Beyond the Hate Speech Law Debate: A "*Charter* Values" Approach to Free Expression

*Emmett Macfarlane**

Debates over what to do about hate speech continue to rage, in contexts that range from social media to campus speech. That legal restrictions on hate speech remain controversial despite major Charter *cases upholding Canada's anti-hate speech laws reflects a number of issues, including: the effectiveness of anti-hate speech laws; the evidence about, and diffuse nature of, the harms involved in hate speech that falls short of targeted harassment or incitement of violence; the high threshold the Supreme Court has drawn for identifying when hateful speech crosses the line into unlawful hate speech; and the authorities' tendency to censor or suppress speech, especially when censorship is wielded against members of oppressed groups. This article argues in favour of a "*Charter *values" approach to free expression that seeks to enhance the expressive freedoms of individuals and groups subjected to historical and ongoing forms of oppression. After analyzing the Court's approach to assessing Canada's hate speech laws, this article contends that debates over the legitimacy and effectiveness of hate speech laws, which apply to such a miniscule number of relevant instances of hateful speech and falsely pit free expression against equality, distract us from properly remedying one of the most pressing consequences of hate speech: the impairment of human dignity and the sense of belonging of targeted groups within our society. Instead, a* Charter *values approach imposes obligations on relevant institutions to take positive action to enhance and protect the expressive freedom*

Les débats sur les mesures à prendre à l'encontre du discours haineux, autant dans le contexte des médias sociaux que dans celui de la liberté académique, continuent de faire rage. Le fait que les restrictions juridiques à l'égard du discours haineux demeurent controversées, malgré d'importantes causes fondées sur la Charte *qui ont confirmé les lois canadiennes relatives au discours haineux, met en lumière un certain nombre de questions. Parmi celles-ci, on compte notamment l'efficacité des lois contre le discours haineux; les preuves et la nature diffuse des préjudices causés par le discours haineux qui ne constitue pas du harcèlement ciblé ou de l'incitation à la violence; le seuil élevé que la Cour suprême a établi pour déterminer quand un discours haineux franchit la ligne et devient un discours illégal; et la tendance des autorités de censurer ou de supprimer le discours haineux, notamment lorsqu'il est exercé à l'encontre de membres de groupes opprimés. Cet article plaide en faveur d'une approche de la liberté d'expression fondée sur les « valeurs de la* Charte *», une approche qui vise à renforcer la liberté d'expression des individus et des groupes soumis à des formes historiques et continues d'oppression. Après avoir analysé l'approche de la Cour pour évaluer les lois canadiennes relatives au discours haineux, l'article soutient que les débats sur ces lois, qui s'appliquent à un nombre infime de cas pertinents de discours haineux, nous empêchent de remédier adéquatement à l'une des conséquences les plus importantes du discours haineux :*

* Associate Professor, Department of Political Science, University of Waterloo.

of oppressed groups. Rather than an approach that falsely "balances" equality rights and other sections of the Charter*, like section 27, against free expression, the approach advocated here seeks to strengthen all of those rights and values by ensuring that targeted groups cannot be silenced by harmful or offensive speech and that their sense of belonging and status within the community is promoted and ensured.*

l'atteinte à la dignité humaine et au sentiment d'appartenance des groupes désavantagés dans notre société. Une approche fondée sur les valeurs de la Charte *imposerait plutôt aux institutions concernées l'obligation de prendre des mesures positives pour améliorer et protéger la liberté d'expression des groupes opprimés. Plutôt que d'adopter une approche qui met faussement en balance le droit à l'égalité et d'autres articles de la* Charte*, comme l'article 27, avec la liberté d'expression, l'approche préconisée ici vise à renforcer tous ces droits et valeurs en veillant non seulement à ce que les groupes désavantagés ne puissent être réduits au silence par des discours nuisibles ou offensants, mais aussi à ce que leur sentiment d'appartenance et leur statut au sein de la communauté soient promus et assurés.*

Contents

I. Introduction 147

II. The *Charter*, the Supreme Court, and Hate Speech 148

III. The Hate Speech Law Debate 151

IV. Expression-Enhancing Measures to Address the Harms of Hate Speech 156

V. A *Charter* Values Approach to Hateful Speech 161
Case Illustration: University of Waterloo 164

Conclusion 167

I. Introduction

Debates over what to do about hate speech continue to rage in diverse contexts: from social media to campus speech controversies. That legal restrictions on hate speech remain controversial despite major *Charter* cases like *Keegstra* (1990), *Taylor* (1990), and *Whatcott* (2013) — which have seen the Supreme Court uphold Canada's anti-hate speech laws — reflects a number of issues. These include: the evidence about, and diffuse nature of, the harms involved in hate speech that falls short of targeted harassment or incitement of violence; the high threshold the Court has drawn for identifying when hateful speech crosses the line into unlawful hate speech; and the authorities' tendency to censor or suppress speech, including when it is wielded against members of oppressed groups. What is clear, regardless of the ongoing debate over the legitimacy of hate speech laws, is that such laws have not proven particularly effective at combatting hate or preventing hate speech. Moreover, such debates, and the relevant *Charter* jurisprudence, both tend to frame the issue as pitting free expression against rights and values such as substantive equality and diversity.

This article offers a different perspective, one that encourages governments and public institutions grappling with rights issues to adopt a proactive "*Charter* values" approach to free expression that avoids falsely pitting equality concerns against free expression. If one of the central harms associated with hate speech is the impairment of human dignity and the sense of belonging for members of targeted groups within our society, then a broader array of policy measures is needed to mitigate those harms. Such policies, unlike laws that sanction or censor speech, can be implemented in a way that enhances expressive freedom while still mitigating the capacity of hateful speech to erode equality or damage the dignity of its targets. In short, this article argues that the state and other public institutions must devote the resources necessary to ensure members of targeted groups enjoy a sense of belonging in addition to being granted their own protected platforms or vehicles for expression. Moreover, in certain contexts, state actors and public officials should exercise their own freedom of expression to speak out against hate.

After analyzing the Supreme Court's approach to assessing Canada's hate speech laws, this article contends that debates over such laws — which apply to a miniscule proportion of relevant instances of hateful speech — distract us from properly addressing the consequences. A *Charter* values approach imposes obligations on relevant institutions to take positive action to enhance and protect the expressive freedom of oppressed groups. Rather than an approach that falsely "balances" equality rights and other sections of the *Charter*, like section

27,[1] against free expression, the approach advocated here seeks to strengthen all of those rights and values by ensuring that targeted groups cannot be silenced by harmful or offensive speech and that their sense of belonging and status within the community is promoted and ensured. For the purposes of illustration, the article tackles the context of campus speech and the role universities can play.

II. The *Charter*, the Supreme Court, and Hate Speech

Section 2(b) of the *Charter* guarantees the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[2] The Supreme Court grants freedom of expression a broad and liberal interpretation, defining it as protected "if the [expressive] activity conveys or attempts to convey a meaning."[3] The Court initially established that section 2(b) safeguarded almost any communicative expression short of physical violence. As a result of this expansive definitional approach, the Court's assessments of proportionality under section 1 are almost always pivotal in determining whether laws implicating free expression survive constitutional challenge.

The *Canadian Criminal Code* includes provisions against publicly inciting hatred and wilfully promoting hatred, provisions which were upheld by a divided Supreme Court in the landmark 1990 case *R v Keegstra*.[4] *Keegstra* involved a former high school teacher charged with unlawfully promoting hatred after making anti-Semitic statements to his students. Writing for the majority, then-Chief Justice Brian Dickson drew a number of important conclusions regarding the characterization of hate speech. Both the majority and dissenting justices rejected the idea that hate speech should be considered a form of violence or analogous to violence,[5] even noting that threats of violence enjoy section 2(b) protection (although on this latter point, the Court would eventually clarify that the exception of physical violence includes threats of violence[6]).

In *Keegstra*, Dickson accepted the view that hate speech causes harm, not only in the sense of emotional or dignity-effacing harm suffered by those tar-

1 *Canadian Charter of Rights and Freedoms*, s 17, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *Ibid*, s 2(b).

3 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969, 58 DLR (4th) 577.

4 *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1 [*Keegstra*].

5 *Ibid* at 723.

6 See *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31; *R v Khawaja*, 2012 SCC 69.

geted by hate speech but also in the sense that hate speech can influence society at large. He concluded that hate speech "is of limited importance when measured against free expression values," and that "the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas."[7] The government thus has a pressing and substantial objective in prohibiting hate speech. In assessing the proportionality of the limit on free expression, Dickson acknowledged that "it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely debilitate the effectiveness of [the law] in achieving Parliament's aim."[8] Instead, he argued, the objective was to prevent the *risk* of harm, and thus capturing public instances of the promotion of hatred should not be overly broad.

The dissenting opinion by then-Justice Beverley McLachlin acknowledged the various harms of hate speech, but noted that there was a lack of evidence that criminalization would be effective in mitigating hate speech or the harms that come from it. McLachlin noted that the term "hatred" is notoriously broad and relies on subjectivity and vague understandings. She also pointed to state overreach in enforcing the law, including incidents where copies of Salman Rushdie's *The Satanic Verses* were stopped by border authorities and arrests were made when pamphlets containing the words "Yankee Go Home" were distributed.[9] The dissenting justices concluded that the "questionable benefit of the legislation is outweighed by the significant infringement on the constitutional guarantee of free expression."[10]

The Court divided in a similar fashion in a companion case decided at the same time, *Canada (Human Rights Commission) v Taylor*, where the majority upheld section 13(1) of the *Canadian Human Rights Act* (*CHRA*) — a provision that restricted telephone communication "likely to expose a person or persons to hatred or contempt by reason of the fact that the person or persons are identifiable on the basis of a prohibited ground of discrimination."[11] A key difference in the law at issue in *Taylor* is that the *CHRA* provision did not require any intent by the speaker to expose people to hatred or contempt.

7 *Keegstra*, *supra* note 4 at 762-63.
8 *Ibid* at 763.
9 *Ibid* at 859.
10 *Ibid* at 865.
11 *Canada (Human Rights Commission) v Taylor,* [1990] 3 SCR 892, 75 DLR (4th) 577 [*Taylor*].

The Court revisited the constitutionality of statutory human rights limits on hate speech in the 2013 case, *Saskatchewan v Whatcott*.[12] The *Saskatchewan Human Rights Code* prohibited the publication or display of any representation "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground." *Whatcott* concerned an individual who was distributing flyers with malicious, homophobic messaging. A unanimous Court upheld the law, although it read down the relevant provision to exclude concepts like "ridicules," "belittles," and "affronts the dignity of" for a focus on hatred.[13] Most significantly, the Court held that to qualify as hate speech under the law, the expression at issue must rise to the level of instilling "detestation" and "vilification" towards the targeted group. The Court also cautioned that expression must be assessed by an objective, reasonable person standard, and that the *Taylor* majority's reference to "unusually strong and deep-felt emotions" was not an invitation to subjective analysis.[14]

The *Whatcott* Court also adopted a limited objective for restrictions on hate speech, concluding that protecting individuals in targeted groups from emotional harm was *not* rationally connected to the overall purpose of reducing discrimination. "Instead," the Court wrote, "the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech."[15] This is a markedly narrower approach compared to the one that the majority adopted in the 1990 cases, which made explicit reference to emotional harms as part of the basis for upholding the laws at stake.

The result of this jurisprudence is that laws prohibiting hate speech are permissible under the *Charter,* but only if limited to the most extreme forms of hateful expression. In reality, few charges are laid under the federal criminal law and many complaints under statutory human rights codes do not rise to the level of unlawful hate speech. Moreover, as I explore in the next section, the Court's decisions have not settled the debates over hate speech legislation. A number of issues remain deeply contested, including whether laws predicated on the impact that speech has on the actions or thoughts of third parties external to the groups targeted are properly the moral responsibility of the speaker; whether the courts' deference to the legislative objectives are appropri-

12 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*].

13 *Ibid* at para 85.

14 *Ibid* at para 56, citing *Taylor, supra* note 11 at 928.

15 *Whatcott*, *supra* note 12 at para 82.

ate in light of the infringement on free expression; and whether hate speech laws are effective in actually combatting hate and mitigating the effects of discrimination or the harms towards the targeted groups.

III. The Hate Speech Law Debate

There is no such thing as free speech absolutism. The vast majority of people routinely accept limitations on speech, be they perjury laws, requirements that food manufacturers provide nutritional information on packaging, or the expectation that students in the classroom avoid disrupting a lecture. In the social context, speech is routinely, albeit informally, regulated in all manner of ways. The classic justificatory rationale for *state* or *legal* restrictions on speech in liberal democratic societies is premised on the harm principle: the idea that limits on freedoms are legitimated in the pursuit of protecting other people's liberty or security.[16] Thus even in the United States context — with a contemporary First Amendment jurisprudence that would not accept Canadian-style hate speech legislation — "a narrow category of hate speech that crosses over into being a 'true threat'" is subject to legitimate regulation and sanction.[17]

The debates over laws prohibiting hate speech is complicated by the diffuse nature of hate speech. Most commentators readily accept restrictions on incitement to violence or targeted harassment of individuals. By contrast, restrictions on generalized hateful utterances about certain groups or categories of people are more controversial, in part because of the considerable challenges in identifying a causal link between such speech and harm to specific individuals. Even the nature of what counts as harm is subject to intense debate.

The social-scientific and philosophical literatures on the harms of hate speech are replete with conceptual and methodological challenges. Two broad categories of harm are typically examined. Consequentialist harms are usually *acts* of discrimination or violence that are incited or influenced by hate speech. Constitutive harms are those directly manifested by the speech, in that they are psychic or emotional harms inflicted on the targets. In Jeremy Waldron's view, constitutive harms do not emerge merely because targets take offense at words, but actually concern the damage hate speech does to people's dignity

16 Many scholars have elaborated on the harm principle as famously articulated in John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991). See, for example, Melina Constantine Bell, "John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm" (2021) 33 Utilitas 162.

17 Keith E Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton: Princeton University Press, 2018) at 79.

and their status in society.[18] A key related harm is the silencing effect that hate speech can have on its targets.[19] My own recent meta-study of the contemporary scholarship on harm concludes that causal evidence for harm is surprisingly limited.[20] With respect to consequentialist harms, correlational studies are often heavily conditional, and interpretation of their findings is mired by the complex social environment in which speech is but one part of the evidentiary matrix.[21] Moreover, well-established difficulties with the (under-)reporting of hate crimes add to the methodological challenges of tracing the effects of speech on crime or other acts of discrimination. Studies on constitutive harms appear more plentiful, but face challenging interpretative difficulties because they often rely on cataloguing (intense) subjective emotional responses,[22] and because data collection is largely derived from self-reporting mechanisms, such as surveys or online message boards.[23]

More often than not, the harms of hate speech are asserted more than they are demonstrated, with even book-length analyses on the topic presenting virtually no empirical evidence to support their conclusions.[24] This is not to suggest that harms do not exist. As I have written elsewhere:

> … the lack of causal evidence is likely more a reflection of problems with data and methodological limitations than a clear suggestion that no link exists between hate and violence or discrimination. It would be difficult, if not absurd, to argue that misogynistic attitudes and systemic behaviour like violence against women (for example) are not somehow related. Yet incidents of hate speech are subsumed in a broader culture of discrimination, entrenched attitudes like stereotypes, and systemic

18 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).

19 Caroline West, "Words That Silence? Freedom of Expression and Racist Hate Speech" in Ishani Maitra & Mary Kate McGowan, eds, *Speech & Harm: Controversies Over Free Speech* (Oxford: Oxford University Press, 2012).

20 Emmett Macfarlane, "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022).

21 Matthew L Williams et al, "Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime" (2019) 60:1 British J of Criminology 93; Wiktor Soral, Michat Bilewicz & Mikotaj Winiewski, "Exposure to Hate Speech Increases Prejudice through Desensitization" (2017) 44 Aggressive Behavior 136.

22 Mari J Matsuda, Charles R Lawrence, III, Richard Delgado, & Kimberlé Williams Crenshaw, eds, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993).

23 Katharine Gelber & Luke McNamara, "Evidencing the Harms of Hate Speech" (2016) 22:3 J for the Study of Race, Nation & Culture 324; Koustuv Saha, Eshwa Chandrasekharan & Munmun De Choudhury, "Prevalence and Psychological Effects of Hateful Speech in Online College Communities" (Presentation delivered at the 11th ACM Conference on Web Science, Boston, MA, June 30-July 3, 2019) WebSci'19 255; Laura Leets, "Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech" (2002) 58:2 J of Soc Issues 341.

24 Waldron, *supra* note 18, is an example of this.

> forms of oppression towards minority or disadvantaged groups, that the *causal* effect of hate speech is usually impossible to know. It is certainly plausible that hate speech increases or entrenches these aspects of our society, but it is just as likely, if not more so, that much of the hate speech generated is a product of those deeper systemic forces. Thus the search for the harms of hate speech may too often assume a causal arrow pointed in only one direction: someone says a hateful thing, and it leads to acts of harm or attitudinal changes and the entrenchment of poisonous ideas.[25]

One challenging factor is that a lot of diffuse hate speech essentially disappears into the ether, in that either no one in a targeted group sees or hears it or it is quickly forgotten, and is unlikely to produce behavioural change in third parties or impose emotional harm on its targets. For critics of hate speech laws, it is thus questionable for the state to punish individuals for expressions of thought, however ugly or offensive, where there is no clear intent to incite illegal action against, or inflict harm upon, any identifiable person. To hold people to account for the lowest common denominator reactions to their speech is to abandon any pretense that one is committed to reasonableness, in the sense that we consider how a reasonable person might react to hate speech relevant to any analysis of these issues. For proponents of hate speech laws, every instance of expression that rises to the level of hate speech is a poisonous sulfur expelled into the societal atmosphere, if not an outright act of violence. To allow hate speech, in their view, is to allow the harmful erosion of social norms. These two views are fundamentally irreconcilable, and because they ultimately rest on competing moral frames of the issue, they are unlikely to be resolved by social-scientific evidence.

Perhaps a more fundamental problem with hate speech laws is that they capture only a thin segment of the most extreme forms of hate speech. Consider, for example, the strong correlational evidence of the rise in anti-Asian hate crimes in 2020, following discourse referring to the COVID-19 virus as the "China virus" or "Chinese virus." According to one study, after the use of the term by former United States President Donald Trump, a significant proportion of social media users used the term in association with other anti-Asian hashtags.[26] A massive rise in reported anti-Asian hate crimes across North America is almost certainly connected to some of this rhetoric.[27] Yet casual references to "China virus" that are not accompanied by more pernicious

25 Macfarlane, *supra* note 20 at 43.

26 Yulin Hswen et al, "Association of '#covid19' Versus '#chinesevirus' with Anti-Asian Sentiments on Twitter: March 9-23, 2020" (2021) 111:5 American J of Public Health 956.

27 Center for the Study of Hate & Extremism, "Report to the Nation: Anti-Asian Prejudice & Hate Crime: New 2020-21 First Quarter Comparison Data" (2021), online (pdf): *California State University, San Bernardino* <www.csusb.edu/sites/default/files/Report%20to%20the%20Nation%20-%20Anti-

language are unlikely to rise to the threshold of unlawful hate speech as articulated by the Canadian Supreme Court.

This is true of a wide range of expressions where "rote, day-to-day microaggressions, coded language, dog whistles, and other forms of rhetoric are much more pervasive and almost certainly contribute in a much more systemic way to the various harms advocates of hate speech laws identify" but do not meet the high threshold required for them to be identified as unlawful.[28] Indeed, the typical person is more likely to recoil from extreme and more explicit forms of hate than they are from dog whistles like "China virus," and thus, it is the less extreme speech that is arguably more dangerous and harmful, as it more readily penetrates social discourse.

This is not to suggest that the correct course of action is to lower the threshold at which expression counts as unlawful hate speech. To lower the threshold would be to capture a wide array of political and social expression on an increasingly ambiguous and subjective basis; a prospect that is fundamentally incompatible with a free and democratic society. There are few studies of the effectiveness of hate speech legislation, but they tend to confirm the intuitively obvious based on the relatively few cases brought to court on an annual basis: there is little to suggest hate speech laws have much of an impact on the quantity of hate speech or on mitigating its harmful effects.[29]

Another fundamental consideration is the unintended consequences of state regulation, censorship, or punishment for expressions of hate. The examples then-Justice McLachlin cited in her dissenting reasons in *Keegstra* speak to the very real risks of public officials being authorized to engage in content-based censorship of speech. A similar phenomenon has occurred at the university level, where members of groups often targeted by hate have been subject to investigations or censorious rules. For example, Dalhousie University launched an investigation after complaints surfaced about a racialized student who spoke out against White fragility in a Facebook post. Public attention eventually led the university to refrain from taking any disciplinary

Asian%20Hate%202020%20Final%20Draft%20-%20As%20of%20Apr%2030%202021%206%20PM%20corrected.pdf> [perma.cc/HF6F-9SRH].

28 Macfarlane, *supra* note 20 at 49.

29 Gelber and McNamara, for example, find that Australian hate speech legislation has not resulted in a drop in hate speech generally, and creates a perceived burden on the targets of hate speech to initiate complaints and follow up. There is also mixed evidence that hate speech laws have an educative purpose (with some evidence hate speech litigation can appropriate the educative purpose in a way at odds with legislative intent). See: Katharine Gelber & Luke McNamara, "The Effects of Civil Hate Speech Laws: Lessons from Australia" (2015) 49:3 Law & Soc'y Rev 631.

action.[30] The power to censor can be used in considerably regressive ways, as is evidenced by the slew of US states introducing bans on the teaching of critical race theory.[31]

These myriad problems with hate speech laws remain deeply relevant, both for consideration of the various rights implicated by hate speech and for ongoing public policy debates. The federal Liberal government has promised new regulations to address hate speech online, including requirements that online platforms remove illegal content, such as hate speech, within 24 hours, as well as implementing options for civil remedies for victims of hate speech. In 2021, the government accordingly tabled Bill C-36, which would implement new restrictions for online hate propaganda, hate crimes, and hate speech. The bill would also reintroduce a version of the *CHRA*'s previously repealed provisions concerning hate speech.[32]

Regulating hate speech in the online and social media context presents a host of problems — in addition to those already noted — with respect to existing legislation. Carissima Mathen summarizes the technological challenges, noting that every day:

> 60 billion messages are sent using Facebook Messenger and WhatsApp; 95 million photos are uploaded to Instagram; 500,000 persons join Facebook; 500 million tweets appear on Twitter; and one billion hours of YouTube video is watched (and is added at the rate of 500 hours per minute). Google processes 100 billion search requests per month, or 40,000 per second. By 2014, it had indexed 130 trillion (130,000,000,000) web pages.[33]

As Mathen points out, the only way to identify hateful speech is to rely on automated systems and algorithms — themselves notable for flaws, ranging from overbreadth to systemically racist outcomes[34] — and the sheer scale of

30 Anjuli Patil, "Dalhousie Withdraws Disciplinary Action Against Masuma Khan Over 'White Fragility' Facebook Post", *CBC News* (25 October 2017) <www.cbc.ca/news/canada/nova-scotia/dalhousie-withdraws-complaint-against-masuma-khan-1.4371332> [perma.cc/7XMH-2NLW].

31 Rashawn Ray & Alexandra Gibbons, "Why Are States Banning Critical Race Theory?" (November 2021), online (blog): *Brookings* <www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [perma.cc/Q4XS-LLPQ].

32 The bill died on the order paper when Parliament was dissolved for the 2021 election.

33 Carissima Mathen, "Regulating Expression on Social Media" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 91 at 92, citing Kit Smith, "126 Amazing Social Media Statistics and Facts" (30 December 2019), online (blog): *Brandwatch* <www.brandwatch.com/blog/amazing-social-media-statistics-and-facts/#section-15> [perma.cc/5KU8-VV2W].

34 Ruha Benjamin, "Assessing Risk, Automating Racism" (2019) 366:6464 Science 421; Rebecca Heilweil, "Why Algorithms Can Be Racist and Sexist" (18 February 2020), online: *Vox* <www.vox.com/recode/2020/2/18/21121286/algorithms-bias-discrimination-facial-recognition-transparency>

social media traffic also means that even "the smallest of policy changes can have profound impacts on communication and on communities. Even with near perfect certainty (say, 99.9999 percent accuracy), any new scheme will produce many thousands of 'false positives' or false negatives."[35] Add to this the problem of anonymity and the jurisdictional issues that go hand-in-hand with digital platforms, and the challenge of implementing the proposed new laws becomes exceptionally daunting. This does not, however, mean that any attempt at regulation is either undesirable or impractical. While *content* regulation raises obvious dangers, a valid approach to combatting hate speech might include efforts to reform the algorithms social media sites use, so that harmful content is not amplified.

Instead of pursuing a questionable policy of regulating social media and Internet content, deeper systemic efforts at ensuring members of society are sufficiently educated about race and racism, sexism and other forms of hate, as well as historical and ongoing forms of oppression, including colonialism, should be implemented. Part of this educative process is not merely curricular but also ensures targeted groups are given a voice in the design of such curricula, and are given sway in governance and in other hallways of power and society writ large.

Hate speech laws are rooted in a deeply contested moral justificatory context, and come with their own harms — not only to the value of free expression, but also in the form of inevitable overreach and unintended consequences. Hate speech laws also have considerable implementation challenges, and demonstrate negligible effectiveness. Regardless of where one comes down on the debate about the normative desirability of hate speech laws, it is essential to consider alternative policy measures to address the harms of hate speech, and to consider the rights implications under the *Charter*.

IV. Expression-Enhancing Measures to Address the Harms of Hate Speech

The state and affiliated public actors have a significant role to play in addressing the harms of hate speech — a role that extends beyond sanctioning or censoring hateful expression. A traditional liberal view is to treat the state as a neutral entity with respect to public discourse, allowing the "marketplace of ideas" to regulate speech rather than having the state adopt content-based restrictions on

[perma.cc/6USP-T5P9]; "Facebook and Instagram to examine racist algorithms", *BBC News* (22 July 2020), online <www.bbc.com/news/technology-53498685> [perma.cc/TH97-M5WK].

35 Mathen, *supra* note 33 at 92-93.

expression. In practice, however, the state routinely adopts positions on matters relating to rights and values — like equality — and actively promotes tolerance, diversity, and a host of related values. The idea that the state and public officials have a role to play in enhancing resources and access to platforms that protect targeted groups, and even in speaking out against hate speech in certain contexts, helps push back against the notion that state responses to hate speech can only take place in "conflict" between constitutional rights like free expression and equality.[36]

A growing number of commentators have recognized this reality and prescribed state action to combat hate speech. Abigal Levin writes that an "activist" liberal state can work to remedy the harms of cultural oppression resulting from hate speech by engaging in speech, expending resources, and modelling and encouraging discourse about diversity.[37] Katherine Gelber writes persuasively that the basis for governmental support to assist certain people is rooted in the idea that groups targeted by hate speech suffer from systematic disadvantages that can prevent them from speaking.[38] She argues for "a policy of speaking back, in which individuals who are the targets of hate speech are provided with the institutional, educational, and material support to enable them to speak back, both to contradict the messages contained within the hate speech and to counteract the effects of the speech on their ability to respond."[39] Eric Heinze notes that "[t]here is no such thing as state neutrality because countless state norms and practices represent moral or philosophical choices."[40] Like Gelber, Heinze notes that the choice is not "between punishing hate speech and ignoring it."[41] Instead, governments have the legitimate option of employing "constructive means of giving voices to minorities."[42]

36 Yared Legesse Mengistu, "Shielding Marginalized Groups from Verbal Assaults without Abusing Hate Speech Laws" in Michael Herz & Peter Molnar, eds, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012) 352 at 355.

37 Abigail Levin, *The Cost of Free Speech: Pornography, Hate Speech, and Their Challenge to Liberalism* (New York: Palgrave Macmillan, 2010).

38 Katherine Gelber, "'Speaking Back': The Likely Fate of Hate Speech Policy in the United States and Australia" Ishani Maitra & Mary Kate McGowan, eds, *Speech & Harm: Controversies Over Free Speech* (Oxford: Oxford University Press, 2012) 50 at 50 [Gelber, "Speaking Back"].

39 *Ibid* at 51. See also Katherine Gelber, "Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)" in Michael Herz and Peter Molnar, eds, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012) 198 [Gelber, "Reconceptualizing Counterspeech"].

40 Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016) at 116.

41 *Ibid.*

42 *Ibid.*

One immediate issue is whether such an approach would amount to discrimination. In the US context, Gelber writes, any counter-speech or "speaking back" policy must conform to the First Amendment prohibition on content discrimination.[43] She notes that governments can promote their own views, even if doing so discriminates on the basis of content, but they cannot "encourage private speech by funding or subsidizing speech in a way that encourages speech and is simultaneously content-discriminatory."[44]

Limitations on this basis are not particularly pertinent to the Canadian context under the *Charter*. In Canada, if programs designed to provide resources or platforms to targeted groups are perceived as "discriminatory" in a broad sense, they may nonetheless find cover under section 15(2) of the *Charter*, which expressly protects "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups."[45] Such policies would also enhance, rather than detract from, other *Charter* rights and values, including free expression and clauses recognizing diversity in Canada, such as the multicultural heritage provision under section 27.[46] Indeed, Canadian governments, at all levels, routinely fund cultural associations and events, enact anti-racism campaigns and educational initiatives, and engage in speech to combat hate.

However, many of these initiatives are part of a broader multiculturalism umbrella of policies and are not specifically linked to combatting hate speech or enabling free expression in response to hate *per se*. In fact, racism and attention to race is often hidden within multiculturalism policy and in academic analyses of multiculturalism in Canada. As Keith Banting and Debra Thompson note, "social problems that might elsewhere be interpreted through the prism of race tend to be seen as issues of immigration status or cultural or linguistic difference, and policy tools have been deployed accordingly."[47] Because multiculturalism policy has focused more on integration and intercultural harmony than on fighting racial discrimination, it has undermined its own goals insofar as the "experience of discrimination discourages the sense of attachment to Canada."[48]

---

43 Gelber, "Speaking Back", *supra* note 38 at 56.

44 *Ibid* at 60.

45 *Charter*, *supra* note 1, s 15(2).

46 Section 27 of the Charter reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Charter*, *supra* note 1, s 27.

47 Keith Banting & Debra Thompson, "The Puzzling Persistence of Racial Inequality in Canada" (2021) 54:4 Can J of Political Science 870 at 875. See also Debra Thompson, "Is Race Political?" (2008) 41:3 Can J of Political Science 525 at 535-6.

48 Banting & Thompson, *supra* note 47 at 884, citing Feng Hou, Grant Schellenberg & John Berry, *Patterns and Determinants of Immigrants' Sense of Belonging to Canada and to their Source Country* (Ottawa:

What are needed are expression-enhancing policies designed specifically to respond to hate speech and a strengthening of social solidarity to ensure those targeted by hate speech are not alienated from broader society and, more specifically, that they are not subject to a silencing effect.[49] Gelber provides examples of initiatives and resources the state might provide to support in this regard, including: the production and distribution of community newsletters in response to a specific event to counteract misunderstandings or misinformation; anti-racism programming; advertisements; and subsidizing small-scale community art projects.[50] Governments and public institutions can also, in particular contexts, use their own voice to speak out against hate, to ensure the full burden of "speaking back" does not fall on the targets of hate speech.

Yet these sorts of expression-enhancing initiatives should not be limited to discrete responses to specific incidents of hate speech. As is discussed in the case illustration below, groups subject to historical and ongoing forms of oppression should be supported in systemic and dedicated ways rather than in a piecemeal fashion. Nor should they be expected or required to routinely "speak back" to hate speech. Instead, measures should provide systems of support rather than fleeting platforms for expression, engagement, and attachments to community.

In the context of mitigating the harms of hate speech, rights-enhancing measures have the virtue of avoiding artificial conflict between free expression and equality rights. Actively supporting the voices of those targeted by hate speech is not only an anti-discrimination measure (and thus consistent with equality rights), it is also an expression-enhancing measure, one that adopts a positive conception of the *Charter*'s free expression guarantee. As Benjamin Oliphant writes, the orthodox view is that free expression under the *Charter* is primarily a negative entitlement.[51] The *Charter* is sometimes conceived of as existing largely as a "negative rights" document — a document that prevents governments from interfering with or infringing rights — as opposed to a "positive rights" one that requires governments to take action or expend resources to protect the rights in question. However, certain *Charter* rights are explicitly positive in nature (such as section 23's mandate for minority language

Ministry of Industry, 2016); Jeffrey Reitz & Rupa Banerjee, "Racial Inequality: Social Cohesion and Policy Issues in Canada" in Keith Banting, Thomas Courchene & Leslie Seidle, eds, *Belonging: Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 2007).

49 Broader policies to address systemic racism, oppression, and exclusion are also needed, and examples of institutional policies that serve as a starting point are discussed in the case illustration below.

50 Gelber, "Reconceptualizing Counterspeech", *supra* note 39 at 214.

51 Benjamin J Oliphant, "Positive Rights, Negative Freedoms, and the Margins of Expressive Freedom" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 130 at 132, citing *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577.

education[52]), and debate continues over whether other *Charter* sections, including section 15's equality rights, might be interpreted in a much more positive manner.[53] In the section 2(b) context, the Court "has rejected various constitutional challenges where the claimant sought state assistance or access to a certain 'platform' to facilitate their expression."[54] Oliphant notes that governments do have the ability to choose to extend opportunities to some, and not others, "without impacting the freedom of expression of the latter."[55]

Where governments extend specific platforms to particular groups, the failure to extend those opportunities to all "does not deprive anyone of an expressive opportunity or ability they otherwise had prior to the impugned government action."[56] Such supports are not necessarily mandated by the *Charter,* but it is important to consider them as advancing *Charter* values, and to see the ways in which legislative and administrative actors can adopt a more proactive approach to *Charter* rights. In this respect, Vanessa MacDonnell argues that the Constitution is a "framework for governance," and that when it comes to *Charter* rights, the government is properly viewed not merely as the key actor that might infringe *Charter* rights but as a key body responsible for constitutional implementation.[57]

Governments need not merely adhere to the minimum standards applied by courts but can exceed them by adopting a more robust and positive approach to implementation or, in other words, a *Charter* values approach to policy. *Charter* values are typically considered in the jurisprudential sense, where the courts employ them in two contexts. First, the concept of *Charter* values sometimes "refers to underlying values, such as 'human dignity,' that do not appear in the [*Charter*] but help give interpretive meaning to its explicit provisions. In this sense, *Charter* values are a subset of the unwritten, 'underlying principles' that 'infuse our Constitution and breathe life into it'."[58] Second, the Court will interpret a law in a way that makes it compliant with *Charter* values, sometimes invoking *Charter* values to guide the application

52 *Charter*, *supra* note 1, s 23.

53 Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma" (2018) 38:1 NJCL 147.

54 Oliphant, *supra* note 48 at 132, citing *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224; *Siemens v Manitoba (Attorney General),* 2003 SCC 3; *Baier v Alberta*, 2007 SCC 31.

55 *Ibid*.

56 Oliphant, *supra* note 51 at 141.

57 Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624.

58 Mark S Harding & Rainer Knopff, "'Charter Values' vs. Charter Dialogue" (2013) 31 NJCL 161 at 161-162, citing *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [Harding & Knopff].

and development of the common law or when reviewing "sufficiently ambiguous legislation" in the statutory context.[59] Importantly, the Supreme Court has also held that *Charter* values should even guide judges in their development of judge-made private law where the *Charter* itself does not directly apply.[60] Yet it is important to recognize that governments and legislatures — and indeed, other public actors and institutions — also have a duty to adhere to, and even interpret, the *Charter* when the law, rules, or actions may have implications for rights. Developing and implementing policy consistent with *Charter* values can help to ensure that the state and public officials are not merely meeting the minimum guarantees by not violating rights, but are also actively protecting and even enhancing those rights.

V. A *Charter* Values Approach to Hateful Speech

University campuses across North America are front and centre in ongoing debates about free speech. These controversies feature calls for deplatforming controversial speakers or protests (and counter-protests) over hateful or offensive expression, and are reflective of similar campus debates in the 1990s over "political correctness." Even then, scholars pointed out that the expressive principles undergirding academic freedom were falsely pitted against inclusivity and diversity.[61] A key difference in the contemporary context, at least in the view of Chemerinksy and Gillman, is that students today are more supportive of censorship in the name of combatting the purported harms of hateful expression.[62] Whereas the free speech movement on campuses in the 1960s featured protests and sit-ins demanding that universities abandon censorious policies, a segment of the student and faculty populations today adheres to the belief that restrictions on speech are necessary for ensuring a safe and hospitable institutional environment.[63] Yet, it is an overstatement to characterize students as oversensitive or as possessing a desire to be coddled. There is "scant empirical data" in favour of the "snowflake thesis."[64] Nevertheless, there are more than enough anecdotes and controversies to justify concern that we are at risk of eroding the vitality of free expression as a value at universities. Many

59 Harding & Knopff, *supra* note 58 at 162.

60 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

61 Janice Drakich, Marilyn Taylor & Jennifer Bakier, "Academic Freedom *Is* the Inclusive University" Stephen Richer and Lorna Weir, eds, *Beyond Political Correctness: Toward the Inclusive University* (Toronto: University of Toronto Press, 1995).

62 Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* (New Haven: Yale University Press, 2017) at 12.

63 Dax D'Orazio, "Expressive Freedom on Campus and the Conceptual Elasticity of Harm" (2020) 53:4 Can J of Political Science 755 at 756-758.

64 *Ibid* at 759.

recent cases involve deplatforming — which arguably results in hateful messages receiving exponentially more attention, and their speaker even attaining fame and notoriety as a result[65] — as well as faculty being punished or fired for expressing unfavourable ideas.[66]

A diverse set of speech contexts occurs in universities, such that speech is often regulated in many banal ways depending on the situation. Student speech is commonly limited in the classroom setting by the instructor's expectations, basic common sense, and a social norm that can require or incentivize students to refrain from speech to ensure class discussions happen in an orderly and productive manner.[67] Similarly, faculty speech is limited in both the teaching and research contexts. There are job-related expectations that faculty stay on topic when acting as course instructors, and they are subject to a peer review or gatekeeping process when publishing research findings. No one blinks at these direct and indirect forms of regulation of expression, nor does anyone view these as restrictions on the related, albeit distinct, concept of academic freedom.

Yet campuses are also communities where free expression is a fundamental value. Beyond the classroom, lively debate, political forms of expression, protests, and guest speakers are vital aspects of university life. It is cases and controversies within these contexts where much of the "campus speech debate" occurs. Canadian universities are well-positioned to adopt alternative mechanisms for dealing with hateful or offensive speech rather than engaging in censorship or countenancing deplatforming tactics. Even in the American context, some commentators now advocate that campuses adopt policies to support students and enhance the expressive freedom of the targets of hate — including by providing resources, platforms, and opportunities for those subject to the potential harms of hateful speech[68] — and suggest extending these ideas to core aspects of the university mission, including the broadening of voices reflected in the curriculum.[69]

---

65 Emmett Macfarlane, "The Challenge and Controversy of Free Expression" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 3 at 5; Dax D'Orazio, "Deplatforming in Theory and Practice: The Ann Coulter Debacle" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 269.

66 Jeffrey Adam Sachs, "Faculty Free Speech in Canada: Trends, Risks, and Possible Futures" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 236.

67 Shannon Dea, "On Silence: Student Refrainment from Speech" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 252.

68 See Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017) at 44; Chemerinsky & Gillman, *supra* note 62 at 147.

69 Michael S Rother, *Safe Enough Spaces: A Pragmatist's Approach to Inclusion, Free Speech, and Political Correctness on College Campuses* (New Haven: Yale University Press, 2019) at 33.

A further issue worth noting is that the *Charter* may apply to university decisions to censor or sanction hateful speech that does not rise to the level of unlawful hate speech, although the jurisprudence on the *Charter*'s application to universities has always been a bit muddled. In the context of mandatory retirement policies, the Court held in 1990 that universities are not "government" for the purposes of section 32[70] — the *Charter*'s application provision — but that community colleges *are*, on the basis of the degree of direct control governments enjoy over their respective boards.[71] Over two decades later, in a case involving student discipline for speech at the University of Calgary, the Court of Appeal of Alberta concluded that universities could be subject to the *Charter* "if they are involved in governmental activities, such as 'the implementation of a specific statutory scheme or governmental program.'"[72] Importantly, the introduction in Alberta and Ontario of mandatory free speech policies, modelled on the University of Chicago Statement of Principles,[73] likely means the *Charter* is engaged by any university policies or actions that implicate free expression in those provinces.[74] The result is, universities may face serious financial penalties or further regulatory burdens if they are seen as restricting or punishing speech or permitting deplatforming.[75]

Case Illustration: University of Waterloo

Like other campuses, the University of Waterloo has struggled to balance expressive freedoms with other values in light of speech controversies. In 2010, a speaking event featuring *Globe & Mail* columnist Christie Blatchford was cancelled due to student protesters occupying the stage and refusing to

70 *Charter*, *supra* note 1, s 32.

71 *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94.

72 *Pridgen v University of Calgary*, 2012 ABCA 139, citing *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

73 Geoffrey R Stone et al, "Report of the Committee on Freedom of Expression" (2014), online (pdf): *University of Chicago* <provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [perma.cc/N4DZ-4XRJ].

74 Jamie Cameron, "Compelling Freedom on Campus: A Free Speech Paradox" (2020) 29:2 Const Forum Const 5; James L Turk, "Universities, the Charter, Doug Ford, and Campus Free Speech" (2020) 29:2 Const Forum Const 31; Alison Braley-Rattai & Kate Bezanson, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expression Freedom, and Institutional Autonomy" (2020) 29:2 Const Forum Const 65.

75 It is worth noting the provincial directives are themselves in tension with free expression, to the extent that universities may be compelled to silence counter-protest. See Cara Faith Zwibel, "The Right to Protest and Counter-Protest: Complexities and Considerations" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 111 at 122-123.

leave on the basis that Blatchford was "racist."[76] In 2013, an event featuring Stephen Woodworth, an anti-abortion member of Parliament, was similarly shut down by student protesters. In both of these cases, the university was criticized for not ensuring the events could continue. It is also possible that, had these incidents occurred after the passing of the Ontario campus speech regulations noted above, the university would have been in violation of provincial rules.

In 2020, after a controversial incident in which a White course instructor uttered the N-word in a class, the University of Waterloo was quick to issue a statement that "there is no place for the use of the [N]-word in class, on campus or in our community."[77] The university was compelled to withdraw its censorious statement after Black scholars raised the issue of the chilling effect such a rule would have for "Black, Indigenous, and other racialized scholars who research and teach about race and racism."[78]

In the context of other events, and in large part as a reaction to earlier incidents, university officials — including administrators, the Faculty Association of the University of Waterloo (FAUW), and other community members — adopted alternative approaches to campus speech controversies. For example, when a University of Waterloo campus venue was booked in 2018 by the Laurier Society for Open Inquiry to host White nationalists Faith Goldy and Ricardo Duchense, FAUW considered whether to take any action in response. Shannon Dea, then-Vice President of FAUW, writes that for White nationalist provocateurs, such situations are a "win-win":

> When their events happen, their organizations gain the respectability conveyed by association with a university. When their events are refused, canceled, or protested and shut down, it provides fodder for the groups to whip up public sentiment against universities for being 'politically correct' (all while garnering more publicity for themselves).
>
> By contrast, it is a lose-lose situation for universities. Either they play host to white nationalists — thereby creating a toxic climate for the Indigenous and racialized members of their campus communities — or they refuse them

76 Robyn Urback, "Shouting 'Racist' in a Crowded University", *Maclean's* (14 November 2010), online: <www.macleans.ca/education/university/shouting-racist-in-a-crowded-university/> [perma.cc/7MQJ-EBLH].

77 Faculty Association of the University of Waterloo, "UW Statement Risks Chilling Black Anti-Racism Scholarship" (15 June 2020), online: *University of Waterloo* <uwaterloo.ca/faculty-association/news/uw-statement-risks-chilling-black-anti-racism-scholarship> [perma.cc/2ZLN-MUJ6].

78 *Ibid.*

> and get attacked by the media, the public, and donors for not supporting free speech.[79]

Members were concerned about the "Streisand effect," in which speakers (and their messages) would receive dramatically more attention as a result of being cancelled or shut down.[80] Moreover, as Dea writes, FAUW "wasn't interested in shutting the event down. Like any faculty association, we represent members with a wide range of views about the scope and limits of free expression on campus."[81] Instead, FAUW organized a crowd-funding campaign designed to support university groups devoted to Indigenous, racialized, and international students. It was wildly successful, topping $13,000 in donations before it was closed down (the speaking event itself never happened, on the basis of steep security fees the university imposed to maintain order and safety).[82]

A similar tactic a few years earlier also garnered favourable press coverage and had desired effects. Conservative legal scholar and University of Notre Dame professor Charles Rice was invited to speak on campus, and concerned members of the community organized a silent protest before and during the talk. Rice was well known for virulently homophobic views, and the protest was designed with requests from organizers that participants "(a) refrain from interrupting the lecture in any way (b) wear rainbow-themed clothing (c) bring posters (but not on sticks) [and] (d) cooperate with UW security."[83] The result was media reports that noted over 100 people protested peacefully and that they "outnumbered those who had come to hear" Rice speak.[84]

In both of these cases, the result was demonstrable support and increased resources for members of targeted groups from the campus community. While

---

79 Shannon Dea, "Free Speech and the Battle for the University", *Academic Matters* (Fall 2018), online (pdf): <academicmatters.ca/free-speech-and-the-battle-for-the-university/> [perma.cc/2WNH-FFMV]

80 *Ibid*. As Dea describes: "The Streisand effect is so named because it has its origins in Barbra Streisand's 2003 attempt to suppress details of the location of her Santa Monica home. Streisand sued to have an aerial image of her home removed from an online website and, in doing so, drew the world's attention to the fact that the home was actually hers, dramatically increasing visits to the website she was suing."

81 *Ibid*.

82 *Ibid*. See also Simona Chiose, "Campaign against Campus Appearance by Far-Right Activist Faith Goldy Raises over $12,000", *Globe and Mail* (26 April 2018), online: <www.theglobeandmail.com/canada/article-campaign-against-campus-appearance-by-far-right-activist-faith-goldy/> [perma.cc/723X-HU9L].

83 Jeffrey Shallit, "Tonight's Pascal Lecture and Protest" (20 March 2012), online (blog): *Recursivity* <recursed.blogspot.com/2012/03/tonights-pascal-lecture-and-protest.html> [perma.cc/R4XC-LLC2].

84 "Peaceful Protest Greets Controversial Lecturer", *The Record* (20 March 2012), online: <www.therecord.com/news/waterloo-region/2012/03/20/peaceful-protest-greets-controversial-lecturer.html> [perma.cc/84C4-P9EC].

these approaches do not wholly eliminate the potential dignity-effacing harms associated with hateful personalities being given a platform on campus, they do mitigate them. Indeed, the show of support and the fundraising efforts in response to the Goldy and Duchense booking manifested as material benefits for targeted groups. The events around the Rice talk illustrate that there were more people invested in solidarity with the targets of hate than there were interested in even attending the talk. Moreover, the approaches here avoided the negative repercussions of deplatforming or shutting down the events: not only with respect to protecting the principles of free expression, but also in inadvertently amplifying the hateful messages in the ensuing controversy or in allowing the speakers to play martyr and benefit from their alleged victimhood through the media coverage that these campus free speech incidents often generate.

The University of Waterloo has also acted in the aftermath of the "N-word" incident of 2020 (though not solely because of it) to address governance and representational issues in relation to Black faculty, Indigenous faculty, and other faculty of colour (BIPOC faculty). In the immediate weeks following the administration's failure to consult Black faculty members before pronouncing against the use of the "N-word," the President announced a new anti-racism taskforce, co-chaired by BIPOC members.[85] A month later, the university announced cluster hiring to address underrepresentation of Black and Indigenous faculty.[86] And a month after that, in August 2020, the President announced that the university would establish a Black Studies program and an Indigenous Studies program, create a Black cultural centre on campus, work to address barriers in recruitment and hiring for BIPOC individuals, develop a non-credit anti-racism module available to all students, and commit funds to explore the possibility of establishing a Transitional Year Program for BIPOC high school students, among other initiatives.[87] These initiatives, it should be noted, were the direct result of explicit advocacy done by BIPOC community members.

These broad and robust measures help to ensure that BIPOC members of the university community have a clear sense of belonging, have formalized and entrenched institutional support, and have the resources in place to mitigate the sorts of dignity-effacing harms associated with hateful speech. These mea-

85 Feridun Hamdullahpur, "University of Waterloo launched the President's Anti-Racism Taskforce (PART)" (15 June 2020), online: *University of Waterloo* <uwaterloo.ca/news/university-waterloo-launches-presidents-anti-racism> [perma.cc/E97G-UHD8].

86 Media Relations, "Cluster hiring at Waterloo" (29 July 2021), online: *University of Waterloo* <uwaterloo.ca/news/media/cluster-hiring-waterloo> [perma.cc/9NK8-MVHP].

87 Feridun Hamdullahpur, "University Commits to Actions to Address Systemic Racism" (19 August 2020), online: *University of Waterloo* <uwaterloo.ca/news/university-commits-actions-address-systemic-racism> [perma.cc/8MRE-CULL].

sures were designed to address systemic racism, not merely to counterbalance the effects of hate speech. However, without these measures, university statements and decisions to protect free expression ring hollow when members of targeted communities are left to fend for themselves to deal with the fallout of hateful speech. These institutional, resource, and policy changes, as well as the specific responses to controversial speakers, are part of an overall system of approaches that demonstrate how universities (and indeed, all public institutions) are not presented with a binary choice of defending free expression or engaging in censorship by deplatforming or punishing unpopular speech. This is proof that we can move beyond the hate speech law debate.

The university context is unique, but much of this approach is transportable to other aspects of society. We can ensure that primary and secondary education similarly makes room for BIPOC and gendered voices, not only in the curriculum but in school boards and in the setting of curricular policy. The antipathy and assault against teaching critical race theory, or banning the mention of diverse sexual and gender identities in certain US states, is the inverse of this: by providing resources to ensure younger generations learn and appreciate historical and ongoing forms of oppression, society is protected with better armour against hate, not only in our schools, but online as well. Governments could also provide resources for targeted groups at the municipal or local levels, just as some universities are in their communities.

Conclusion

A *Charter* values approach to policy-making should motivate the state and public institutions to consider the full panoply of rights when addressing issues of social concern. Debates over hate speech legislation, and censorious or punitive policies or rules relating to hate speech, ultimately distract from meaningful policy alternatives that do not falsely pit expressive values against equality rights or diversity. Some may argue that the *Charter* has little to provide to this discussion, because the initiatives discussed above are not legalistic *Charter* requirements. Yet the broader debates about free speech are rooted in the language of rights and, in the Canadian context, a *Charter* values approach is therefore appropriate: not only for thinking about how rights operate in this context, but also in the symbolic sense of recognizing how these measures are fundamentally rights-enhancing. A *Charter* values approach thus performs the work of rights in a way that a free-floating discussion of equality and free speech — as political morality or philosophy — otherwise would not.

From the perspective of policy, the choice is not between censorship or punitive anti-hate speech rules and inaction that abandons the targets of hate speech to bear the brunt of the harms of hate. The *Charter* may not mandate specific policies in situations where the state or public institutions face pressure to violate section 2(b) — as censorship or punitive policies regulating otherwise lawful speech risk doing — but a principled approach to the *Charter* and to its core values requires that legislatures, governments, and other public institutions take rights seriously and implement policies in ways that protect and enhance them. In other words, while the Charter does not mandate such action in the legal sense, a *Charter* values approach contemplates the implementation of positive rights by the state. In the context of hateful expression, the meaningful protection of free expression principles may require that positive action and resources are also expended to protect other values, like the equality and dignity of those targeted by hate.