary sociocultural dimensions and demands that present new challenges for justices, legislators and administrators, alike.

II. Methodology and Organization

This paper emerges from a theoretical and practical inquiry undertaken by an Equity and Inclusion Office in one Canadian university. The inquiry revolved around the question of whether and how the legislative landscape in Canada may or should be shifting in relation to the adjudication and regulation of expression – specifically, expression with bias-motivated undertones or overtures given the observable rise in xenophobia across the nation.[26] The overarching goals of the inquiry were to (1) invite renewed thinking about campus expression controversies; and (2) produce concrete strategies to enhance individual and institutional capacities to navigate expression-equality rights challenges, within the current legal framework.

The discussion in this paper considers some of the thinking and analysis documented in relevant books authored by Canadian scholars who have written extensively on free expression and human rights, in peer reviewed articles published in academic journals and in case law and legal commentaries. While a fulsome review of the voluminous body of literature on campus free expression is beyond this paper's scope and purpose, the discussion aims to introduce the reader to complexities associated with navigating expression and equality controversies, engage the reader in a critical analysis of the challenges, offer some practical tools for administrators and inspire further exploration by experts in the field.

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[25] See Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017) at 103.

[26] Statistics Canada reports an increase in police-reported hate crimes between 2016 and 2020, with the greatest numbers of incidents seen in hate motivated by race, ethnicity, religion and sexual orientation. Data available online at Statistics Canada "Police-reported hate crime, by type of motivation, Canada (selected police services)" (2014), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006601> [perma.cc/9K4M-SP4H].

We begin the paper by discussing the concept of an expression-equality rights continuum as a reframing counternarrative to the free expression versus hate speech polarity, to enhance the possibilities for their more efficacious management. We then describe the nature of the vast and ambiguous space between what is interpreted as free expression and hate speech and elaborate on the tension between expression and equality rights issues on campus in this ambiguous space. Following these sections, we explore the legislation and case law related to expression and equality rights, where we highlight the ambiguity that exists surrounding the interpretation and application of criminal and civil law in defining the limits of free expression. We then consider the distinctive features of university environments and the implication of these features on the management of campus issues, which involve both expression and equality rights. We end by offering some ideas to support university administrators in the task of managing these complex and controversial issues.

III. Discussion

A. Contested Space Between Free Expression and Hate Speech

Canada is a pluralistic federation with Indigenous and "minority ethnic" rights in the *Charter*, federal and provincial human rights legislation and an international human rights framework.[27] As no right is absolute, it is expected, then, that these legal frameworks guide the balancing act required to appropriately reconcile individual rights (including freedom of expression) and group rights (including equality of opportunity and freedom from discrimination).[28] However, there is a contested space between free expression and hate speech. Many issues relating to campus expression and equality rights fall within this contested space. Hate speech, which includes bias-motivated violence and threats of violence, is a criminal act and its criminalization constitutes a reasonable limit to free expression in Canada.[29] The Supreme Court of Canada ("SCC") ruled that "prohibiting representations that are objectively seen to expose protected groups to 'hatred' is rationally connected to the objective of eliminating discrimination

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[27] See Evelyn Kallen, *Ethnicity and Human Rights in Canada: A Human Rights Perspective on Ethnicity, Racism, and Systemic Inequality*, 3rd ed (Don Mills, ON, Canada: Oxford University Press, 2003).

[28] See Eliadis, *supra* note 7 at 210.

[29] See Canada, Library of Parliament, *Hate Speech and Freedom of Expression: Legal Boundaries in Canada*, by Julian Walker, Research Publication: Background Paper, Parliamentary Information and Research Service, Publication No 2018-25-E (Ottawa: Legal and Social Affairs Division, 29 June 2018) at 1–6.

and the other harmful effects of hatred."[30] As such, when assessing freedom of expression cases, criminal law must be consulted to determine whether the expression in question constitutes hate speech. Speech that is discriminatory in nature also constitutes a reasonable limit to free expression in Canada. Discriminatory or harassing acts, which create a differential adverse effect or poisoned environment for an individual or class of individuals, on the basis of prohibited grounds for discrimination, are a violation of human rights. As such, when assessing freedom of expression cases, human rights law – a form of administrative law – must also be consulted to determine whether speech acts constitute a form of discrimination or harassment.

While the *Criminal Code* provides descriptions of hate crimes, such as hate propaganda,[31] and the *CHRA* defines the parameters of a discriminatory and harassing practice,[32] there are still many subjective elements introduced when either criminal courts or administrative tribunals attempt to ascertain bias motivation and harmful impact – both of which are instrumental to assessing claims of hate speech. There exists a vast amount of behaviour, including speech, which would not be considered criminal nor discriminatory but which, nonetheless, has been described as profoundly injurious to those who are the target or subject of that behaviour or speech. In this contested space, we find biased attitudes and acts, which have been described as micro-aggressions – acts that are typically unintended, unconscious and implicit forms of prejudice based on stereotypes.[33] While everyday micro-aggressive comments and behaviours do communicate hostile, derogatory and negative indignities towards identifiable social groups, there is common consensus that these everyday comments – particularly when they are unintended – constitute free expression.[34] Education and dialogue are, therefore, recommended to counteract such micro-aggressive expression. In other words, there is expression that neither meets the "ardent and extreme" threshold of hate set out in the *Criminal Code,* nor found to meet the threshold of harassment or discrimination set out in the *CHRA*. Yet, for many members of marginalized groups, the impact of expression which falls within this contested space is more than a slight indignity.

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30 *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11 at para 99 [*Whatcott*].
31 *Criminal Code*, *supra* note 15, s 318.
32 *CHRA*, *supra* note 12, s 5.
33 Derald Wing Sue et al, "Racial Microaggressions in Everyday Life: Implications for Clinical Practice" (2007) 62:4 Am Psychologist 271.
34 *Ibid*.

Most campus expression debates fall into this contested space, where already socially marginalized community members may experience the expression as impeding their dignity and personhood as well as hindering their equal opportunity to participate and thrive as their full selves in the campus living, learning or working environment. Of course, whether it can be objectively demonstrated that an act, including a speech act, has had an adverse effect on an individual or community belonging to a protected group under human rights codes generally, is a key criterion for determining whether that act amounts to discrimination or harassment. Proving adverse effect is a dilemma. To answer the question of whether adverse effect can be demonstrated, the question of what would constitute a sufficiently adverse effect and how to enumerate it must be considered. There is a growing body of literature that discusses the effects of microaggressions, over time, on the health and wellbeing of individuals. One example of such scholarship is a recently published book entitled *Microaggressions and Traumatic Stress: Theory, Research, and Clinical Treatment* by Kevin L Nadal. Nadal describes "how microaggressions may have long-lasting effects on the psychological health of all people – especially individuals from historically oppressed groups and communities"[35] and describes "ways in which microaggressions may lead to psychological trauma".[36]

Notwithstanding the ongoing dilemma of proving adverse effect, we will provide an example of a topic that has featured prominently in campus expression controversies because of its possible adverse effects on transgender community members. Transgender communities have indicated that they experience identity misclassification – both benign neglect of and wilful resistance to gender inclusive language (e.g. misgendering and deadnaming, for example) – as invalidating or delegitimizing of their personhood.[37] A recent study undertaken by Kevin A McLemore explores the affective and psychological experiences of misgendering transgender spectrum individuals. The results suggest that misgendering can be stigmatizing and devaluing and can play a disruptive role in education and employment. The author states that "misgendering may also disrupt transgender spectrum individuals' full participation in society because of its impact on factors that contribute to their mental health

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[35] Kevin L Nadal, *Microaggressions and Traumatic Stress: Theory, Research, and Clinical Treatment* (Washington, DC: American Psychological Association, 2018) at 4.

[36] *Ibid*.

[37] Kevin A McLemore, "Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals" (2014) 14:1 Self and Identity 51 at 69.

(e.g. anxiety, felt authenticity)".[38] Therefore, the adverse effects of misgendering warrant further examination.

Many Canadian campuses have been embroiled in controversy surrounding whether high profile figures should be provided a platform to express resistance to the use of preferred gender pronouns. For the most part, these speakers have not been prohibited from speaking on campus; while the intention and impact of their actions may not be deemed hateful or discriminatory by criminal and human rights law standards, studies are beginning to document repeated testimony from gender diverse individuals that recurring invalidation of their identity has both negative psychic and physical effects on their wellbeing.[39] Some social justice advocates question whether engaging such consciously and explicitly biased attitudes and behaviours, through education and dialogue, is an appropriate or useful strategy. More studies on the impacts of such invalidating microaggressions are needed to better understand the extent of their harmful effects on individuals.

It is unclear what role human rights legislation can and should play in regulating different degrees of expression on campus,[40] which may not meet a criminal threshold but may nonetheless have a sufficiently adverse effect on individuals identified as belonging to groups protected from discrimination under human rights law. As we learn more about the adverse effects of persistent conscious or unconscious microaggressions on educational and employment experiences, it seems reasonable to question whether human rights legislation is being sufficiently leveraged to address these forms of harassment which may be contributing to a poisoned learning and working environment. Richard Moon, a Canadian law professor whose research focuses on freedom of expression, gave expert advice that led to the repeal of section 33 of the *CHRA*, which aimed to prevent discriminatory practices and compensate victims of extremely hateful expression. Moon has cited concerns "that the human rights process is poorly suited to the regulation of hate speech."[41] Other scholars, like Eliadis, have argued that the human rights system can play an important behaviour modification and culture shifting role by regulating hate speech, rather than simply

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[38] *Ibid*.

[39] Nadal, *supra* note 35 at 105.

[40] Richard Moon, "The Hate Speech Diversion" in Ken Normal, Lucie Lamarche & Shelagh Day, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto, Canada: Irwin Law, 2014) 279.

[41] *Ibid* at 280.

criminalizing these speech acts.[42] While the most egregious forms of bias-motivated violence or incitement of violence require criminal intervention, civil interventions can play a larger role to appropriately address bias-related expression that has discriminatory effects.

Another such vigorously debated topic, is whether the "n" word be able to be used in an educational setting? While use of the "n" word does not meet the threshold of hate speech, it certainly pushes up against the boundaries of discriminatory speech. This topic highlights the importance of understanding the nuances of academic freedom that distinguish it from the concept of freedom of expression, as articulated by Universities Canada: "Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities."[43]

In his analysis of the 2018 *Philip v Andrews* case, the Human Rights Tribunal of Ontario adjudicator stated, "I am satisfied that the use of [the n-word] is inherently discriminatory and must be reasonably expected to be offensive and hurtful to any Black person. Indeed, it would be reasonably expected to be offensive to any person, regardless of race or colour, but especially so for a Black person."[44] The adjudicator made a point of agreeing with the analysis of a 2017 case, *Knights v Debt Collect Inc*, in which the adjudicator stated, "[t]he N-word carries with it the baggage of centuries of slavery, racism, abuse and disrespect. The term is more than simply hurtful towards African-Canadians; it demeans, humiliates and asserts a threatening sense of racial superiority. It is without a doubt discriminatory language".[45] It is reasonable to ask whether these decisions, on cases involving the utterance of the "n" word in employment settings, will have implications for cases involving the utterance of the "n" word in the classroom, which is arguably a learning and working environment. Universities must pay close attention to caselaw emerging within the last five years, as it may be redefining how the human rights system is leveraged to address expression, which, in the past, may have been judged as a case of competing expression and equality rights, but may now fall squarely in the category of a human rights violation. In the meantime, when expression

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42 Eliadis, *supra* note 7 at 216.

43 "Statement on Academic Freedom" (25 October 2011), online: *Universities Canada* <univcan.ca/media-room/media-releases/statement-on-academic-freedom/> [perma.cc/8F85-QBUY].

44 *Phillip v Andrews*, 2018 HRTO 28 at para 38.

45 *Knights v Debt Collect Inc*, 2017 HRTO 211 at para 21.

reflects more than implicit and unintentional biased attitudes but does not meet the threshold of a human rights or *Criminal Code* violation, the remedy prescribed to counter this "bad" expression will be "more"[46] and "better"[47] expression, along with support provided to those who feel demeaned and dehumanized by the expression.

When navigating claims regarding the infringement of expression and/or equality rights, we suggest that university administrators ensure they receive comprehensive legal advice. Canadian human rights statutory law and constitutional law may have a role to play in regulating such situations. Thus, administrators must be advised on what and how federal and provincial laws govern expression and equality rights, and what legal definitions and tests tribunals and courts use to aid them in determining whether speech is permissible or prohibited. Figure 1 depicts the Pyramid of Hate[48], which is an educational tool created by the Anti-Defamation League[49], a United States civil rights organization, to describe the levels of biased attitudes and bias-motivated behaviours that underpin anti-Semitism and other forms of bigotry. Considering the levels and progression of attitudes and behaviours from the base to the tip of the Pyramid, different rhetorical tools (e.g. education and dialogue) and/or legislative tools (e.g. policies and laws) may be used to address biased attitudes, speech and acts depending on the nature of the expression.

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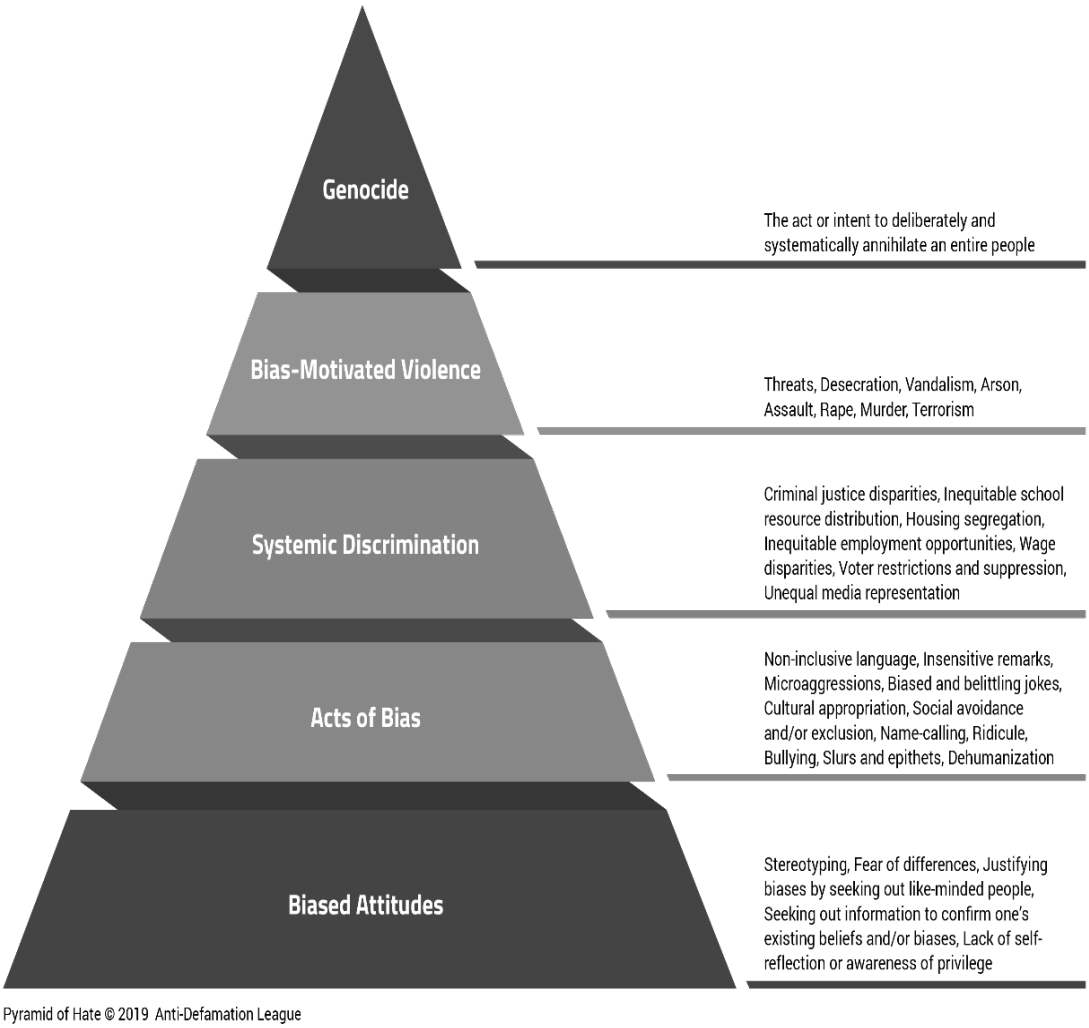
[46] *Whitney v People of the State of California*, 274 US 357 (1927).

[47] Deborah MacLatchy, "Not Merely Free Speech, but Better Speech Needs to be Protected on Campus" (31 July 2018), online: *Globe and Mail* <theglobeandmail.com/opinion/article-not-merely-free-speech-but-better-speech-needs-to-be-protected-on/> [perma.cc/4H68-C5LB].

[48] "Pyramid of Hate" (last modified 2018), online (pdf): *Anti-Defamation League* <adl.org/sites/default/files/documents/pyramid-of-hate.pdf> [perma.cc/2J2V-FBHP].

[49] *Ibid.*

Figure 1. Pyramid of Hate



B. Tension Between Expression and Equality Rights

The tension between expression and equality rights on university campuses is often dichotomized as a "debate" between two mutually exclusive aims, advanced by free expression proponents and social justice advocates.[50] The former group is presented as seeking to protect the right to free expression and to promote a marketplace of unfettered expression, including controversial ideas to preserve a healthy democracy.[51] The latter group is presented as seeking to censor any expression which is thought to psychically harm or exclude socially marginalized populations.[52] We suggest that conclusions such as "freedom of expression is under attack [and] the concept of universities as intellectual spaces is also under attack as a result of intellectual laziness accompanied by ideology and anger" contribute to the polarity.[53] We would argue that it is grossly condescending and oversimplified to suggest that opponents of unfettered free expression do not understand the value of expression rights in a free and democratic society, that they lack the self-actualization and resiliency to hear offensive speech and that their focus on group rights represents an identity politic or agenda which undermines individual rights.

In Canada and the United States, the state of this debate has fluctuated throughout the years. Earlier generations put an exceptionally high value on the right to free expression, as it would foster an environment where all ideas could be voiced. It is now more common that university students are "open to some curtailment of speech",[54] to protect members of marginalized communities on campus from harmful expression. While there may be an increased awareness and understanding from students concerning the exceptionally harmful and powerful effect of speech on members of marginalized groups – which may have strengthened the value students place on protecting equality rights – the debate continues to be framed as two contrasting sides.[55] Those who advocate for free expression continue to argue that it is an "instrument of truth … and personal-fulfillment",[56] and some free expression advocates even argue that commitments to equity and

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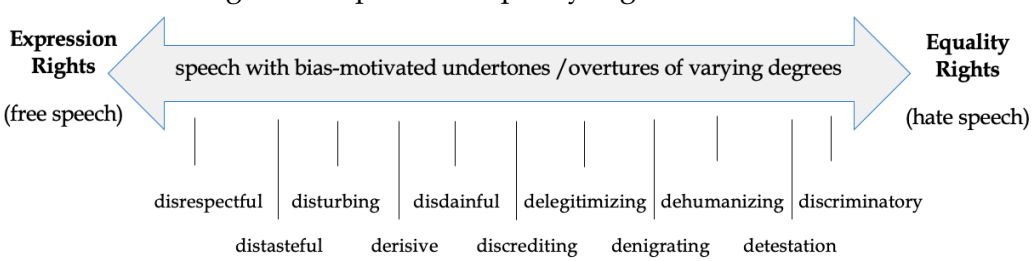
[50] MacKinnon, *supra* note 19; Whittington, *supra* note 18.
[51] Whittington, *supra* note 18 at 45–46
[52] Ben-Porath, *supra* note 25 at 28.
[53] MacKinnon, *supra* note 19 at 55–56.
[54] Ben-Porath, *supra* note 25 at 10.
[55] *Ibid*.
[56] Walker, *supra* note 29 at 2 citing Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007) at 43-7–43-10.

inclusion have gone "too far" as they seek to ensure everyone is comfortable at all times – an environment believed to be unreflective of the "real world".[57] In contrast, some advocates of equality rights believe that the right to freedom of expression at times undermines "the social justice causes they champion."[58] The framing of the free expression versus hate speech polarity has speciously subordinated equality rights, which are perceived as group rights, beneath expression rights, which are perceived as individual rights. At the very least, the continuum framework counters the tendency to hierarchize expression and equality rights, despite assertions from constitutional and human rights scholars that expression and equality rights should not be viewed hierarchically.[59] In this way, the notion of an expression-equality rights continuum can help us to better recognize, if not better respond to, the varying degrees of bias-motivated undertones and overtures in a speech act.

Rather than conceptualizing the free expression versus hate speech debate as representing a manifestation of conflicting and competing rights, we propose the notion of an expression-equality rights continuum (Figure 2), along which connected and complementary rights fall. Speech that is not in violation of any other freedom or right and therefore *not* subject to any limits according to the *Charter,* is at the expression rights end of the continuum.[60] Speech that is in violation of administrative or criminal law and therefore subject to reasonable limits articulated in the *Charter* and the various *Human Rights Codes*, is at the equality rights end of the continuum.[61]

Figure 2. Expression-Equality Rights Continuum



[57] Kitchen, Cameron & Carpay, *supra* note 1 at 4, 15.

[58] Nadine Strossen, *Hate: Why We Should Resist it With Free Speech, Not Censorship* (Oxford: Oxford University Press, 2018) at 184.

[59] Eliadis, *supra* note 7 at 210.

[60] See *Charter*, *supra* note 8, s 1.

[61] See *Charter*, *supra* note 8, s 15(1). See also *Criminal Code*, *supra* note 15, s 319(1)(2). See e.g. *Human Rights Code*, *supra* note 12, s 13.

As speech moves along the continuum from the expression rights end (left) to the equality rights end (right) in Figure 2, it reflects progressively more bias-motivation. Within this continuum framework, speech which deliberately and demonstrably incites physical violence is prohibited as it crosses the threshold into criminally sanctioned hate speech and, therefore, would be a categorical infringement of statutory criminal and/or human rights law. However, within this framework, all speech acts are viewed as invoking varying degrees of both expression and equality rights. This constitutes a reframing of the simplistic narrative surrounding campus freedom of expression debates, which characterizes the debate as being about mutually exclusive rights and interests at opposite ends of a polarity, with free expression proponents characterized as defenders of a free democracy on one end and hate speech opponents characterized as advocates of censorship on the other end. Instead, this expression-equality continuum complicates the narrative and invites consideration relating to speech that can neither be defined as criminal hate speech nor unfettered free expression. The concept of a continuum invites dialogue about intersecting rights that must be reconciled, as opposed to debate about mutually exclusive competing rights.

At this point, it is important to contextualize the discussion within legal definitions and precedent related to expression and equality rights. The section below discusses the ambiguity with which the courts characterize and differentiate expression.

C. Ambiguity Across the Legislative Landscape

The *Charter*, which outlines the rights and freedoms that must be respected and protected by all levels of government in the laws they create and the services they provide, guarantees the fundamental right to free expression.[62] Section 2(b) of the *Charter* states that everyone has the "freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication."[63] Expression has been interpreted and defined broadly by the SCC as "any activity or communication that conveys or attempts to convey meaning".[64] It is

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[62] See Walker, *supra* note 29 at 2. See also Craig Martin, "Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada" (2018) 45:3 Hastings Const LQ 455 at 456.

[63] *Charter*, *supra* note 8, s 2(b).

[64] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy Ltd*]. See also *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 81, 159 DLR (4th) 385 citing *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385.

important to clarify that expression does not only include verbal forms of communication, but also non-verbal forms of communication that attempt to convey meaning. For example, a symbol, an image, or a particular body gesture could all constitute forms of expression.[65] The right to free expression is guaranteed in the *Charter* "so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[66]

The courts have long recognized that free expression is a fundamental human right necessary for the functioning of democratic constitutional systems. It is a right that is not to be taken for granted; there are governing bodies throughout the world that criminalize certain types of expression or punish people for speaking out against injustice or for challenging certain ideologies and governmental institutions.[67] In the 1988 SCC case of *Ford v Quebec (Attorney General)*, three essential freedom of expression values were established: the furthering of democracy; the search for and attainment of truth; and individual self-fulfillment.[68] Freedom of expression enables people to fully participate in social and political decision-making, ensuring a truly democratic community, where conversations can reveal truths. It also enables people to claim their identity within the larger body politic. Ultimately, the values underlying free expression should never be undermined, as they shape the nation's social, political and cultural landscape and protect individual identity. That said, as with all *Charter* rights and freedoms, the right to free expression is *not absolute*.[69] Discriminatory speech and hate speech, two types of expression which clearly detract from the core values of free expression, are prohibited in Canada "as explicitly informed by the constitutional equality right"[70]

The *Criminal Code,* a federal statute which compiles most of the criminal offences in Canada, outlines a series of hate propaganda provisions.[71] Sections 318 and 319 of the *Criminal Code* state that anyone who willfully promotes genocide or promotes or incites hatred against an identifiable

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65 *Criminal Code*, *supra* note 15, s 319(7). See e.g. Martin, *supra* note 62 at 459. See e.g. *Bracken v Niagara Parks Police*, 2018 ONCA 261 [*Bracken*].
66 *Irwin Toy Ltd*, *supra* note 65 at 968.
67 Martin, *supra* note 62 at 477.
68 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 56, 54 DLR (4th) 577 [*Ford*].
69 Walker, *supra* note 29 at 3.
70 *Ibid*. See also Martin, *supra* note 62 at 523.
71 Walker, *supra* note 29 at 3–5.

group,[72] is criminally liable.[73] The *Criminal Code* does not define the terms "hate speech" or "hatred", leaving their meanings to be interpreted by the judiciary. For example, in a well-known 2013 SCC freedom of expression case, *Saskatchewan Human Rights Commission v Whatcott*, the Court noted that hate speech "is, at its core, an effort to marginalize individuals based on their membership in a group"[74] and seeks to "delegitimize", "vilify" and "dehumanize"[75] those members. The court noted that the term "hatred" involves "detestation, extreme ill-will and the failure to find any redeeming qualities in the target of the expression."[76] Given the inherent ambiguity of these terms (e.g. hate speech) and their associated definitions (e.g. delegitimizing), the SCC developed a three-part test which must be followed to better help courts determine whether expression reaches the threshold of criminal hate speech.[77] The three-part test requires answering the following questions:

(1) "Whether a reasonable person, aware of the relevant context and circumstances, would view the expression as exposing the protected group to hatred";[78]

(2) Does the expression "incite the level of abhorrence, delegitimization and rejection", detestation and vilification which "risks causing discrimination or other harmful effects";[79]

(3) "Is the expression likely to expose the targeted person or group to hatred by others?"[80]

It is important to note that this test requires judges to focus on the *effects* of the impugned expression and not on the *content* of the expression.[81] Although the ideas, beliefs or thoughts being expressed may be abhorrent and the author of the expression intended to incite hatred, these facts are irrelevant and insufficient when determining whether to restrict expression. To reiterate this important point, this three-part test is focused solely on the likely effect of the expression on its audience. In *Warman v Kouba*,[82] the

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[72] Identifiable group: "any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability." *Criminal Code*, *supra* note 15, ss 318–19.

[73] *Ibid*.

[74] *Whatcott*, supra note 30 at para 71.

[75] *Ibid* at paras 41, 45.

[76] *Ibid* at para 40.

[77] *Ibid* at para 55.

[78] *Ibid* at para 56

[79] *Ibid* at para 57.

[80] *Ibid* at para 58.

[81] *Ibid* at para 49.

[82] *Warman v Kouba*, 2006 CHRT 50 at paras 24–84.

Canadian Human Rights Tribunal summarized eleven "Hallmarks of Hate" in order to help differentiate hate speech from other offensive commentary. If expression reflects various "Hallmarks of Hate" then it should be referred to local police to assess whether it constitutes a violation of the *Criminal Code*. The Hallmarks include:

(1) portraying the targeted group as a "powerful menace";

(2) the use of true stories to make negative generalizations about the group;

(3) portraying the group as preying on children, the aged or other vulnerable persons;

(4) blaming the group for current problems;

(5) portraying them as violent or dangerous by nature;

(6) conveying the idea that the members of the group have no redeeming qualities and are simply evil;

(7) communicating the idea that the banishment, segregation or eradication of the group is necessary to save others from harm;

(8) dehumanizing the group by comparisons to animals, vermin, excrement and other noxious substances;

(9) using highly inflammatory and derogatory language to create a tone of extreme hatred and contempt;

(10) trivializing or celebrating past persecution or tragedy involving group members; and

(11) calling for violent action against the group.[83]

As with the right to freedom of expression, the courts have long recognized the importance of anti-hate provisions, given the harmful effects hate speech can have on the members of an identifiable group and on society as a whole.[84] Hate speech causes emotional and psychological harm to the target group as it reduces an individual's sense of self-worth and it can increase levels of discrimination as it may "skew attitudes and beliefs"[85] and cause certain "hateful views [to] gain credence".[86] On this point, it is worth quoting Eliadis at length:

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[83] See Elidia, *supra* note 7 at 214–15.

[84] See *Whatcott*, *supra* note 30 at paras 43, 148, 171; *R v Keegstra*, [1990] 3 SCR 697 at 699–701, 703, 718–19, [1991] 2 WWR 1 [*Keegstra*].

[85] Martin, *supra* note 62 at 503.

[86] *Ibid*.

> A Climate where people are vilified and deemed less than human is a poisoned society where individuals cannot go about their daily lives without fear of being singled out, harassed, racially profiled, or denied the basic goods of life, from education and employment to government services and housing.
>
> Portraying people with whom we are uncomfortable as foreign and dangerous makes the targets doubly vulnerable because they cannot readily speak for themselves or rise above the stereotypes applied to their communities. The Supreme Court has said that "hate speech can also distort or limit the robust and free exchanges of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of the of the victim." Seen is this light, hate speech is another form of discrimination, albeit an extreme form. It seeks to shut its targets out of public discourse, which makes it much easier to exclude them from everything else as well.[87]

Ultimately, the value of anti-hate provisions should never be undermined as they seek to ensure everyone has equal benefit and equal protection under the law, by preventing or eliminating expression which seeks to discriminate and incite hatred against members of identifiable groups.[88]

Anti-hate provisions are also found in the *CHRA* and in provincial and territorial human rights legislation.[89] However, these statutory laws do not include explicit prohibitions against hate speech, such as in the *Criminal Code*. In fact, section 13 of the *CHRA,* which gave Parliament jurisdiction to deal with hate messages under a human rights framework, was repealed in 2013.[90] Rather, the *CHRA* prohibits expressive activities which discriminate against individuals based on a series of protected grounds.[91] The *CHRA* also retains jurisdiction to address practices which "publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that (a) expresses or implies discrimination or an intention to discriminate, or (b) incites or is calculated to incite others to discriminate".[92] It is important to note that human rights legislation only applies within the contexts of goods, services, facilities, accommodation or employment.[93] Goods, services and facilities include, but

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87 Eliadis, *supra* note 7 at 234.

88 See *CHRA*, *supra* note 12, s 2. See also *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 907–08, 917, 75 DLR (4th) 577. See also Martin, *supra* note 62 at 499.

89 See Walker, *supra* note 29 at 2, 7–9.

90 See *CHRA, supra* note 12, s 13 as repealed by *An Act to amend the Canadian Human Rights Act (protecting freedom),* SC 2013, c 37.

91 *Ibid,* s 3(1). Note: Yukon's *Human Rights Act,* RSY 2002, c 116, is the only human rights legislation in Canada which does not prohibit the publication of messages that announce an intention to discriminate, or that incite others to discriminate, based on the enumerated grounds.

92 *CHRA*, *supra* note 12, s 12.

93 *Ibid*, ss 5–11.

are not limited to, public places, schools, universities and colleges, services provided by municipal and provincial governments, insurance companies and classified advertisement space.[94]

Just as the legislature does not define expression and criminal hate speech, the legislature does not *explicitly* define discriminatory expression. The *CHRA* only states that expression which has been communicated in one of the aforementioned contexts can be understood as "discriminatory" if it is any statement, publication, display or broadcast which discriminates or incites others to discriminate against people based upon one or more of the enumerated grounds.[95] Thus, once again, the identification of discriminatory expression has been left to judicial interpretation. Ultimately, the purpose of human rights legislation is to ensure that all individuals have equal access to opportunities and "have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on"[96] any of the enumerated grounds. While the right to express one's thoughts, beliefs and opinions is a fundamental and indispensable freedom for both self-fulfillment and for the flourishing of society, expression which is discriminatory or likely to foster hatred is capable of cowing individuals into silence and destroying social harmony.[97]

The judiciary has developed various legal tests and prescriptions intended to guide the determination of whether expression should or should not be limited, such as the three essential values of free expression, the three-part criminal hate speech test and the eleven Hallmarks of Hate. However, if anything is made apparent from this brief overview, it is the nuances around what expression should be labelled as fostering hate, discriminatory speech or free speech. Despite the associated legal tests, guidelines and definitions developed by the judiciary in precedent analyses and decisions, ambiguous language persists. In fact, "Canadian officials … have continued to disagree about whether particular speech does or does not satisfy these [legal guidelines]."[98]

To illustrate the legal ambiguity which characterizes the discussion around lawful and unlawful forms of expression, we created two lists of words: one list contains vocabulary used to define lawful expression (i.e.

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[94] See "Goods, services and facilities" (last visited 27 February 2021), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/social_areas/goods_services_facilities> [perma.cc/KE6V-S7RJ].

[95] See *CHRA*, *supra* note 12, s 12.

[96] *Ibid*, s 2.

[97] See Martin, *supra* note 62 at 455–56.

[98] Strossen, *supra* note 58 at 78. See e.g. *Bracken*, *supra* note 62.

free speech) according to language used in Canadian free expression precedent and the other list contains vocabulary used to define hate speech, also according to language used in Canadian free expression precedent. While some of the words in Figure 3 are drawn from various SCC cases, the majority of words originate from the 2013 *Saskatchewan (Human Rights Commission) v Whatcott* case, due to its legal standing and continued relevance in most recent freedom of expression cases in Canada.[99]

Figure 3. Legal Ambiguity Demonstrated by Free Expression Precedent[100]

FREE SPEECH	**HATE SPEECH**
Free speech is expression which / which is…	***Hate speech is expression which / which is / which promotes***
hurtful	hatred
disdainful	contempt
ridiculing	extreme ill-will
distasteful	threatens violence
affronts the dignity of	violent expression

[99] *Whatcott*, *supra* note 30.

[100] *Ibid* at para 51. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 at para 77; *McKenzie v Isla*, 2012 HRTO 1908 at paras 40, 43 [*McKenzie*]; *R v A.B.*, 2012 NSPC 31 at para 15; *Irwin Toy Ltd*, *supra* note 61 at 969.

repugnant	delegitimizes
offensive	vilifies
derogatory	denigrates
blatantly false	dehumanizes
shocks or disturbs the state	detestation
discrediting	
humiliating	

From this list we can see that according to the SCC, expression which discredits, offends, "belittles",[101] humiliates or "affronts the dignity of"[102] should *not* be limited and thus constitutes lawful expression.[103] On the other hand, according to the SCC, expression which "delegitimizes",[104] dehumanizes, denigrates, "vilifies",[105] or "threatens violence"[106] *should* be limited as it is synonymous with expression that fosters hatred.[107] While it may be "easier" for courts and tribunals to discern between expression which threatens violence, such as "transgender people should all have their

[101] *Whatcott*, *supra* note 30 at para 85.
[102] *Ibid*.
[103] *Ibid* at para 89.
[104] *Ibid* at para 44.
[105] *Ibid*.
[106] *Ibid* at para 112.
[107] *Ibid* at paras 41, 43–45, 112.

heads smashed in"[108] and that which does not, how can judges ultimately discern between expression which is humiliating and that which is denigrating? Or between expression which is derogatory and that which is denigrating? If you focus your attention on the word "disdain", a term which falls under the category of lawful expression,[109] it is defined as "showing *contempt* or lack of respect [emphasis added]."[110] Yet, according to the SCC, the term "contempt" falls under the category of hate speech.[111] Following this line of thought, a paradox ensues: expression which "shows contempt" is considered free speech, whereas expression which exposes persons to contempt is considered hate speech. By compiling this list, we can begin to see one aspect that makes the management of free expression matters incredibly complex; namely, the ambiguity of the language used to define the limits of permissible expression.

It is not a stretch, therefore, to appreciate how the lay-person, who experiences incidents of bias-motivated expression and characterizes them as disdainful, delegitimizing or dehumanizing, may look to human rights legislation, and its Supreme Court conferred "quasi-constitutional"[112] status for recourse. Some have argued that section 13 of the *CHRA* (now repealed) allowed for appropriate human rights intervention for allegations of such bias-motivated expressions, which did not meet the criminal standard of hate speech. Eliadis has criticized the decision to repeal section 13 of the *CHRA,* calling it a wrong-headed attempt to criminalize all such speech behaviour.[113] Instead, Eliadis would agree with those who acknowledge that such bias-motivated speech acts certainly do not qualify as criminalized hate speech, but, by virtue of their undermining effects on the dignity, equality and liberty of the person, these types of speech acts surely warrant some form of reasonable non-criminal remediation.[114] Educational and preventative interventions might be possible by reinstating some iteration of section 13 thereby "upholding the constitutionality of civil (i.e. non-criminal) prohibitions on hate speech in human rights laws … [as] a key element in Canada's toolbox of policy instruments designed to address

[108] Kitchen, Cameron & Carpay, *supra* note 1 at 13.
[109] See *Whatcott*, *supra* note 30 at paras 41, 90.
[110] Angus Stevenson, eds, *Oxford English Dictionary*, (Oxford: Oxford University Press, 2010) sub verbo "disdainful".
[111] See *Whatcott*, *supra* note 30 at para 57.
[112] Eliadis, *supra* note 7 at 216.
[113] *Ibid*.
[114] *Ibid*.

public vilification and group hate."[115] In other words, reinstating section 13, or introducing a similar clause, may help address those bias-motivated acts that are deemed to fall below the criminal threshold, but may well create a hateful environment and adverse effects. Arguably, the stakes are not as high when behaviour constitutes a violation of a human right as opposed to when behaviour amounts to a criminal offense – the recourse for a human rights violation tends to be remedial rather than punitive.

To conclude this section, an exploration of Canada's legal landscape (i.e. the associated legal documents and significant freedom of expression cases) helped to elucidate how the judiciary has attempted to differentiate between free expression, hate speech and discriminatory speech. This exploration demonstrated that precedent, legal statutes and codes do not always clarify aspects of the law, but rather can add to its ambiguity. Moreover, to understand how expression is managed at Canadian universities, how federal and provincial legislation applies to universities and how universities can ensure both expression rights and human rights are upheld, a detailed understanding of the law and judicial interpretations is crucial. We now turn to a discussion of the distinctive character and context of universities to better understand the nuances university administrators face in reaching decisions that attempt to balance campus expression and equality rights.

D. Implications of the Distinct University Environment

Universities are unique microcosmic social organizations, connected to the larger society, heavily influenced by socio-political forces and often influencing change within the body politic.[116] They are spaces of engagement, collaboration, constant learning, teaching and research.[117] As in the larger community, universities can be sites of harassment, discrimination and violence – intolerable behaviours can create a sense of exclusion, inequity and insecurity among students, staff and faculty. Because such behaviours threaten the social cohesion of a university community and its overall purpose and mission,[118] universities "should be concerned about inclusion and about actively creating a sense of connection and belonging."[119] When a freedom of expression matter arises on campus,

[115] *Ibid* at 232.
[116] See MacKinnon, *supra* note 19.
[117] See Ben-Porath, *supra* note 25; MacKinnon, *supra* note 19; Whittington, *supra* note 18.
[118] See Ben-Porath, *supra* note 25.
[119] *Ibid* at 10.

there are important factors administrators must consider in their deliberations. What follows is an exploration of three distinctive features of the university, which we argue are important factors to consider in the decision-making process: (1) the university's commitments to social betterment as a fundamental aspect of their academic missions, (2) the context of varying "sites"[120] across the university environment in which the speech acts take place, and (3) the contested nature of the universities' legal autonomy in relation to the government and Charter applicability.

i. Commitment to Social Betterment

Universities have common and distinct elements within their missions, vision statements and mandates and typically a distinguishing "brand". For example, the University of Toronto is dedicated to exploring the "boundless possibilities of its community of alumni, students and faculty for global leadership and societal impact";[121] the University of Ottawa commits to "provide students with an outstanding education and enrich the intellectual, economic and cultural life of Canada",[122] and to promoting French culture in Ontario; and McMaster University articulated its purpose as to "advancing human and societal health and well-being".[123] However vague the brand language and promise, overall, it can be said that the underlying missions of institutions of higher learning have several common goals:

(1) to produce and disseminate knowledge;

(2) to aid in the pursuit of truth through pedagogy, research and collaboration;

(3) to create a climate of constant learning, thought and reflection;

(4) to encourage students and staff to challenge and question various ideologies and institutions;

(5) to prepare students to tackle society's infinite challenges;

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[120] Richard Moon, "Understanding the Right to Freedom of Expression and its Place on Campus" (21 November 2018), online: *Academic Matters OCUFA's Journal of Higher Education* <academicmatters.ca/understanding-the-right-to-freedom-of-expression-and-its-place-on-campus/> [perma.cc/BVF9-PMHG].

[121] "The University of Toronto launches Boundless, its $2-billion fundraising campaign" (20 November 2011), online: *UoT News* <utoronto.ca/news/university-toronto-launches-boundless-its-2-billion-fundraising-campaign> [perma.cc/K8CW-UUHY].

[122] "The University of Ottawa's strategic plan" (2020) at 2, online (pdf): *University of Ottawa* <uottawa.ca> [perma.cc/9L6S-T8MJ].

[123] "Brand Standards: Our Story" (last modified 2021), online: *McMaster University* <brand.mcmaster.ca/our-story/> [perma.cc/GTJ8-J6TJ].

(6) to enable students, staff and faculty to cultivate various educational, work and personal skills;

(7) to foster an environment where individuals can exercise their creative and educational potential; and

(8) to ensure all members of the university can experience these opportunities and learn, work, live and research free from fear, violence, hate, discrimination and harassment.[124]

Taken together, we can see how the purpose of universities is to contribute to social betterment – the enhancement of social and economic positions of people and prosperity of societies. Universities leverage commitments to fundamental rights and freedoms to "serve the common good of society, through searching for, and disseminating, knowledge, and understanding and through fostering independent thinking and expression."[125] In addition to these common goals, universities have a suite of internal policies and protocols that are aligned with federal and provincial legislation. These documents outline the rights and responsibilities of their community members and the university's obligations and procedures for managing non-adherence to these rights and responsibilities.[126] For example, universities have statements of commitment, guidance documents and policies that address academic integrity, mental well-being, accessibility and accommodation, equitable recruitment, student and employee conduct and professionalism, discrimination, harassment and violence as well as academic freedom.

In the past couple of years, several provincial jurisdictions have required post-secondary institutions to introduce free speech policy statements.[127] These relatively new government requirements for universities to develop stand-alone free speech policy statements have been introduced where, arguably, there are already existing statements on freedom of expression, and particularly long-standing statements on academic freedom – one of the most fundamental aspects unique to all universities.[128] Before continuing, at

[124] See Ben-Porath, *supra* note 25; Mackinnon, *supra* note 19; Strossen, *supra* note 85; Whittington, *supra* note 18.

[125] *Canadian Association of University Teachers*, *supra* note 13.

[126] See Ben-Porath, *supra* note 25; Mackinnon, *supra* note 19; Strossen, *supra* note 58; Whittington, *supra* note 18.

[127] See McKay-Panos, *supra* note 21 at paras 1–2; See also Moira Wyton, "Post-Secondaries Across Alberta Adopt American-Flavoured Free Speech Policies" (17 December 2019), online: *Edmonton Journal* <edmontonjournal.com> [perma.cc/VVL5-KVVA].

[128] See Ben-Porath, *supra* note 25; MacKinnon, *supra* note 19; Whittington, *supra* note 18; Strossen, *supra* note 55.

this point it is important to define academic freedom in relation to freedom of expression. Academic freedom is a privilege specific to institutions of higher education and it plays an important role in the commitment to the social betterment of universities. The right to academic freedom belongs to faculty members whereby they have the freedom to "put forward new ideas and unpopular opinions without placing [themselves] in jeopardy within [their] institution … and to make decisions, at least with respect to academic matters, free from government interference."[129] In a 1990 freedom of expression case involving the University of Guelph, the SCC stated that the "preservation of academic freedom … is an objective of pressing and substantial importance."[130] Moreover, as with freedom of expression, academic freedom can be said to have various fundamental core values; that is, to pursue multiple avenues of research, to learn unhindered and to engage in full and unrestricted consideration of any opinion.[131] As with free expression, the right to academic freedom is not absolute. Academic freedom is bound by various constraints around assessment and peer evaluation.

Based upon the language institutions have used within these stand-alone free speech policy statements, two observations can be made. First, the nuance required to determine whether expression is or is not acceptable within a university setting, as well as the appropriate set of responses once a decision is taken, requires both legal and critical social analysis. Second, oftentimes these statements articulate the prohibition of, or non-tolerance for, expression that is "intimidating"[132] although this type of expression would not on its own meet the threshold for limitation in society according to case precedent including decisions of the SCC. The human rights legislation in some jurisdictions uses the terminology of intimidation to illustrate what may constitute harassment or a poisoned environment,[133] and the occupational health and safety legislation in some jurisdictions uses the

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[129] *Pridgen v University of Calgary*, [2012] ABCA 139 at para 114 [*Pridgen*].

[130] *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 234, 281, 283, 76 DLR (4th) 545 [*Mckinney*].

[131] *Ford*, *supra* note 69 at 765–66.

[132] "Code of Student Conduct" (2018) at 4, online (pdf): *Dalhousie University* <dal.ca/dept/university_secretariat/policies.html#> [perma.cc/RR96-W6PS]; See also "Harassment and Discrimination Prevention and Response Policy" (2021), online (pdf): *Queen's University* <queensu.ca/secretariat/harassment-and-discrimination-prevention-and-response-policy> [perma.cc/2S8L-GTA4]; "Disclosure and Complaints Procedure" (2009), s 2.10 (b), online (pdf): *University of Manitoba* <umanitoba.ca/admin/governance/media/Disclosures_and_Complaints_Procedure_2020_09_29.pdf> [perma.cc/Y4MB-UKRY].

[133] See Bill 212, *The Human Rights Code Amendment Act (Bullying)*, 2nd Sess, 40th Leg, Manitoba, 2013, s 19.1(2).

terminology in reference to prohibiting employers from coercing workers, for example.[134] However, the conversation about the ambiguity of terminology used to determine the thresholds of the limit of free expression in the case precedent is a reminder that university policies regulating conduct must thoughtfully consider the analysis of and any intervention for behaviour that is experienced as intimidating in the context of both statutory and constitutional law.

This language used within universities is important because it suggests various thresholds of acceptable and nonacceptable speech and behavior and it may, on its surface, appear to conflict with the thresholds determined in Canadian freedom of expression caselaw. However, this language may be understandable given strong anti-bullying and anti-harassment movements in educational and workplace settings (whether based on human rights protected grounds or not). That said, it is important to note that the language used to regulate behaviour can differ greatly across universities. In fact, in a submission to the Wilfred Laurier University Task Force on Freedom of Expression, the Justice Centre for Constitutional Freedoms recommended adopting a policy that only prohibits expression that is considered by the courts to be criminal hate speech.[135] Therefore, just as tribunals and courts have different interpretations and descriptions of reasonable limits to free expression, universities may also have different interpretations and descriptions of reasonable limits to behaviour and/or expression. These differing approaches suggest that the way in which campus free expression matters may be assessed and addressed may also vary depending upon a university's set of statements of commitment, guidance documents, policies and protocols. As will become apparent in paragraphs to follow, the unique approaches and definitions universities have adopted and embraced are important to recognize and understand in the context of navigating and reconciling campus expression and equality rights issues.

ii. Context of Varying Sites of Expression

While universities are subject to different municipal, provincial and national jurisdictional legislation, their policies governing expression and equality may not be exactly the same as those governing public spaces within society. One reason for this difference is that university campuses are dynamic landscapes composed of various spaces or "sites". These "sites"

[134] See *Occupational Health and Safety Act*, RSO 1990, c O.1, s 50(1)(d).
[135] See Kitchen, Cameron & Carpay, *supra* note 1.

further different objectives and consist of varying authoritative structures whether that be to provide living space for academic learning, or to foster an environment conducive to research, dialogue and exploration. Some examples of different "sites" include classrooms, office spaces, research labs, libraries, open social spaces, residencies, campus stores, gyms and theatres. While expression that is communicated in different public spaces within society follows the same legal protocols set out by human rights legislation, the *Charter* and the *Criminal Code*, some scholars, like Richard Moon, a law professor at the University of Windsor, have queried whether and how expression (which is communicated in different living) and learning and working "sites" on campus should be subject to different rules and expectations. In a blog entitled "(Free) Speech on Campus", posted on the Ryerson University Centre for Free Expression website, Moon argues that "expression may be subject to greater limits when it occurs in a particular institutional context".[136]

The concept of differentiating between various "sites" on campus (as a means to nuance the conversation and interpretation of expression and equality rights on campuses) has not been contemplated at great length by Ontario universities. However, some scholars have argued that because "campuses house a unique type of community … this makes it necessary to … clarify to their members the expectations and rules around speech"[137] in different "sites". Of course, each university site will not tolerate hate speech, discriminatory speech or harassment, but it has been queried whether, for example, students *living* on campus should be free from certain forms of expression in their living environment even though those forms of expression may not be so easily restricted within *academic* learning sites on campus. A consideration of the different objectives of various sites across a university campus may be relevant to enhancing the processes and outcomes associated with managing free expression challenges.

iii. Contested Legal Autonomy

To no surprise, universities across Canada are not entirely free from government influence or intervention. Universities are funded by their provincial governments and, within Ontario for example, a ministry develops policy directions for the universities and authorizes them to grant

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[136] Richard Moon, "(Free) Speech on Campus" (16 November 2017), online (blog): *Centre for Free Expression: Ryerson University* <cfe.ryerson.ca/blog/2017/11/free-speech-campus> [perma.cc/HBN2-YKUS].
[137] Ben-Porath, *supra* note 25 at 104.

degrees.[138] Generally speaking, however, Canadian universities have had the distinct feature of being legally autonomous institutions with their own systems of governance – a feature facilitated by university acts that play a "major role in protecting this autonomy by assigning responsibility for important matters requiring academic judgement to the university, and more importantly, explicitly to the senate within the internal governance structure of the university".[139] While historically recognized by the courts, this valued autonomy, however, is being complicated through actions such as government mandated free speech policy statements and recent judicial decisions declaring that university expression *can* be subject to the *Charter*.[140] James Turk, Director of the Centre of Free Expression at Ryerson University, chronicles the case precedent across jurisdictions where the courts found the *Charter* applied[141] or did not apply,[142] pointing to "a divide between the courts in Alberta and those in British Columbia and Ontario".[143] Increased government intervention has the potential to greatly influence the way in which freedom of expression matters are dealt with on campus and how those matters are dealt with in a court of law.[144] Thus, it is exceptionally important that university administrators understand the uncertainty that characterizes this discussion around university autonomy, with respect to expression, as it relates to *Charter* applicability.

Earlier, this article discussed *Charter* section 2(b), which outlines Canada's fundamental freedoms, including the right to freedom of expression. The *Charter* is a document that seeks to ensure governments and governmental entities are not infringing upon an individual's *Charter* rights.[145] Thus, the *Charter* ultimately governs relationships between a government entity and an individual.[146] That being said, the judiciary has ruled that the *Charter can* apply to *non*-governmental entities, but only if that

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[138] See "Ministry of colleges and universities" (last modified 1 October 2020), online: *Ontario* <ontario.ca/page/ministry-colleges-universities> [perma.cc/CN9S-S58E].

[139] Julia A Eastman et al, "Provincial Oversight and University Autonomy in Canada: Findings of a Comparative Study of Canadian University Governance" (2018) 48:2 Can J Higher Education 65 at 78.

[140] See *McKinney, supra* note 130; see also Alison Braley-Rattai & Kate Bezanson, "Un-chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" (2020) 29:2 Const Forum Const 65; James L Turk, "Universities, the Charter, Doug Ford, and Campus Free Speech" (2020) 29:2 Const Forum Const 31.

[141] *See Pridgen*, *supra* note 129; *Whatcott*, *supra* note 30; *Wilson v University of Calgary*, 2014 ABQB 190.

[142] See *McKinney*, *supra* note 130; *Telfer v The University of Western Ontario*, 2012 ONSC 1287; *Lobo v Carleton University, 2012 ONSC 254; Alghaithy v University of Ottawa*, 2012 ONSC 142.

[143] Turk, *supra* note 140 at 40.

[144] See *Mckinney, supra* note 130 at para 45.

[145] See Walker, *supra* note 29 at 2. See also *Charter*, *supra* note 8, s 1.

[146] Nick E Milanovic, *Introduction to Public Law: Readings on the Law, State, and Constitution*, 7th ed (Concord, ON: Captus Press, 2015).

entity is implementing a specific government policy or program.[147] Following that line of logic, would the *Charter* then apply to university expression within Ontario as they are non-governmental entities implementing a government-mandated free speech policy? This, therefore, begs the question of the whether the introduction of provincially mandated activity places universities closer to an interpretation that deems them subject to the *Charter*; hence the term "*Charter* applicability". Thus far, judges within Ontario have not ruled that the *Charter* applies to university expression, and because the SCC also has not arrived at a definitive decision on this matter, the answer remains unknown. However, this situation differs slightly in Alberta. In January of 2020, the Alberta Court of Appeal released a controversial decision stating that the *Charter does* apply to the exercise of speech by students, a judgment that directly contradicts jurisprudence in other jurisdictions.[148]

As mentioned, until the SCC releases a binding decision concerning *Charter* applicability with respect to free expression matters, the issue in Ontario universities will remain unclear. That being said, one can cautiously speculate as to how *Charter* applicability may affect the ways in which free expression issues are dealt with on campus in Ontario. For example, if universities are *not* found to be *Charter*-free zones, this may put pressure on universities who have established lower thresholds for prohibited expression to adhere to the high threshold established by the SCC with respect to criminal hate speech. As a result, university policies on discrimination and harassment often include language aligned with human rights legislation clarifying that nothing in the policy may interfere with or restrict freedom of expression and academic freedom. Moreover, as stated by the SCC in the 1990 *McKinney v University of Guelph* case concerning *Charter* applicability to private entities, "any attempt by government to influence university decisions … could lead to breaches of academic freedom, which is necessary to our continuance as a lively democracy."[149] Similarly, the Human Rights Tribunal of Ontario in a 2012 freedom of expression case, also made a point of noting that "courts and tribunals should be restrained in intervening in the affairs of a university in any circumstance where what is at issue is expression…no matter how

[147] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 42–4, 151 DLR (4th) 577.
[148] *Ibid*. See also *UAlberta*, *supra* note 24; see also Michaluk, *supra* note 23 at para 1.
[149] *Mckinney*, *supra* note 130 at para 45.

controversial or provocative those ideas may be"[150] so as to protect the values and privilege of academic freedom.

The question of *Charter* applicability to universities remains relevant as the case law across jurisdictions demonstrates differing conclusions.[151] That said, legal practitioners advise that university administrators always consider reasonable, proportional and balanced interventions when managing freedom of expression issues.[152] This is due to the fact that precedent cases demonstrate these are principles that judges will be looking for when making their assessment of whether a university intervention to limit speech is warranted or constitutes a violation of the *Charter.*

It is crucial that university administrators tasked with managing freedom of expression issues have a comprehensive understanding on what the *Charter*, *Criminal Code* and *CHRA* state with respect to expression, when these pieces of legislation apply, and to whom they apply. Knowledge of the law and how the law applies to freedom of expression cases through precedent is crucial for three reasons. First, it will help university administrators to mitigate freedom of expression incidents on campus. Second, the legal tests and guidelines developed by various courts and tribunals will provide guidance for university administrators as they attempt to discern between different types of expression. Third, if university administrators are compelled to limit expression, up-to-date knowledge of recent precedent along with a focus on reasonable, proportional and balanced limits will adequately prepare them to more successfully defend a claim of a free expression violation in a manner that avoids creating bad precedent – a decision that undermines the goals of strengthening equality rights simply due to lack of consideration of the substantive and procedural criteria for the *Oakes* Test.

IV. Implications

Freedom of expression matters are incredibly complicated to navigate in and of themselves, but when they emerge on the terrain of a university, there are added layers of complexity when it comes to managing those matters. Firstly, although universities are reflective of society, they are not solely

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[150] *McKenzie*, *supra* note 101 at para 35.

[151] See *McKinney*, *supra* note 130; *Pridgen*, *supra* note 129; *Telfer*, *supra* note 142; *Aba-Alkhail v University of Ottawa*, 2013 ONSC 2127.

[152] Rory Rogers & Jennifer Taylor, "Canada: An Update on Freedom of Expression & *Charter* Application to Universities" (1 March 2018), online: *Mondaq* <mondaq.com/canada/education/678606/an-update-on-freedom-of-expression-charter-application-to-universities> [perma.cc/8V4Z-ZN4R].

governed by human rights legislation, the *Criminal Code* and the *Charter* (notwithstanding the uncertain nature of where and how the *Charter* is applicable). Institutions of higher learning are also governed and influenced by their core values for academic freedom and commitments to social betterment articulated as a commitment to equity, diversity and inclusion. Secondly, universities possess various "sites", creating a dynamic landscape with multiple purposes, varying power structures and different expectations concerning appropriate discourse. Thirdly, although universities are non-governmental entities, there is still a looming uncertainty around *Charter* applicability in the context of expression. Nonetheless, it is through recognizing these contextual factors and understanding how they contribute to the complexity of on-campus free expression matters, that will help guide administrators through the deliberation and decision-making process. As Ben-Porath states, the management of campus expression and equality rights issues must go beyond understandings and considerations of constitutional and legal limits and precedent in order to incorporate the aspirations of the university considering its societal purpose (shaping new social and legal norms).[153] She also suggests that "speech is even more precious and has an even more significant role to play on campus, which, in turn, requires that further attention be given to it in handbooks or guidelines" beyond academic freedom guidance documents, the *Criminal Code* and human rights legislation.[154]

Below we discuss two recommended strategies to enhance the capacity of university administrators and the campus community to respond to campus expression and equality rights challenges:

(1) developing and improving student and faculty capacity; and

(2) developing assessment and decision-making tools.

A. Student and Faculty Capacity

The first recommendation is that universities invest in orientation, onboarding and ongoing initiatives to build the capacities of students and faculty members to better navigate topics that may fall on the expression-equality rights continuum. In-person and/or blended in-person and online training opportunities should be designed and delivered using pedagogies that resonate for different target audiences. For example, developing the

[153] See Ben-Porath, *supra* note 25.
[154] *Ibid* at 104.

necessary skills to integrate an ethics of care[155] approach in the teaching and learning process. While some concepts and definitions will need to be described by the facilitator, the training should primarily be focused on skill-building by employing interactive team-based learning through discussion of various scenarios. The content of the training should aim to achieve the following learning outcomes for any participating community members:

(1) awareness of legislative and university policy expectations with respect to expression and equality rights;

(2) an understanding of academic freedom as a fundamental institutional principle and how it differs from freedom of expression;

(3) an awareness of issues related to social identity and inequality;

(4) greater confidence to discuss controversial topics;

(5) a commitment to building and applying a set of skills required for more effective engagement of controversial topics within a diverse learning environment (e.g. intellectual humility, emotional intelligence, active and empathic listening, compassionate critique, critical thinking, conflict resolution, etc.); and

(6) an awareness of campus resources available to further develop skills and/or to address any concerns relating to expression and equality rights challenges.

i. Students

As students transition from secondary school to university, they are educated on various rules and expectations that must be followed on campus to ensure a safe, collaborative and active learning environment. For example, incoming students are informed of university sexual violence and alcohol policies. However, they have less exposure to their university's commitments to expression and equity rights. Thus, it would greatly benefit the university community if incoming students were also educated on the institution's core values including commitments to academic freedom, human dignity, equality of opportunity, freedom from harassment and discrimination and to free expression within the bounds set out in constitutional, administrative and criminal law, as well as the parameters of university policy.

[155] The ethics of care theory and movement, which emerged from the work of psychologist Carol Gilligan and philosopher Nel Noddings, is a relational perspective that provides an alternative to more utilitarian approaches to the administration of human rights and other laws.

As with any educational effort, the pedagogical challenge is to identify the appropriate content and modes of delivery to capture the incoming students' attention and achieve the desired learning outcomes. A particularly challenging aspect of these types of socially and legally complex topics is finding the right balance of online self-directed and in-person interactive opportunities for effective learning. For example, perhaps this information might best be communicated through interactive workshops whereby an opportunity for dialogic engagement between students and the workshop facilitator is created. Ultimately, such information sessions would aim to better prepare incoming students for their adjustment from the academic culture in the secondary school environment, where certain controversial topics would have typically been avoided, to the academic culture in the post-secondary school environment, where these same topics are more likely to be invited and engaged.

Equity and Inclusion Office personnel should collaborate with Student Affairs personnel to design and deliver these intentional educational opportunities. These opportunities would serve as a staple within first-year student orientation programming, as part of the suite of programming available throughout the first-year transition process, and as general educational opportunities for *all* students. Faculty should also be able to invite facilitators of this programming to attend portions of their classes as required. While hearing from professional human rights and student development staff members will be helpful, training a diverse cadre of upper-year and graduate students to deliver these sessions to first-year students will be much more impactful, as "research on peer teaching indicates that both the peer learner and the peer teacher learn significantly from collaborative learning experiences."[156] In this way, "formalized peer-learning can help students learn effectively" and can act as an "important addition to the repertoire of teaching and learning activities that can enhance the quality of education,"[157] including education goals related to human rights, equity and inclusion. In their guide for peer educators on college campuses, Fred Newton and Steven Ender map out the value of a reciprocal student to student teaching and learning model and the contributions that peer educators make to promoting student maturation, cultural proficiency and a range of other interpersonal skills – skills which we suggest are

[156] John N Gardner & Betsy O Barefoot, *Your College Experience: Strategies for Success*, 12th ed (Boston, MA: Bedford/St. Martin's, 2015) at 12.

[157] David Boud, Ruth Cohen, & Jane Sampson, *Peer Learning in Higher Education: Learning from and with Each Other* (New York, NY: Routledge, 2013) at 3–4.

important for navigating equality and expression controversies.[158] Jennifer Keup, Executive Director of the National Resource Centre for the First-Year Experience and Students in Transition, has written that peer leadership "provides a valuable means to advance diversity skills and intercultural competence in a way that is more organic and less socially engineered than more formal curricula and events about the topic of cross-cultural awareness and interaction."[159] Further thought must be given to strategies to continue engaging students in this learning through their undergraduate and graduate years.[160]

ii. Faculty

The faculty body would equally benefit from the training described above, tailored to their needs, as well as more intentional opportunities to explore teaching philosophies that may better support the management of expression and equality rights issues in academic contexts. Increasingly, faculty members – and particularly those who have a deep appreciation of social justice and a commitment to equity and inclusion – are seeking proactive guidance and reactive advice in relation to managing expression and equality rights challenges in the classroom. We return to the example of the use of the "n-word" in the classroom. This example highlights the value of establishing and sustaining an ethics of care in the learning environment as a pedagogical norm and best practice. An ethics of care, in addition to knowledge of the thresholds of harassment and discrimination within the context of academic freedom, will help to protect equality rights and foster a learning environment that supports the dignity of all persons.

Mainstream media has highlighted various instances when a university's mismanagement of complaints relates to expression and equality rights issues emerging from classroom interactions. A plethora of these cases involved the use of the "n-word" in classrooms. Two recent articles – one published in the *Montreal Gazette* and one for *Inside Higher ED* – explored the long-standing debate on the use of the "n-word" in the classroom from a Canadian and a US standpoint respectively.[161] Both articles

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[158] See Fred B Newton & Steven C Ender, *Students Helping Students: A Guide for Peer Educators on College Campuses* (San Francisco, CA: Jossey-Bass, 2010).

[159] Jennifer R Keup, "Peer Leadership as an Emerging High-Impact Practice: An Exploratory Study of the American Experience" (2016) 4:1 J Student Affairs in Africa 33 at 46.

[160] See Jennifer R Keup, *Peer Leadership in Higher Education*, 1st ed (San Francisco, CA: Jossey-Bass, 2012).

[161] See René Bruemmer, "N-Word Deserves Repugnance, but also Discussion: Experts" (21 October 2020), online: *Montreal Gazette* <montrealgazette.com> [perma.cc/PLD7-KL22]; Ruth A Starkman, "Dropping

point to a valuable pedagogical concept advocated by critical feminist and antiracist scholars like Berenice Malka Fisher and bell hooks – the concept of an ethics of care. In her book *No Angel in the Classroom*, Fisher devotes an entire chapter to exploring the ethics of care where she argues that "the interplay among experience, feeling, thinking, and action evokes certain needs",[162] requiring teachers to exercise care and compassion towards students in order to create an optimal learning environment.[163] In her book *All About Love*, hooks says that engaging care, trust, responsibility and respect in addition to knowledge in the classroom, is a more holistic and human-centred approach to teaching – an approach that critical pedagogy scholars have long argued has greater potential for more engaged and transformative learning.[164] Fisher and hooks invite consideration that employing an ethics of care in the classroom provides the teacher, and indeed the learning community, with a particular framework that acknowledges the effective power of language and an opportunity to make a relational rather than legally-driven choice about whether and how to use words.

These articles are demonstrative of the contemporary public conversation that will not only continue into the foreseeable future, but will also intensify in the aftermath of renewed attention to anti-Black racism and to the equality, dignity and liberty rights of individuals of African descent and diaspora in Canada. The classroom-use of the "n-word" is an interesting example when considering shifting mores and, therefore, possible changes within the legislative landscape. Given that we are now seeing more mainstream recognition among students and faculty that the "n-word" is not only disrespectful and distasteful, but also profoundly dehumanizing, employing an ethics of care approach to navigate thoughtfully engaged academic discussions on content that references terminology seems a reasonable and proactive measure to maintain a productive learning environment.

For faculty development, we suggest that resources and training workshops be collaboratively designed and delivered by Equity and Inclusion Office personnel and Teaching and Learning Centre personnel.

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the N-Word in College Classrooms" (24 July 2020), online: *Inside Higher ED* <insidehighered.com> [perma.cc/3G6N-5HRM]; bell hooks, *All About Love* (New York, NY: Harper Perennial, 2000).

[162] Berenice Malka Fisher, *No Angel in the Classroom: Teaching through Feminist Discourse* (Lanham, MD: Rowman & Littlefield Publishers, 2001) at 113.

[163] *Ibid*.

[164] hooks, *supra* note 161.

These should become a staple for new faculty onboarding programming and available year-round for instructors including teaching assistants.

B. Tools for Assessment and Decision Making

The second recommendation is that universities develop assessment and decision-making tools to guide academic administrators in their responses to campus expression controversies. We propose that an assessment questionnaire (that helps to map a university's contextual factors) as well as a decision-making flow-chart (to support more effective processes and outcomes), should be considered when managing such controversies. These tools will also be helpful records of thoughtful assessment and decision-making if *Charter* or *CHRA* violation claims are brought against the university.

Here too, we stress the value of university administrators exercising an ethics of care philosophy while adhering to legal frameworks to guide responses to expression-equality issues. The ethics of care framework says that attending to emotions and relationships – particularly with students belonging to socially marginalized groups – is essential to fostering a sense of dignity and respect. This philosophy may help to humanize processes that may otherwise be experienced as a legal exercise devoid of consideration of human impact regardless of the outcome.

i. An Assessment Questionnaire to Map Contextual Factors

Appendix A provides an example of the types of questions that can be developed as part of a formal assessment questionnaire to help guide administrators in surfacing and mapping the contextual factors that will need to be considered when responding to expression-equality rights challenges on campus. As mentioned before, it is crucial to recognize and attend to these distinct contextual factors. Such documentation may help to both remind administrators of their importance, as well as to ground the deliberation process. The creation of such a document would also encourage university administrators to reflect upon the boundaries of speech as it pertains to each space and to ensure that their expectations and rules attend to both expression and equality rights. Such a tool would also help community members understand the type of questions that university administrators must consider when accessing what may be acceptable or unacceptable expression within various contexts. Moreover, students, professors, teaching assistants, staff and researchers would greatly benefit

from such a transparent guiding document as it would support their understanding of the complexity of individual and groups rights to be protected on campus. This guidance document does not, and would not seek to, define or prescribe rigid limits around what *specific* expression is or is not acceptable. Rather, the document would merely seek to map out some contextual differences across the campus environment for more nuanced deliberation and decision-making. To illustrate the application of the questionnaire, Figure 4. outlines a hypothetical scenario (taken from a composite of actual incidents experienced by one of the authors) to demonstrates how the assessment tool can help to map some contextual factors that will be important to deliberations and decisions about this case. Over time, universities will have a bank of precedent situations to inform and improve deliberations and decision-making. This bank of cases can be used in the design of hypothetical scenarios for the training sessions discussed in the preceding section.

Figure 4. Example of Expression-Equality Scenario in a Residence Hall

A student living in a residence hall reports where one of their neighbours has a Canadian Red Ensign flag hanging in their room. The student says that the flag comes into plain view from the hallway whenever the neighbour's door is opened. The student feels that hanging the flag in a residence room is a violation of the University's Student Code of Conduct and Discrimination and Harassment Policy because "the flag is used by contemporary white supremacy groups as a symbol of white pride and the promotion of racial bigotry". The student claims that awareness and visibility of the flag is creating a "chilling effect" on the residence floor and that it is particularly distressing racially minoritized students. The student shares that they are now seeing several students posting pictures of the flag with captions asserting that the owner of the flag is racist and calling for the University to take action to remove the flag and reprimand the owner. Apparently, when confronted by the student, the neighbour stated that he was not racist and this was a flag that represents his family heritage – he was gifted it by his grandfather who was a war veteran.	
Contextual Mapping Questionnaire	
1. How does academic freedom apply or not apply to the situation?	Academic freedom does not apply in this situation.
2. How does the expression further or detract from the university's missions including social betterment goals?	The Red Canadian Ensign flag has indeed been co-opted in the last decade by contemporary white supremacist groups, and therefore perceived/experienced by some as a hate symbol.

3. How does the expression further or detract from the core values of the university including safeguarding the dignity, equality and liberty of community members? 4. How does the expression serve to advance or threaten to undermine university commitments to equity, diversity and inclusion?	The contemporary hate symbolism clearly detracts from the university's goals. This flag's contemporary hate symbolism is experienced as an affront to the sense of dignity of racialized students threatening to undermine the perception of the university's commitment to equity, diversity and inclusion.
5. In which "site" on campus was the expression communicated? What is the purpose of that space, as well as the expectations and rules around engagement in that space? 6. Through what medium was the expression communicated? And was that medium public, private or university-owned/sanctioned?	The expression occurred in a residence, which serves as a living and learning space. Residence rooms are private spaces within the broader public residence buildings. The public spaces are governed by the university's policies and the laws of the land. The message was conveyed, intentionally or unintentionally, in the hanging of the flag in a private space which was, however, visible to the public from the hallway – a designated public space in the residence.
7. Who is claiming the right to expression versus equality and what is the power differential between the sender and the receiver of the expression?	The reporting student, racialized students on the floor and on campus as well as some members of the broader student body are claiming an infringement on human rights. The owner of the flag is claiming that they have a right to freedom of expression particularly in their private room.
8. What external societal factors or dynamics may be at play? (e.g., Black Lives Matter movement, government commissions to address systemic inequities etc.)	There is a rise in xenophobia with more reported instances of white supremacist groups expressing anti-Indigenous and anti-Black racism as well as Islamophobia and antisemitism in Canada. At the same time, there are heightened calls across sectors to address colonialism and the multiple forms of systemic racism.
9. What strategies have been considered to mitigate the possibility that the expression may incite hate or discrimination?	If the case does not meet the threshold of discrimination or a criminal act after a human rights and *Criminal Code* analysis, then the following strategies may be considered:

10. What strategies have been considered to mitigate claims of rights infringements (e.g., dignity, equality and liberty) given the decision to limit or not limit the expression?	a) education of all parties on the history of the flag including its contemporary co-opted usage; and b) consideration of moving the flag to an area of the private room where it is not in plain sight from the hallway.

ii. A Decision-Making Flow Chart

As stated earlier, if the expression in question reflects various "hallmarks of hate" then it should be referred to local police to assess whether it constitutes a violation of the *Criminal Code*. However, if the threshold for criminal hate speech is not reached, the assessment tool, discussed above, along with the decision-making tool, discussed below, will help guide university administrators through the situational complexities of expression and equality rights challenges at hand so that they may bring the most nuanced analysis to their deliberations. Appendix B depicts an example of a decision-making flow-chart that can be developed to assist administrators in determining the appropriate response to each unique situation.

When an expression and equality rights issue is brought to the attention of administrators by a community member seeking intervention by the university, the first step is to determine whether there is a central connection or nexus to the university. This determination dictates whether the university has jurisdiction to address the issue through its human rights and other relevant regulatory policies. To assess whether there is sufficient nexus to the university and therefore jurisdiction to engage university policies, administrators will consider the following:

(1) did the incident occur on or off campus;

(2) was the occurrence in a public or private space; and

(3) did it take place in the context of a university sanctioned or unsanctioned event or presented as a university affiliated event?

If it can be argued that there *is* a clear connection to the university learning or working environment, the next question to ask is whether there is a real or potential adverse effect on the educational or employment experience of campus community members. Following this determination,

when community members seek to engage a university human rights policy to address expression that is alleged to have violated an equality right, administrators must first examine the context in which that expression occurred and the content of the expression to determine whether the university "can, should, or will act"[165] – let alone *how* it might act.

When considering context, administrators must further examine the educational or employment context of the expression assessing whether it occurred in a curricular, co-curricular or extracurricular environment. In extracurricular spaces, such as in the context of residence environments and student life or athletic activities, codes of student conduct must ~~also~~ typically be consulted in addition to human rights policies and consideration must be given to private versus public domains in which the expression occurred. In curricular space or formal teaching and learning environments, academic freedom of faculty members must be considered alongside any faculty codes of conduct that may be relevant. If the nature and circumstances surrounding the expression fall under the purview of what is considered academic freedom, then that expression is protected. Otherwise, limits and or mitigations may be applied. In co-curricular spaces, where the expression and equality rights issues emerge in the context of organized events with guest speakers, academic freedom must also be considered and protected where relevant alongside a risk of harm assessment. Administrators would only seek to impose reasonable limits or mitigating adjustments with events deemed to pose a potentially high risk of harming community members. For lower risk events, administrators typically work proactively with event organizers on safety planning and securing skilled facilitators to manage dialogue and debates. Imbedding alerts or prompts in student event planning and risk management forms to trigger administration to reach out to event organizers is an extremely helpful planning step to proactively navigate potential expression and equality rights challenges.

It is important to note that the various university codes of conduct and human rights policies and communications about their implementation should ensure that the language and rationale used is aligned with the law and defensible if it were to be challenged and heard by human rights tribunals and/or courts. Universities may seek to limit or mitigate the expression only after seeking guidance from the legal definitions of discrimination and harassment and case precedent for that kind and context

[165] Milé Komlen, "Drawing the Line: Defining the Nexus to Campus when Off-campus Incidents Occur" (31 March 2021), online (video): *CAPDHHE* <capdhhe.ca/training> [perma.cc/A3LS-TSRK].

of expression that has been found by tribunals or courts to be an infringement of human rights. In situations where the university assesses that limitations or mitigating adjustments may be warranted, they must be applied reasonably and progressively so as not be:

(a) arbitrary;

(b) overreaching; or

(c) grossly disproportionate.

Ensuring this would minimally violate individual autonomy and free expression. Returning to the case in the residence hall described in Figure 4. and having considered some contextual factors, we can use the decision-making flow-chart to consider the most appropriate response. First, there *is a nexus* to the campus as the expression is taking place on university property that is emerging from a private space, but reaching a publicly available space, with possible adverse effects on minoritized student groups. As there is a possible association with hate symbolism, engaging campus security and the police to assess whether the incident meets the threshold of hate speech is warranted. Second, the expression took place in an *extracurricular context*, outside of any learning purpose, so academic freedom is not relevant. The university may engage its human rights policy and codes of student conduct and professionalism to investigate and apply a legal analysis as to whether and how the expression may meet the definitions of discrimination and harassment, in which case, limits or mitigations to freedom of expression may be imposed. If the legal analysis leads to a finding of an adverse discriminatory effect on the basis of a protected ground, then the university can impose remediation to ensure the discriminatory behaviour ceases (e.g. requiring that the flag be moved to a location that is not visible to the public, if not requiring the removal of the flag entirely, depending on the findings of the analysis). If the legal analysis does not lead to a finding of an adverse discriminatory effect on the basis of a protected ground, then the university can consider engaging informal restorative methods to achieve a mutually agreeable resolution (e.g. requesting consideration of the history of the flag and impacts on individuals and communities and proposing moving the flag to a location that is not visible to the public). Whether formal or informal remedies are sought, this resolution will be enhanced by providing support and education to both parties and possibly facilitated discussion as a restorative measure for the residence community.

V. Conclusion

It is not uncommon to read in an article or to hear among the chatter on campus that universities are undergoing a "free speech crisis", or that the right to free speech "is under attack".[166] Not only is this characterization false, but it contributes to, and intensifies, an existing polarity between expression rights and equality rights – two fundamental rights that contribute to the success of universities and should be in a symbiotic relationship with one another, not at war. While university campuses may be experiencing an increase of "free speech controversies", this reality is not synonymous with a "free speech crisis". This article discussed the ambiguities involved in managing expression and equality rights cases that are further complicated by the distinctive nature and contexts of universities. Within this complexity, we identified opportunities for university administrators to bring a more nuanced analysis to the task of navigating expression and equality rights issues. These opportunities include having administrators attend to their unique commitments to social betterment, the contextual nature of the university's varying sites of expression and their contested authority with respect to the applicability of the *Charter*. This article sought to explore the question of whether and how the legislative landscape in Canada may or should be shifting in relation to the adjudication and regulation of expression with hate-motivated undertones or overtures given the observable rise in xenophobia across the nation and the globe.

The purpose of the article was threefold:

(1) to highlight the complexities of free expression issues in the context of Canadian universities;

(2) to discuss the contemporary challenges and nuanced opportunities facing university administrators; and

(3) to provide some suggestions for the improved management of campus expression and equality rights issues.

To achieve these goals, the article began by proposing a conceptual shift from the framing of the free expression versus hate speech polarity of

[166] "Free Speech – Under Attack" (4 June 2016), online: *The Economist* <economist.com> [perma.cc/7JZH-926X]; Tom Slater, "The Suppression of Free Speech on University Campuses is Reaching Epidemic Levels" (3 February 2015), online: *The Telegraph* <telegraph.co.uk> [perma.cc/UF5P-SZ5M]; William Davies, "The Free Speech Panic: How the Right Concocted a Crisis" (26 July 2018), online: *The Guardian* <theguardian.com> [perma.cc/X2LK-GB5H].

conflicting rights, to a more balanced model of an expression-equality rights continuum of complementary rights to be reconciled. This reframing was offered as a way to reinforce the primacy of each of the three pillars of human rights and freedoms in Canada – dignity, equality and liberty – and to discourage the hierarchization of rights and freedoms. The body of the article discussed Canada's legislative landscape in relation to freedom of expression cases, revealing a degree of juridical ambiguity associated with the analysis of, and language used, to describe what constitutes hate speech from the highest court. This was a troubling finding, as was the analysis that administrative law may not be as helpful as it could be with regard to discerning whether contested expression amounts to discrimination or harassment. Revealing such ambiguity offered an opportunity to critically examine the subjectivity that exists within the judiciary and to create the possibility for new interpretations of what constitutes the threshold for harassment, discrimination and hate considering contemporary social realities and beyond.

The possibility for new legal interpretations is critically important to responding and regulating new social norms and expectations with respect to bias and hate-motivated behaviour. Social and political science scholars, as well as human rights practitioners and social justice advocates, have long been concerned about the links between a culture permissive of explicitly biased and prejudiced expressions and the eventuality of more extreme forms of hate-motivated speech acts and other behaviours. Barbara Perry and Ryan Scrivens, experts on hate, bias and extremism, trace the environmental factors or the "conditions that bestow – and challenge – 'permission to hate'".[167] Perry and Scrivens write that "the line between mainstream and extreme is becoming increasingly blurred [and there is a] lengthy history of the parallels between 'mainstream' xenophobia and 'extreme' versions of the same discourse."[168] The article offers recommendations to support improved management of campus expression and equality rights issues. These include the development of student and faculty capacities to better navigate expression and equality rights in various campus and classroom settings and the development of tools to support the administrative management and response to expression and equality rights. These initiatives are suggested as means to enhance responses within the bounds of the current criminal and administrative law.

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[167] Barbara Perry & Ryan Scrivens, *Right-Wing Extremism in Canada* (Cham, Switzerland: Palgrave Macmillan, 2019) at 89.

[168] *Ibid* at 90.

In a chapter exploring contested human rights, Dominique Clément, a Canadian historical sociologist who studies and writes about the sociology of human rights and the hegemony of the law among other areas of expertise, describes several seminal legal rulings in the 1980s and 1990s that "exemplified how grievances that might have been framed as moral issues in the past had, over time, come to be framed in terms of human rights".[169] These cases specifically demonstrate the evolution of women's rights, gay rights and trans rights as human rights and more broadly, demonstrate the malleability of jurisprudence as both legal theory and practice shift with the ever-changing sociocultural landscape and contemporary perspectives of justices tasked with interpreting the law. The possibility for new ways of thinking about, and responding to, harms caused in the space between free expression and hate speech is reinforced by Julian Walker, a lawyer and legal affairs analyst for the Library of Parliament – "It is clear that societal changes and technological developments will mean that the way our laws attempt to contain the harms caused by the spread of hatred will continue to inspire debate and the search for new solutions."[170]

While universities must adhere to present-day legislative parameters when managing campus expression and equality rights issues, they must also continue to be sites that press for a critical analysis of the legal system and its role in advancing human rights and social justice. University community actors – students, faculty, staff and administrators – are uniquely positioned to elevate the dialogue surrounding expression and equality rights issues. By sustaining advocacy efforts, generating new theory and practice and leading cross-sector conversations, university actors can influence the evolution of jurisprudence such that the legal system, along with other social change levers, may more closely approach the aspiration of guaranteeing dignity, equality and liberty for all.

[169] Dominique Clément, *Human Rights in Canada: A History* (Waterloo, ON, Canada: Wilfred University Press, 2016) at 12.
[170] Walker, *supra* note 29 at 14.

I. Appendix A – Questionnaire to Map Contextual Considerations

(1) How does academic freedom apply or not apply to the situation?

(2) How does the expression further or detract from the university's missions including social betterment goals?

(3) How does the expression further or detract from the core values of the university including safeguarding the dignity, equality and liberty of community members?

(4) How does the expression serve to advance or threaten to undermine university commitments to equity, diversity and inclusion?

(5) In which "site" on campus was the expression communicated? What is the purpose of that space, as well as the expectations and rules around engagement in that space?

(6) Through what medium was the expression communicated, and was that medium public, private or university-owned/sanctioned?

(7) Who is claiming the right to expression versus equality and what is the power differential between the sender and the receiver?

(8) What external societal factors or dynamics may be at play (e.g. Black Lives Matter movement, government commissions to address systemic inequities, etc.)?

(9) What strategies have been considered to mitigate the possibility that the expression may incite hate or discrimination?

(10) What strategies have been considered to mitigate claims of rights infringements (e.g. dignity, equality and liberty) given the decision to limit or not limit the expression?

II. Appendix B – Triage Tool