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Talia Joundi

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Freedom of Expression, Discrimination, and the Internet: Legislative Responses and Judicial Reactions

*Talia Joundi**

INTRODUCTION

The spread of hate speech in Canada is an urgent issue in need of greater societal attention. Hate speech causes harm to individuals and groups and increases animosity between people in a society. Racist expression constitutes hate speech because it necessarily targets an individual or group based on their identification with a racial, ethnic, or religious background; in Canada, the law prohibits discrimination on these grounds. In this article, I focus on racist speech in particular, the premise being that racism—whether communicated offline or online—divides and deeply harms society.

Racist speech is by its very nature degrading and of low value.¹ Moreover, it tends to target the most vulnerable segments of the population. Therefore, the medium used to communicate racist expression does not always mitigate the potential harm caused to the victim. Cyber racism refers to the ways in which the Internet and digital media have opened new avenues for expressions of racism across boundaries. While people use the Internet to learn, communicate, and explore, the Internet can also be used to target, threaten, or insult people based on race.

The presence of cyber racism critically informs how people understand themselves, society, and issues of race and social justice. Cyber racism also informs the ideas and perspectives adopted by young people, and has a direct impact on their learning. If the proliferation of cyber racism is not taken seriously, it will continue to have long-lasting and detrimental impacts on society. I emphasize that a critical and honest discussion of the sources and harmful consequences of, and the appropriate responses to, online racism is needed sooner, rather than later. While appropriate responses may involve court-enforced remedies or legislative reform, complex problems call for comprehensive solutions, which extend beyond the reach of the law. At the political level for example, any vigorous defence of free speech must acknowledge that hate speech continues to cause deep harm to racialized individuals and communities in Canada. In other words, if the defence of freedom implies a defence of the right to engage in racist speech at the expense of racial minorities,

* B.C.L./LL.B. McGill 2015, currently student-at-law.

¹ *R. v. Keegstra*, 1990 CarswellAlta 192, 1990 CarswellAlta 661, EYB 1990-66942, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131 (S.C.C.) [*Keegstra* cited to S.C.R.].

then serious consideration must be given to whether freedom is truly the end-goal.

In Part I of this article, I argue that cyber racism is inextricably linked with systemic discrimination. The definition of systemic discrimination relied on was first provided by Judge Abella in the *Report of the Royal Commission on Equality in Employment* (Abella Report), which states that systemic discrimination points to practices or attitudes that can result in inequality of opportunity for individuals or groups.² The Supreme Court of Canada has since adopted this definition, and in some instances, has acknowledged that systemic problems require systemic remedies. The purpose of this discussion is to demonstrate how situating cyber racism within the context of systemic discrimination illuminates the sources of the problem, the appropriate responses, and the multiple stakeholders who have a role to play in curbing cyber racism.³

Following the contextualization of the problem, Part II will discuss cyber racism alongside the phenomenon of the Internet more specifically. In this part, I argue that cyber racism is not a new problem, but simply a new form of a well-known social ill. While the nature and location of racist speech may have changed due to advancements in digital media and the omnipresence of technology, the forces that work to perpetuate racist or discriminatory acts remain deeply embedded in society. For this reason, we must avoid demonizing the Internet, and direct our energy towards users of the Internet instead.

Part III of this article will provide an overview of the legal framework related to racist speech in Canada, including human rights legislation and free speech jurisprudence. Here, I will introduce the relatively recent legislative change to the *Canadian Human Rights Act* (the *CHRA*), i.e. the repeal of section 13. I use the discourse and debates surrounding the repeal of section 13 of the *CHRA* to highlight the tension between freedom of expression interests and the need to protect vulnerable groups from hate speech. Secondly, Part III will introduce constitutional conflicts raising section 2(b) claims in order to demonstrate how Canadian courts have responded to this tension.

I will explore five cases dealing with freedom of expression, beginning with *Canada (Human Rights Commission) v. Taylor*,⁴ which provided a definition of hate speech in 1990 that was adopted in later decisions. Next I will discuss *R. v.*

² *Report of the Royal Commission on Equality in Employment*, by Rosalie Silberman Abella (Ottawa: Supply and Services Canada, 1984) at 2 [*Abella Report*].

³ See, e.g., the Nova Scotia Task Force on Bullying and Cyberbullying, appointed by the province in May 2011 to look at the issue of bullying and cyberbullying in Nova Scotia. The Task Force was made up of various stakeholders in recognition that “[t]he struggle against bullying must be waged on many different fronts”: A. Wayne MacKay, *Respectful and Responsible Relationships: There’s No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying*. Submitted to the Nova Scotia Department of Education on February 29th, 2012. Available on request from the Department of Education and electronically published at <<http://antibullying.novascotia.ca/taskforce>> at 8.

⁴ *Canada (Human Rights Commission) v. Taylor*, 1990 CarswellNat 742, 1990 Carswell-

Keegstra which, though it was a case in the criminal context, is a key decision because the Supreme Court of Canada reaffirmed that hate speech is by its very nature degrading, of low value, and does not advance any of the goals of freedom of expression. This discussion is followed by an analysis of *Citron v. Zündel*,⁵ where the Canadian Human Rights Tribunal dealt with online communications. Lastly, two recent decisions, *Whatcott v. Saskatchewan Human Rights Tribunal*⁶ and *Canada (Human Rights Commission) v. Warman*⁷ reaffirm the constitutionality of section 13 of the *CHRA*. Specifically, in *Whatcott*, the Court emphasized that because hate speech has a “tendency to silence the voice of its target group,” it can “distort or limit the robust and free exchange of ideas,”⁸ and is therefore detrimental to the very values forming the basis of our fundamental freedoms. To conclude this section, I will discuss the serious implications of repealing section 13. Because the government has prioritized individual freedoms over robust collective protections, it has created a legislative void in relation to discrimination claims.

In Part IV, I propose a specific constitutional amendment. While I appreciate the slow pace of legal reform, I posit that it is imperative that Canada creates progressive laws that can better protect society from discriminatory speech. To this end, the Canadian government and ultimately Parliament can gain inspiration from other jurisdictions. This discussion is followed by a broader theoretical analysis of the framework within which claims of human rights violations are assessed. I argue that the adversarial structure relied on by courts and human rights tribunals is an inappropriate method to adjudicate claims of discrimination. While structural reform of adjudicative bodies is beyond the scope of this article, Part IV invites readers to reflect on whether the adversarial framework can effectively protect victims of discrimination.

Finally, the article will conclude with a focus on legal and policy recommendations. Part V will return to the discussion of systemic problems and systemic remedies introduced in Part I. In this section, I gain inspiration from pedagogical experts who explain that online manifestations of racism can be directly connected to how young people learn and interact in the school environment. The institutional culture of schools can inadvertently serve to perpetuate prejudices and stereotypes; this institutional culture includes the

Nat 1030, EYB 1990-67250, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129 (S.C.C.) [*Taylor* cited to S.C.R.].

⁵ *Citron v. Zündel*, 2002 CarswellNat 4364, 41 C.H.R.R. D/274 (Can. Human Rights Trib.) [*Zündel* cited to Carswell].

⁶ *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, 2013 CarswellSask 73, 2013 CarswellSask 74 (S.C.C.), reconsideration / rehearing refused 2013 CarswellSask 236, 2013 CarswellSask 237 (S.C.C.) [*Whatcott*].

⁷ *Canada (Human Rights Commission) v. Warman*, 2012 CF 1162, 2012 FC 1162, 2012 CarswellNat 3691, 2012 CarswellNat 3692 (F.C.), affirmed 2014 CarswellNat 127, 2014 CarswellNat 5431 (F.C.A.) [*Warman* F.C.].

⁸ *Ibid* at para 114.

school's values, norms, assumptions, and habits. For this reason, educators, administrators, and policy-makers must look beyond curricula when confronting racism in schools. I explore the incorporation of a literacy program which includes teaching both legal literacy and digital media literacy, and which has the goal of empowering young people to navigate the Internet in a safe and positive way.

I. DEFINING THE CONTEXT: SYSTEMIC DISCRIMINATION

Contextualizing the spread of hate speech involves confronting the systemic nature of discrimination. Systemic discrimination continues to pervade Canadian institutions, operating to systematically keep certain groups in society more vulnerable than others. Although the discrimination experienced by a distinct group may take different forms, understanding the nature of systemic discrimination with respect to one group is an invaluable aid to understanding systemic discrimination with respect to other groups.

Parliament established the Royal Commission on Equality in Employment (chaired by Judge Rosalie Abella) in 1983 to address changing patterns of Canadian society as women and minorities began making up larger segments of the labour force. As a result, the *Report of the Commission on Equality in Employment*, also known as the *Abella Report*, was released in 1984.⁹ The *Abella Report* recognized that women, native people, disabled persons, and visible minorities were not being granted equal job opportunities. It defined systemic discrimination as: “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.”¹⁰ Canadian courts subsequently adopted this definition of systemic discrimination. The *Abella Report* also clarified that such discrimination does not require proof of intent to harm in order to attract judicial scrutiny:

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.¹¹

Significantly, the *Abella Report* recognized that systemic discrimination in the workplace required a systemic response. It led to the enactment of the *Employment Equity Act* in 1986. The *Employment Equity Act* sought to ensure

⁹ Equity and Diversity Directorate, *History of Employment Equity in the Public Service and the Public Service Commission of Canada* (Ottawa: Public Service Commission of Canada, 2011), online: <www.psc-cfp.gc.ca/plcy-pltq/eead-eeed/rprt/ee-psc-cfp/pdf/ee-psc-cfp-eng.pdf>.

¹⁰ *Abella Report*, *supra* note 2 at 2.

¹¹ *Ibid.*

that no one would be denied employment opportunities and benefits for reasons unrelated to ability, and to eliminate systemic barriers faced by designated groups.¹²

Canadian human rights commissions have championed much of the research and advocacy related to systemic discrimination, since higher courts often do not hear such cases. The research published by human rights commissions is important because their reports frame discrimination as plaguing an entire system rather than individuals alone, and connect individual grievances with institutional inequalities. The Canadian Human Rights Commission's (CHRC) "Report on Plans and Priorities" for the 2013-2014 fiscal year identifies systemic discrimination as a first priority; in answering why this is, the Commission states:

Systemic discrimination is the creation, perpetuation or reinforcement of inequality among disadvantaged groups. It is usually the result of seemingly neutral legislation, policies, procedures, practices or organizational structures. The effect creates barriers to full participation in society. These include barriers to employment, benefits, services and the physical environment.¹³

In the same vein, the Ontario Human Rights Commission (Ontario HRC) defines systemic discrimination as "patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons."¹⁴ In the Quebec context, the issue has been discussed by the *Commission des droits de la personne et des droits de la jeunesse* (Quebec Commission). The Quebec Commission is specifically mandated to ensure that Quebec's laws, bylaws, standards, and institutional practices comply with the *Charter*, which prohibits discrimination based on race, colour, ethnic or national origin, and religion in the exercise of human rights and freedoms.¹⁵ To achieve this mandate, the Quebec Commission conducted a public consultation on systemic discrimination and racial profiling, which targeted three sectors: the public security sector; the education sector; and the youth protection system. The consultation affirmed the prevalence of systemic discrimination in Quebec's institutions, and the urgent need "to stimulate a discussion of potential solutions,

¹² *Employment Equity Act*, S.C. 1995, c. 44. See also the Equity and Diversity Directorate, *supra* note 9; See also University of British Columbia, "Employment Equity" (Vancouver: UBC), online: <equity.ubc.ca/employment/> .

¹³ Canadian Human Rights Commission, "Report on Plans and Priorities, 2013-14" (Ottawa: CHRC) at 4, online: <www.chrc-ccdp.ca/sites/default/files/rpp-eng.pdf> . See also Commission des droits de la personne et des droits de la jeunesse, *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences* (CDPDJ, 2011) [CDPDJ Report].

¹⁴ Ontario Human Rights Commission, "Racism and Racial Discrimination: Systemic Discrimination (Fact Sheet)" (Toronto: OHRC) at para 2, online: OHRC <www.ohrc.on.ca/en/racism-and-racial-discrimination-systemic-discrimination-fact-sheet> [OHRC, "Systemic Discrimination"].

¹⁵ CDPDJ Report, *supra* note 13.

and to create a broader understanding of the consequences of this type of discrimination for Quebec society.”¹⁶ Aside from legal or administrative bodies, issues-based organizations have also played a major role in advancing the recognition of the proliferation of systemic racism in society. Moreover, these organizations strive to keep adjudicative bodies accountable for their commitment to combating systemic racism and intersectional discrimination through research and advocacy.¹⁷

The notion of systemic discrimination gained wide legal recognition in Canada in the case *Canadian National Railway v. Canada (Human Rights Commission)*, which dealt with an issue that arose in the context of employment.¹⁸ Though the decision related to the workplace, the ruling set an important precedent for future cases involving systemic discrimination against historically disadvantaged groups in Canada. Action Travail des Femmes, a Montreal-based community group, complained to the Canadian Human Rights Commission that the practices and procedures for hiring and promoting employees adopted by the Canadian National Railway (CN) denied opportunities to women, and were therefore discriminatory. The Tribunal found that the evidence clearly indicated discriminatory practices, concluding that it was necessary to impose upon CN a special employment program.¹⁹ On appeal, The Supreme Court of Canada affirmed that the Tribunal has the power, under section 41(2)(a) to impose upon an employer an employment program that responds to systemic discrimination in the hiring and promotion of a disadvantaged group (referring, in this case, to women).²⁰ In doing so, the Supreme Court returned to the analysis of systemic discrimination provided by the *Abella Report*, concluding that discrimination can result from the simple operation of established procedures of recruitment, hiring, and promotion, which are not necessarily designed to promote discrimination.

Furthermore, the Court concluded that to combat systemic discrimination “it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.”²¹ The Court’s pronouncement on

¹⁶ *Ibid* at 10, 14. Based on their findings, the report defined systemic discrimination as: Systemic discrimination involves both direct and indirect discrimination, but is also goes much further. It is based on the dynamic interaction between decisions and attitudes tainted by prejudice, and on organizational models and institutional practices that have harmful effects, whether intended or not, on groups that are protected by the Charter.

¹⁷ See, e.g., the Center for Research-Action on Race Relations (CRARR), a Montreal-based independent, non-profit civil rights organization founded in 1983 to promote racial equality and combat racism in Canada: Center for Research-Action on Race Relations, “Our Mandate and Services” (Montreal: CRARR), online: < www.crarr.org/?q=node/1 > .

¹⁸ *Canadian National Railway v. Canada (Human Rights Commission)*, 1987 CarswellNat 831, 1987 CarswellNat 905, [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42 (S.C.C.) [*CN v. CHRC* cited to S.C.R.].

¹⁹ *Ibid*.

²⁰ *Ibid* at 1124.

how to respond to situations of inequality of opportunity is a crucial aspect of the judgment's legacy; specifically, the Court noted that "[s]ystemic remedies must be built upon the experience of the past so as to prevent discrimination in the future."²²

(a) Systemic Remedies for Systemic Problems: Are We There Yet?

Though references have been made to the need for court-enforced systemic remedies, their likelihood and viability remain in question.²³ In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*²⁴ the Court found that the aerobic standards forming part of a mandatory fitness test of forest firefighters discriminated against women. The issue arose because Tawney Meiorin, a female forest firefighter, had lost her employment after failing the mandatory test. In this case, an individual's grievance exposed standards of systemic exclusion embedded in a "neutral" employment standard. This case confirmed that direct and indirect or adverse effect discrimination require the same analysis in order to ensure that hidden or institutionalized forms of discrimination are exposed and remedied. As stated by Colleen Sheppard, legal scholar in the field of constitutional law and equality rights, naming adverse effect discrimination "reinforces the importance of redressing systemic inequalities that result in exclusion and prejudice through institutional transformation and not merely by individual special treatment."²⁵ Indeed, the discrimination claim put forward by *Meiorin* advanced the human rights analysis by forcing the Court to consider the complexities of the manifestations of systemic discrimination. And yet, legal experts have questioned whether this analysis has facilitated the framing and enforcing of systemic remedies.

How have the courts responded to the broad and systemic nature of many discriminatory practices? According to Dianne Pothier, the Supreme Court of Canada's performance in relation to properly framing and enforcing systemic remedies has been less than impressive. Pothier looks critically at the Supreme Court's approach in *Moore v. British Columbia (Ministry of Education)*, noting that although the issues at hand warranted systemic remedies, the Court reverted to ordering individual remedies, diverging from its own long-standing jurisprudence. Pothier writes that the institutional capacity of human rights

²¹ *Ibid* at 1139.

²² *Ibid* at 1145.

²³ Dianne Pothier, "Adjudicating Systemic Equality Issues: The Unfulfilled Promise of *Action Travail des Femmes*" (2014) 18:1 C.L.E.L.J. 177 [Pothier, "Systemic Equality"].

²⁴ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, 1999 CarswellBC 1907, 1999 CarswellBC 1908, (*sub nom.* British Columbia (Public Service Employee Relations Commission) v. BCGSEU) [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (S.C.C.) [*Meiorin* cited to S.C.R.].

²⁵ Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001) 46:2 McGill L.J. 533 at 558.

adjudication has been seriously challenged since the *Canadian National Railway v. Canada (Human Rights Commission)* decision was decided nearly three decades ago.²⁶

In *Moore S.C.C.*, the Supreme Court of Canada reversed the systemic remedy awarded by the Tribunal on the basis of remoteness.²⁷ Jeffrey Moore initiated a complaint against the North Vancouver School Board and the Province of British Columbia on the basis that he had been discriminated against because of serious learning disabilities (SLDs). Because the school district did not provide options to meet the educational needs of students with serious learning disabilities, Moore had to attend a private school for students with learning disabilities from kindergarten to graduation—the year the BC Human Rights Tribunal issued its decision.

The Tribunal found that the school district and the ministry of education discriminated against students with SLDs based on their failure to provide reasonable accommodation, and their inability to prove undue hardship.²⁸ The Tribunal provided for individual remedies in the form of damages, and in addition, awarded systemic remedies, which included an order against the ministry to make funding available for students with learning disabilities. On judicial review, the majority of the British Columbia Court of Appeal decided that there was no discrimination, and therefore the question of systemic remedies was ousted from the conversation. The Moores were granted leave to appeal to the Supreme Court of Canada.

The question of how and when to grant systemic remedies landed in the hands of the Supreme Court of Canada. The Court broadly defined the relevant services under the human rights code²⁹ and confirmed the Tribunal's key finding of systemic discrimination. The Tribunal had defined the goal of a systemic analysis as being:

[T]o review all of the evidence about the education system to examine the way in which it operates, as a system. . . . If that evidence discloses that there are systemic barriers, through Ministry policies or actions, that do not facilitate access, then a finding of systemic discrimination should follow.³⁰

²⁶ According to Pothier, the 1987 *Action Travail des Femmes* (referred to in this paper as *CN v. CHRC*) decision represents “a high-water mark in the invocation of systemic remedies in human rights cases” and that the promise that systemic remedies could be relied upon has not been fulfilled: Pothier, “Systemic Equality,” *supra* note 23 at 208.

²⁷ *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, 2012 CarswellBC 3446, 2012 CarswellBC 3447 (S.C.C.) [*Moore S.C.C.*].

²⁸ *Ibid* at para 46.

²⁹ Justice Abella defined special education as being the means by which those students get meaningful access to the general education services (*ibid* at para 5). According to MacKay, “[b]roadly defining the services covered by human rights codes also promotes a broad and purposive interpretation of equality”: A. Wayne MacKay, “The Marriage of Human Rights Codes and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice” (2013) 64 U.N.B.L.J. 54 at 80.

An expansive definition of services under the BC *Human Rights Code* did not translate into a broad award of systemic remedies against the provincial department of education. Rather, the Court put the responsibility on the school board. The Court's reason for disagreeing with the Tribunal's award of systemic remedies was that the "remedy must flow from the claim."³¹ In the case before it, the claim had been made on behalf of the individual complainant, around whom the evidence was centred; systemic remedies were rejected on this basis.

The suggestion that systemic remedies can be rejected based on the individual nature of the complaint does not align with the broad remedial authority articulated in *Meiorin*. Pothier recognizes that although the issue in *Moore S.C.C.* was much more complex than that in *Meiorin* (involving the design and operation of the whole public school system rather than a single exclusionary standard),³² she criticizes the way the Court averted the issue of when and how systemic remedies can be granted. This, she believes, undermines the principle that incidents of discrimination can (and should) point to the need for systemic responses.

It is important to take a step back, and note the reality that Canadian human rights tribunals remain the primary adjudicators for individual complaints stemming from systemic issues. In a recent judgment, the Quebec Human Rights Tribunal specified that: "one of the characteristics of systemic discrimination is the disproportionate exclusionary effect, which, for the members of a group contemplated by a prohibited ground of discrimination, stems from a set of practices, policies and attitudes."³³ Therefore, advancing complaints related to systemic discrimination remains challenging due to serious evidential barriers and burdens on the plaintiff at the start. Recently, a decision by the Canadian Human Rights Tribunal stated that evidence of such claims often relies on "the subtle scent of discrimination."³⁴ While the detrimental impact on the person bringing a well-founded complaint to the Tribunal is anything but "subtle," the covert nature of discrimination requires courts to rely on inferences. As noted by an Ontario Commission race policy dialogue paper, "[w]hile cases of overt racial harassment usually turn on the credibility of the parties and their witnesses, cases alleging more subtle forms of racism are, not surprisingly, contingent on

³⁰ *Moore v. British Columbia (Ministry of Education)*, 2005 BCHRT 580, 2005 CarswellBC 3573 (B.C. Human Rights Trib.), reversed 2008 BCSC 264, 2008 CarswellBC 388 (B.C. S.C.), affirmed 2010 BCCA 478, 2010 CarswellBC 3446 (B.C. C.A.), reversed 2012 CarswellBC 3446, 2012 CarswellBC 3447 (S.C.C.) at para. 840, *supra* note 27.

³¹ *Moore S.C.C.*, *supra* note 27 at para 64.

³² Pothier, "Systemic Equality," *supra* note 23 at 202.

³³ *Québec (Commission des droits de la personne des droits de la jeunesse) c. Gaz Métropolitain inc.*, 2008 QCTDP 24, 2008 CarswellQue 15059, 2008 CarswellQue 8515 (T.D.P.Q.) at para. 28, varied 2011 CarswellQue 6683, 2011 CarswellQue 15856 (C.A. Que.).

³⁴ *Turner v. Canada Border Services Agency*, 2014 CHRT 10, 2014 CarswellNat 560 (Can. Human Rights Trib.) at paras. 28ff.

inferring discrimination through circumstantial evidence.”³⁵ In addition, the Public Service Alliance of Canada opined that “[i]t can be difficult to establish that people are excluded from employment opportunities due to the taint of stereotyping or unwillingness to judge people on the basis of merit.”³⁶

Despite the fact that changes have been incremental and inconsistent at times, political and legal actors have recognized that systemic discrimination is not an abstract notion but, rather, a concrete and pervasive problem. Court decisions that acknowledge systemic discrimination can play a role in compelling anti-racism efforts. The simple recognition that seemingly neutral legislation or standards can have extremely harmful effects on vulnerable populations is an important reminder for legislators and policy-makers who seek to create broader human rights protections for people across Canada. Moreover, decisions involving the interaction between human rights Codes and the *Charter* demonstrate the transformative potential of human rights legislation.

Overall, decisions taken by administrative tribunals, regulatory bodies, and statutory human rights agencies reinforce the fact that in order to deal with manifestations of discrimination and racism there is work to be done below the surface. As pointed out by the Ontario Commission, “tackling systemic discrimination can be complex.”³⁷ To conclude, I argue that Canadian courts should follow the lead set by human rights commissions and civil rights organizations in identifying systemic discrimination as a priority, which involves a commitment to racial equality and social justice. This commitment should translate into a willingness to consider the viability of systemic remedies.

While the law plays a critical role by setting precedents reflecting how society must govern itself, the law is not the whole answer. In order to properly understand the pervasive problem of hate speech in Canada and across boundaries, the issue must be framed within the context of systemic discrimination. Ultimately, systemic discrimination continuously manifests itself in new forms, such as cyber racism. This article will demonstrate that cyber racism is a systemic problem that calls for vigorous solutions involving multiple stakeholders. It is imperative that the issue be addressed from both inside and outside of the legal context.

II. RACISM AND THE INTERNET: AN OLD PROBLEM, A NEW DIMENSION

In this section I argue that while the nature and location of racist speech may have changed, the forces that work to perpetuate racist and discriminatory

³⁵ Ontario Human Rights Commission, “Surveying Racial Discrimination Cases,” by Aryn Hadibhai (OHRC, 2004), online: OHRC < www.ohrc.on.ca/en > .

³⁶ Public Service Alliance of Canada, “Human rights victory: Member wins discrimination case and sets precedent for other workers,” (PSAC, 2014), online: < psacunion.ca/human-rights-tribunal-agrees-cbsa-discriminated-against-job-applicant > .

³⁷ OHRC, “Systemic Discrimination,” *supra* note 14.

actions are deeply embedded in society. For this reason, I emphasize the need to avoid making the Internet the focus when shaping appropriate responses to the problem of cyber racism.

The Internet is ubiquitous and powerful in terms of its ability to influence public opinion. “Cyber hate” has been identified on the international level as a danger in need of an active response. In June 2009, the United Nations held a seminar entitled “Cyber Hate: The Dangers of Cyber Space” as part of an “Unlearning Intolerance” series. In his concluding remarks on the seminar, Ban Ki-moon stated that though the Internet is a positive force, and has transformed the way people live and work, “[f]or young people, electronic harassment and cyber hate can have a searing impact. . . we have seen it time and again targeting innocents because of their faith, their race, their ethnicity, their sexual orientation.”³⁹

I mention such initiatives because they are part of the way forward; however, I reject the position that the Internet is the *source* of the problem. As reinforced by the discussion of systemic discrimination, racism exists in structures and policies—the dissemination of ideas based on hatred and racial superiority were an urgent social problem *before* the emergence of digital communications and media. Technological innovations have simply changed how the message is communicated, which does not diminish its effect. In other words, racist messages communicated via websites, social media, or Internet message boards can be just as harmful to anyone subject to them as those communicated offline.

Though her analysis focuses on the rise of white supremacy online, Jessie Daniels’ description of the manifestation of racial hatred on the Internet is informative. In her book, she notes that digital media is neither a “raceless panacea,”⁴⁰ nor a dangerous place where people are lured into hate groups; rather, the Internet provides a new method to spread old forms of hatred:

Old forms of overt white supremacy (e.g., racist hate speech) have moved into the Information Age alongside new, emergent forms of white supremacy that include searchable databases of (racially identifiable) user names easily exported for use in mass e-mails along with new forms of covert white supremacy at cloaked sites, whose goal is to undermine the very idea of racial equality.⁴¹

Regardless of how it is named—electronic harassment, cyberhate, or cyber racism—the issue poses new challenges and opportunities for parents, educators,

³⁹ Ban Ki-moon, “Secretary-General’s Remarks at Seminar on Cyber Hate: Danger In Cyber Space” (Address delivered at the Seminar on Cyber Hate, New York, 16 June 2009) [unpublished], online: < www.un.org/sg/statements/?nid=3927 > .

⁴⁰ Jessie Daniels, *Cyber Racism: White Supremacy Online and the New Attack on Civil Rights* (Lanham, MD: Rowman & Littlefield, 2009) at 188. Daniels is a professor in sociology and is recognized as a national expert on white racism in the United States.

⁴¹ *Ibid.*

legislators, scholars, and community workers in understanding the meaning of racial hatred, anti-racism, and social justice.

III. THE LEGAL FRAMEWORK: CANADIAN ANTI-DISCRIMINATION LAWS

The discourse surrounding free speech in Canada reveals the tension between two interests: a) the fundamental freedom of expression enjoyed by individuals; and b) the protection from discrimination on certain prohibited grounds afforded to minorities. Though these two interests are not necessarily antithetical, the individualist crusade has so obscured the discourse that it has made it seem that they are necessarily so. In this section I provide an overview of the legal framework related to racist speech in Canada, which includes human rights legislation and free speech jurisprudence. The discussion will include the repeal of section 13 of the *Canadian Human Rights Act*, and the implications of the repeal on discrimination-based claims. I argue that the repeal increases the potential for the spread of hate speech, and stands in opposition to the values underlying a just and democratic society.

Section 1 of the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁴² Section 2 of the *Charter* states that “[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”⁴³ Furthermore, the *Charter* explicitly condemns racial discrimination pursuant to section 15(1), which states:

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.⁴⁴

In addition, The *Canadian Human Rights Act*⁴⁵ (*CHRA*) and provincial human rights codes prohibit discrimination based on race.

The *Criminal Code* protects people from acts of hate and hate propaganda. In the criminal context, racial hatred as a harmful form of expression must meet the definition of “hate speech” in order to attract a criminal law response. While hate speech does not have an internationally agreed upon definition, Canadian courts understand it as speech that can incite violence or prejudiced actions

⁴² *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁴³ *Ibid*, s. 2.

⁴⁴ *Ibid*, s. 15.

⁴⁵ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*].

against particular groups of people. Two sections of the *Criminal Code* are relevant to hate speech—sections 318 and 319.⁴⁶ Under section 319, “statements’ includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.”⁴⁷ Section 318 recognizes that advocating or promoting genocide also constitutes an indictable offence.⁴⁸ Moreover, section 318(4) defines “identifiable group” as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability.”⁴⁹

In sum, while hate speech can potentially attract criminal sanctions it has historically been under the purview of both criminal *and* human rights law. In the context of online expression, protection from electronic harassment was provided for by remedial human rights legislation. Canadians who felt discriminated against by material published online had recourse to a human rights remedy under section 13 of the *CHRA*, which provided that it is a “discriminatory practice” to send hate messages via telecommunications equipment, including the Internet. Section 13 of the *CHRA* allowed the Canadian Human Rights Commission to hold hearings and give penalties to individuals and groups who communicate hate messages by telephone or the Internet.⁵⁰ I write in the past tense because this section of the *CHRA* no longer exists. In June 2012, the House of Commons voted to repeal section 13(1). On June 26, 2013, the provision was formally repealed pursuant to Bill C-304 (also known as *An Act to amend the Canadian Human Rights Act (protecting freedom)*).⁵¹

⁴⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 318-319.une 26, to tts bited grounds note 53 at 9. Employmente Repeal. Section 319 defines “[p]ublic incitement of hatred” as an indictable offence: (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. There are some defences against criminal charges under these sections: see *ibid*, s. 319(3).

⁴⁷ *Ibid*, s. 319(7).

⁴⁸ *Ibid*, s. 318 [emphasis added] reads:(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. . .(2) In this section, “genocide” means any of the following acts committed *with intent to destroy in whole or in part any identifiable group*, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

⁴⁹ *Ibid*, s. 318(4).

⁵⁰ *CHRA*, *supra* note 45, s. 13(1) provided that:It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(a) Section 13(1) of the *Canadian Human Rights Act*: The Debate, the Discourse, and the Repeal

The ability to fight for a more racially just society is predicated on the ability to name and confront the continued presence of racial injustice through public speech acts that bring attention to these issues. To suggest that the call for a limit to racially harassing language is an attempt to curtail freedom of speech is to grant legitimacy to a deliberate mischaracterization of the issue.⁵²

The political discourse surrounding the repeal of section 13 reveals that those who identify as “free speech advocates” consider the repeal to be a major democratic achievement. The debates leading up to the repeal aptly illustrate the tension between an individual’s free speech interests, and the broader protection of human rights in Canadian law. Alberta Conservative MP Brian Storseth—who initiated the Bill that repealed section 13—is quoted describing the provision as a “flawed piece of legislation,” and referring to the Canadian Human Rights Tribunal as “a quasi-judicial, secretive body that takes away your natural rights as a Canadian.”⁵³ Supporters of his arguments included self-identified free speech advocates, who characterized section 13 as a “sword against Canadians.”⁵⁴ In other words, critics of section 13 succeeded in antagonizing the provision by characterizing the law as an “anti-free speech” provision, thus securing its repeal.

Notwithstanding, critics of Parliament’s decision predicted a flood of online hate. According to the University of Calgary’s Darren Lund, whose research centres on human rights and diversity issues, this repeal “leaves a huge gap. . . There are so many hate sites right now on the Internet, and I think some reasonable monitoring of the hatred they’re spewing fits with the Canadian ethos of living harmoniously in a democracy.”⁵⁵

Similarly, I argue that by repealing section 13 of the *CHRA* the government has effectively decided that: a) promoting equality, diversity, and pluralism; and b) protecting individual and group dignity, are less important objectives than

⁵¹ Bill C-304, *An Act to amend the Canadian Human Rights Act (protecting freedom)*, 1st Sess, 41st Parl, 2011 (assented to 26 June 2013), S.C. 2013, c. 37.

⁵² Brittney Cooper, “Stop mocking ‘safe spaces’: What the Mizzou & Yale backlash is really about” *Salon Magazine* (18 November 2015), online: <http://www.salon.com/2015/11/18/what_the_mizzou_yale_backlash_is_really_about_the_right_of_white_people_to_engage_in_racial_recklessness/>. In her article, Professor Cooper articulates why dismissing the importance of safe spaces for people of colour on U.S. college campuses ignores the harm caused by racially charged verbal harassment.

⁵³ Michael Woods, “Hate speech no longer part of Canada’s Human Rights Act,” *National Post* (27 June 2013), online: <www.nationalpost.com>.

⁵⁴ *Ibid.*

⁵⁵ Charlie Gillis, “Section 13: How the battle for free speech was won: Five years, two tribunals, secret hearings, a court challenge and a turning point,” *Macleans* (19 June 2012), online: <www.macleans.ca>.

protecting an individual's free speech rights. Victims of racial hatred or other discriminatory speech are denied a viable mechanism through which they can advance their complaints. Indeed, human rights lawyers, the Canadian Bar Association, and Canadian jurisprudence have expressed the value of section 13 as a citizens' tool to protect themselves against hate speech. While recognizing that section 13 of the *CHRA* did not function perfectly, it nevertheless played an important role in responding to the needs of vulnerable individuals and communities, as will be discussed in the following sections.

(b) An Overview of Freedom of Expression Jurisprudence

While those who attacked section 13 did so on the basis that it had a significant censoring effect on individual speech, this assertion is not supported by Canadian freedom of expression jurisprudence. On the contrary, Canadian courts have affirmed the constitutionality of section 13, stating that while it limits the freedom of expression guaranteed in section 2(b) of the *Charter*, it constitutes a reasonable limit due to the pressing and substantial objective of ensuring people are not subject to hate propaganda.⁵⁶ The judicial trajectory serves to reaffirm that the repeal of section 13 comes to the detriment of those most vulnerable to being subject to racist speech. Other decisions have demonstrated the court's willingness to curb not only freedom of expression, but also freedom of the press and the open courts principle in the name of protecting the privacy rights of a victim seeking redress.⁵⁷

The expansion of the digital world brought with it a wave of complex constitutional conflicts.⁵⁸ A series of cases dealing with freedom of expression will be explored in this section, beginning with *Canada (Human Rights Commission) v. Taylor* and *R. v. Keegstra*, which provided authoritative definitions of hate speech. Next, I will discuss the issue of online communications raised in *Citron v. Zündel*. Two recent decisions, *Whatcott v. Saskatchewan Human Rights Tribunal* and *Canada (Human Rights Commission) v. Warman*, reaffirmed the constitutionality of section 13 of the *CHRA*.

In *Taylor*, a white supremacist challenged the ability of section 13(1) of the *CHRA* to silence his speech. The claimant was operating a hate promotion telephone service at the time the case was brought to the court. The Supreme Court of Canada held that controlling hate speech was within the purview of human rights legislation, ruling that though section 13 does violate section 2(b) of the *Charter*, it is saved by section 1 as a reasonable limit in a free and

⁵⁶ Canadian Human Rights Tribunal, "Annual Report, 2002" (Ottawa: Public Works and Government Services, 2003) at 10, online: CHRT <chrt-tcdp.gc.ca/ns/pdf/annual02-e.pdf> [CHRT, "2002 Report"].

⁵⁷ *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, 2012 CarswellNS 675, 2012 CarswellNS 676 (S.C.C.) [*A.B. v. Bragg*].

⁵⁸ A. Wayne MacKay, "Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media" (2015) 66 U.N.B.L.J. 3 at 41 [MacKay, "Ally or Enemy"].

democratic society.⁵⁹ The Supreme Court concluded in *Taylor* that hate propaganda presents a serious threat to society and that in seeking to prevent the harms caused by hate propaganda, the objective behind section 13(1) is obviously one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression.⁶⁰ The Court determined that hate propaganda contributes little to the aspirations enshrined in section 2(b) of the *Charter* such as the quest for truth, the protection of democracy, or individual fulfillment. Furthermore, the Court recognized that the values of equality and multiculturalism found in sections 15 and 27 of the *Charter* “magnify the weightiness of Parliament’s objective in enacting s. 13(1).”⁶¹ In other words, respect for the dignity and equality of the individual as a member of a particular group can justify the infringement on the freedom of expression.

Another seminal case in the free speech trajectory is *Keegstra*, which examined the constitutionality of the limitation on free speech included in the *Criminal Code*. Writing for the majority, Chief Justice Dickson rejected the respondent’s argument that there could be no rational connection because it was questionable whether section 13 actually mitigates the spread of hateful speech.⁶² According to the Chief Justice, the very process of hearing a complaint and, if substantiated, issuing a cease and desist order, “reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance.”⁶³ Moreover, the Chief Justice argued that paradoxically, hate speech *undermines the very principles upon which freedom of expression is based* and contributes little to the “quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.”⁶⁴ Finally, the Court concluded that the important parliamentary objective reflected in the enactment of section 13(1) is an objective supported by research, as well as by “our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred.”⁶⁵

The most prominent Canadian Human Rights Tribunal decision on the issue of hateful expression over the Internet, *Zündel*, dealt with a website maintained by Ernst Zündel, a free speech activist who had been charged for spreading anti-Semitic literature. The case eventually reached the Supreme Court of Canada,

⁵⁹ *Taylor*, *supra* note 4 at para 77.

⁶⁰ Parliamentary Information and Research Service, “Canadian Anti-hate Laws and Freedom of Expression (Background Paper)” (Ottawa: Library of Parliament, 2010), online: < www.parl.gc.ca/content/lop/researchpublications/2010-31-e.pdf > [“Walker Paper”].

⁶¹ *Taylor*, *supra* note 4 at 920 .

⁶² *Keegstra*, *supra* note 1.

⁶³ *Taylor*, *supra* note 4 at 924.

⁶⁴ *Keegstra*, *supra* note 1 at 766.

⁶⁵ *Ibid* at 758.

and resulted in the striking down of the provision in the *Criminal Code* that prohibited publication of false information on the basis that it violated the freedom of expression under section 2(b) of the *Charter*.⁶⁶ However, because Mr. Zündel tried to strike down the constitutionality of section 13 of the *CHRA* in his arguments, the decision also dealt with free speech in the context of remedial human rights legislation.

The Tribunal found that while Mr. Zündel was not the owner of the website, he exercised a significant amount of control over what was posted on it. Mr. Zündel and those acting in concert with him were ordered to stop communicating the material that formed the subject of the proceedings.⁶⁷ The Tribunal noted that the Supreme Court of Canada had upheld section 13 in previous decisions as a justifiable infringement on freedom of expression, and that while the provision may limit freedom of conscience and religion, it does so to protect the dignity of others.⁶⁸ The Tribunal found the respondent's evidence of section 13's supposed "chilling effect" on freedom of expression to be unconvincing. The Tribunal also concluded that the provision was not so vague as to violate the principles of fundamental justice.⁶⁹ The decision is notable not only because it affirmed that section 13 is constitutional, but also because it held that the *CHRA* applies to Internet communications. The government respected the Court's direction and amended the provision to include Internet communications.⁷⁰ Subsequent Internet hate promotion decisions made by the CHRT followed the precedent set by *Zündel*, recognizing that section 13 can be used to limit free speech for the greater purpose of protecting individuals and communities from being subject to hate speech—whether communicated online or offline.⁷¹

In *Warman F.C.*, the Federal Court of Canada reviewed a decision taken by the CHRT in 2009, which dealt specifically with the introduction of a penalty provision to section 13 subsequent to *Taylor*, and thus changed the nature of the constitutional analysis.⁷² The Tribunal held in that case that section 13, when viewed in conjunction with the types of remedial orders that can be imposed in relation to that section under section 54 of the *CHRA*, is an unreasonable infringement of section 2(b) of the *Charter*. The CHRT concluded that the introduction of these provisions meant section 13 became "more penal in nature" which could result in a chilling effect on free speech. However, the Tribunal refrained from making declarations on the constitutionality of section 13.⁷³ The Federal Court, receiving the decision on judicial review, confirmed that the

⁶⁶ *Zündel*, *supra* note 5.

⁶⁷ CHRT, "2002 Report," *supra* note 56.

⁶⁸ *Zündel*, *supra* note 5.

⁶⁹ CHRT, "2002 Report," *supra* note 56.

⁷⁰ "Walker Paper," *supra* note 60.

⁷¹ CHRT, "2002 Report," *supra* note 56.

⁷² *Warman F.C.*, *supra* note 7.

⁷³ *Warman v. Lemire*, 2009 CHRT 26 (Can. Human Rights Trib.) at paras. 262, 279,

penalty provisions were of no force or effect. This case is significant because the Federal Court found that the Tribunal should have applied section 13 and in doing so, affirmed the provision's constitutionality.⁷⁴

Decisions justifying the infringement of free expression on the basis of respect for the dignity and equality of individuals or particular groups have yet to be contested. On the contrary, in 2013 the Supreme Court of Canada in *Whatcott* upheld anti-hate laws as a reasonable limit on free expression. The Court conducted a full review of hate speech laws, and the appropriate tests to conduct to justify the courts' limitation of free speech. The Court ruled that the benefits of section 13 outweighed any impact it has on freedom of expression. The Court in *Whatcott* referred to *Taylor*, which set the parameters for what constitutes hate speech:

[C]ourts...[using] Taylor[’s] definition of hatred. . .have generally identified only extreme and egregious examples of delegitimizing expression as hate speech. This approach excludes merely offensive or hurtful expression from the ambit of the provision and respects the legislature’s choice of a prohibition predicated on ‘hatred.’⁷⁵

Whatcott reiterated and clarified this definition of hate speech, declaring that *only the most egregious expressions could justifiably limit freedom of expression*.⁷⁶ Chief Justice McLachlin, writing for the majority, provided a useful discussion of hate speech that is worth repeating. In attempting to define the term, she states it is an effort to marginalize individuals based on their membership in a group. Furthermore, hate speech seeks to “delegitimize group members in the eyes of the majority” reducing their acceptance within society:

Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. . .Hate speech lays the groundwork for later, broad attacks on vulnerable groups. . . [that] can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. . . .It [also] impacts on [a protected] group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.⁷⁷

Whatcott reinforces that section 13 and similar legislation (in this case, section 14(b) of the *Saskatchewan Human Rights Code*, which is similar to section 13 of the *CHRA* because it prohibits “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”⁷⁸) are vital to the

⁷⁴ “Walker Paper,” *supra* note 60 at 10.

⁷⁵ *Whatcott*, *supra* note 6 at para 46.

⁷⁶ *Ibid* at para 99.

⁷⁷ *Ibid* at paras 71, 74-75. Similarly, the Court states that though hate speech may achieve the goal of self-fulfillment, it does so at the expense of the participation and self-fulfillment of individuals within a vulnerable group (*ibid* at para 104).

protection of individual and group dignity in a pluralistic society. Furthermore, the decision makes it clear that such legislation does not significantly impact the rights to freedom of expression, but rather, provides that only speech of an “ardent and extreme nature” should be considered to meet the definition of “hatred.”⁷⁹ This definition of hatred is important in order to avoid far-reaching liability, and to ensure that complaints do not have unintended adverse effects on vulnerable minorities.⁸⁰ Therefore, restrictive provisions found in a remedial human rights legislative context rather than as part of the criminal law do not adversely affect the constitutional acceptability of the provision.

(c) A Canada without Section 13: A Critical Analysis of the Repeal

Since the repeal of section 13(1) of the *CHRA*, human rights law no longer plays a role in protecting people from online harassment, including cyber racism. The *Criminal Code* acts as the sole source of protection against hatred disseminated via electronic means, placing online hate speech under the exclusive domain of the criminal justice system. This has serious implications in light of the fact that in the criminal context, standards of proof are much higher, and convictions are rarer. In order to lay a charge, evidence must show that the material in question was wilfully promoted, that it targeted an identifiable group, and that it meets the common-law test of hate material (all beyond a reasonable doubt).

The decisions taken by the court on the issue of freedom of expression in discrimination claims reveal that characterizing anti-hate legislation as unjustifiable censorship of free speech obscures urgent issues that human rights legislation seeks to respond to. Using the free speech argument to undermine the value of remedial human rights legislation blatantly disregards the fact that hate speech is endured on a daily basis by vulnerable populations, and that the Internet is simply another forum through which racist speech is spread.

⁷⁸ *Ibid* at para 12 [emphasis removed].

⁷⁹ *Ibid* at para 194.

⁸⁰ E.g., claims targeted against religious groups for sexist and homophobic statements, organizers of political campaigns, LGBT groups for anti-religious speech, or even language-rights activists. Creating parameters for what constitutes hate speech is vital to protection from discrimination. In August 2015, Quebec proposed Bill 59, which seeks to ban hate speech and speech inciting violence. A general assessment by CRARR noted that the Bill requires significant amendments to avoid creating injustices in the pursuit of justice and protection from discrimination. The first key amendment proposed by CRARR is for “hate speech” and “speech inciting violence” to be defined in accordance with *Whatcott*, without depriving victims who experience the personal effects of hate speech of the right to file complaints and claim damages for themselves. According to CRARR, failure to define “hate speech” and “speech inciting violence” opens the door to potential abuse of the Bill: Center for Research-Action on Race Relations, News Release, “Quebec’s Hate Speech Bill has Serious Flaws, Many Provisions Possibly Unconstitutional,” (28 August 2015), online: CRARR <www.crarr.org/?q=node/19722>.

Overlooking the seriousness of these issues is based on a false premise that racism is part of Canada's past, not its present. This notion is illustrated in media commentary which seeks to minimize or deny existence of present day racism; for example:

Canada's human-rights law is a product of the 1960s, when much of our society truly was shot through with bigotry and prejudice. Those days are gone, thankfully, and laws such as the Canadian Human Rights Act now comprise a greater threat to our liberty than the harms they were meant to address.⁸¹

A critical analysis of the repeal must involve an analysis not only of public opinion, but also of the legal arguments advanced in support of the repeal. Some legal arguments see criminal standards as more suitable for the regulation of hate speech. Richard Moon submitted a report to the Canadian Human Rights Commission in 2008 concerning section 13 of the *CHRA* and the regulation of hate speech on the Internet. The report provided a useful framing of the broader debate surrounding freedom of expression, and simultaneously supported the repeal of section 13. Moon argued that section 13 should be removed from the *CHRA* and that hateful expression be regulated under the *Criminal Code*.

In response, I point out that the "potential drawbacks to an exclusive reliance on the *Criminal Code* hate speech provisions" that Moon mentioned warrant more attention than he gave them. Moon mentions in passing multiple drawbacks, including: "the higher burden of proof [on claimants], the requirement that the Attorney General of the particular province consent to prosecution and the lack of experience on the part of police and prosecutors in pursuing hate speech cases."⁸² These drawbacks are not insignificant. While any citizen can file a human rights complaint, the high burden of proof and the required approval of the Attorney General limits the protection allegedly offered by the *Criminal Code* to disadvantaged groups in society. As the Ontario Human Rights Commission noted, this does not accord with other areas of human rights: "[f]or example, when sexual harassment involves allegations of violence or assault, it too becomes a mat[t]er for the Criminal Code, but still remains under the purview of human rights legislation."⁸³

In his book, *The Constitutional Protection of Freedom of Expression*, Moon explores the value of expressive freedom, and comments on the limited reach of

⁸¹ Jonathan Kay, "Jonathan Kay: Good riddance to Section 13 of the Canadian Human Rights Act," *National Post* (7 June 2012), online: <www.nationalpost.com> .

⁸² Canadian Human Rights Commission, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*, by Richard Moon (CHRC, 2008) at 31, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=1865282> [*Moon Report*].

⁸³ Ontario Human Rights Commission, "Submission to the Canadian Human Rights Commission concerning section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet," by Richard Moon (OHRC, 2009), online: OHRC <www.ohrc.on.ca> [Moon, "CHRC Submission"].

rights adjudication in this context.⁸⁴ Moon recognizes the pervasive nature of discriminatory speech, only to the extent that it supports his argument that rights adjudication is an inappropriate mechanism for addressing racist expression.⁸⁵ He argues that enforcing limits on speech risks undermining a constitutional freedom while failing to address the true causes of the harm. In other words, the pervasive nature of racist speech calls for the elimination of stereotypes and a shift in popular culture rather than decisions challenging the Constitution's commitment to free expression.⁸⁶ While Moon may be right on the scale of the problem, this approach could be problematic because it focuses on securing a free public discourse, the value of which is framed as being greater than other values entrenched in the Constitution such as equality, respect, and individual dignity. Moreover, he states that, "[a]ny attempt to exclude all racial or other prejudice from public discourse would require extraordinary intervention by the state."⁸⁷ While Moon identifies problems with interfering with freedom's demands in a framework of rights review, he fails to provide tangible alternatives for securing not only free discourse, but also discourse based on fundamental principles of equality.

The belief that hate speech does not belong within the framework of human rights review and can be adequately responded to by Parliament wielding the criminal law power is misplaced. What is required instead is a discussion of how to change the structures and practices that may encourage or facilitate these acts. Focusing resources on targeting and punishing individual perpetrators ultimately shields the state from accountability. In light of the discussion of systemic discrimination, it is clear that the state plays an active role in condoning discriminatory practices, and thus, has a responsibility to exclude prejudice from public discourse. In other words, the state has a responsibility to honestly and critically confront the institutions, policies, and programs that perpetuate racial bias, whether overtly or covertly. Taking responsibility does not amount to "extraordinary intervention"⁸⁸ but constitutes recognition that racism remains a pervasive problem within Canadian institutions and society.

The impetus behind a reliance on the criminal justice system to counter racism reflects the significant shift in the political climate in Canada. Less than ten years ago, the federal government advocated for a "coordinated approach" to combating hate and racism. A report published by the department of

⁸⁴ Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) [Moon, *Freedom of Expression*]. legal literacy programs, which programs seek im in judicial processescting the rongs will be redressed. he more enforcement of legal literacy programs, which programs seek im in judicial processescting the rongs will be redressed. he more enforcement of

⁸⁵ *Ibid* at 219. See also Jamie Cameron, Book Review of *The Constitutional Protection of Freedom of Expression* by Richard Moon, (2002) 40:3 Osgoode Hall L.J. 439.

⁸⁶ Moon, *Freedom of Expression*, *supra* note 84 at 138.

⁸⁷ *Moon Report*, *supra* note 82 at 27.

⁸⁸ *Ibid*.

Canadian Heritage entitled *A Canada for All: Canada's Action Plan against Racism* represented “the first-ever horizontal, coordinated approach across the federal government to combat racism.”⁸⁹ The plan—spear-headed by Prime Minister Paul Martin, and never actually put into action—identified six key priorities to guide governmental activities, two of them being: “[e]ducate children and youth on diversity and anti-racism,” and “[c]ounter hate and bias.”⁹⁰ Moreover, the report recognized that while Canada has put forward various initiatives to promote equality and combat discrimination, “it will require more than legislation to close gaps in social and economic outcomes.”⁹¹ The government recognized the need to involve a variety of stakeholders, including “children, young women and men in its anti-racism strategy,” and maintained that the action plan could promote a lifelong educational approach to anti-racism.⁹² Indeed, this approach stands in stark contrast to existing solutions that rely on criminal sanctions to address the spread of racism.

An exclusive reliance on the criminal justice system creates a legislative gap in relation to prohibited grounds of discrimination. Institutional and procedural barriers will likely make it nearly impossible to lay criminal charges for hate speech on the Internet. Criminalizing hate speech is not the most appropriate or sustainable way of dealing with cyber racism. As recognized by the Ontario Commission;

Human rights codes and consequently commissions and tribunals should have a role in matters of hate expression. Recognizing the harm of hate speech through a finding of discrimination has important social value and potential for other forms of response even if censorship is accepted as an exceptionally narrow legal remedy.⁹³

A sincere confrontation of the issue must involve a more robust remedial human rights framework to address systemic racism and discrimination.

A discussion of the privacy rights implicit in sections 7 and 8 of the *Charter* is essential to a comprehensive discussion of freedom of expression in the cyberbullying context.⁹⁴ However, this discussion will not be elaborated upon here except in the context of potential remedies. At issue in *A.B. v. Bragg* was the amount of anonymity a victim can claim in judicial processes.⁹⁵ The case involved allegations of online bullying and defamation on Facebook. In a precedent-setting decision, the Supreme Court recognized the severity of the

⁸⁹ Department of Canadian Heritage, *A Canada for All: Canada's Action Plan against Racism* (Gatineau: Public Works and Government Services, 2005) at iii, online: <publications.gc.ca/collections/Collection/CH34-7-2005E.pdf> .

⁹⁰ *Ibid* at 12.

⁹¹ *Ibid* at 14.

⁹² *Ibid* at 40.

⁹³ Moon, “CHRC Submission,” *supra* note 83.

⁹⁴ *Charter*, *supra* note 42, ss. 7–8.

⁹⁵ *A.B. v. Bragg*, *supra* note 57.

problem of cyberbullying in Canada, and sided with the plaintiff, a young female. The Court allowed her to pursue the identity of her cyber bully for a defamation claim anonymously. In this particular decision, the privacy rights of a victim seeking redress weighed more heavily than the freedom of the press and the open courts principle.⁹⁶ A discussion of the role the right to privacy should take in constructing remedies for victims of online hate speech is outside the scope of this article; however, *A.B. v. Bragg* demonstrates that victims—including young people, women, and other marginalized victims—may very well have privacy rights in seeking access to legal remedies.⁹⁷

IV. A PROPOSAL FOR LEGAL REFORM

It is incumbent upon us to reject [...] facile conversations about freedom and do the hard work of figuring out how we can secure a robust democracy with lively public discourse without endangering and harming students of color on predominantly white campuses [...] But to do so, we would have to acknowledge that words and language have power.⁹⁸

The fundamental freedom of expression entrenched in the *Charter* is, like all other rights and freedoms, subject to reasonable limits prescribed by law in accordance with section 1 of the *Charter*. Freedom of expression decisions must grapple with the question of what constitutes “a reasonable limit” on freedom of expression. Freedom of expression jurisprudence has attempted to carve out the scope of section 2(b) by defining the meaning of the term “expression.” However, other than the section 1 limitation, there are no explicit exceptions to freedom of expression. Drawing inspiration from the South African Constitution, the following proposal for legal reform involves the inclusion of an internal limitation operating independently of section 1 of the *Charter*.

Section 2(b) of the *Charter* could include an internal limitation that would introduce exceptions to the right of freedom of expression from which there could be no derogation—meaning the courts would have to interpret these exceptions strictly. For example, section 16(2) of the *Constitution of the Republic of South Africa, 1996* contains the following limitations to freedom of expression: “[t]he right in subsection (1) does not extend to a. propaganda for war; b. incitement of imminent violence; or c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”⁹⁹

⁹⁶ MacKay, “Ally or Enemy,” *supra* note 58.

⁹⁷ *Ibid.*

⁹⁸ Brittney Cooper, “Stop mocking ‘safe spaces’: What the Mizzou & Yale backlash is really about” *Salon Magazine* (18 November 2015), online: <http://www.salon.com/2015/11/18/what_the_mizzou_yale_backlash_is_really_about_the_right_of_white_people_to_engage_in_racial_recklessness/> .

⁹⁹ *Constitution of the Republic of South Africa, 1996*, No. 108 of 1996, s. 16.

The effect of the internal limitation on law making and policy is that governments could enact anti-discrimination laws within the class of speech listed in the limitation. In Canadian law, such hate speech legislation or regulation would not be subject to the general limitation analysis conducted under section 1. As explained by Christa van Wyk of the Department of Jurisprudence of the University of South Africa in reference to the limitation of free speech in the South African Constitution: “[i]n short, a statute prohibiting hate speech as defined in the Constitution cannot be subject to a freedom of expression challenge, because there is not constitutional right to speech of this nature.”¹⁰⁰

While anti-hate speech provisions have not been invalidated in all provincial human rights codes, they continue to be challenged in court on the basis that they violate freedom of expression under section 2(b) of the *Charter*.¹⁰¹ As previously mentioned, while the law is not the whole answer to the spread of online racism, it does play a critical role. In *Keegstra*, Chief Justice Dickson explains that Parliament’s preference to regulate hate speech through legislation rather than to trust it to the hands of the marketplace, though not the most effective way of addressing discriminatory ideas, is reasonable: “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.”¹⁰²

I recognize that the issue of enforcing anti-discrimination laws is a particularly complex one; nevertheless, the onerous process of advancing a human rights complaint should give us pause. The following section briefly reflects on the limits of the adversarial structure in the context of discrimination-based claims.

(a) A Preliminary Critique of the Adversarial Structure

Despite disagreeing with Moon’s approach to confronting hate speech, aspects of his analysis are valuable. I agree with Moon’s effort to problematize remedial human rights legislation based on the fact that it requires private citizens to take law enforcement into their own hands. The complaints procedure places a significant and, arguably, an unreasonable burden on victims of discrimination bringing forward the complaint. It is the victim that is responsible for advancing the complaint through both the investigation and adjudication stages and while the Canadian Human Rights Commission is imbued with legislative authority to initiate claims, historically, this has rarely occurred.¹⁰³

¹⁰⁰ Christa van Wyk, “The Constitutional Treatment of Hate Speech in South Africa 1” (Paper delivered at the 16th Congress of the International Academy of Comparative Law, Brisbane, 14–20 July 2002) [unpublished], online: Stop Racism and Hate Collective < www.stopracism.ca/content/hate-speech-south-africa > .

¹⁰¹ See, e.g., *Whatcott*, *supra* note 6.

¹⁰² *Keegstra*, *supra* note 1 at 763.

¹⁰³ *Moon Report*, *supra* note 82.

Hate speech necessarily targets a group, even when directed at a particular individual. Often a targeted person is simply being used as a scapegoat for a claim about a larger group. Seen in this light, the burden is on the individual complainant to bring forward a complaint in order to rectify harms caused to groups and communities. Moon notes that without the initiative of individuals, “section 13 might have no operation at all.”¹⁰⁴ Aside from the significant time and money required from complainants, Moon points out that due to the irrational behaviour of many of the respondents in such cases, complainants can be subject to threats of violence, noting that some complainants have been subject to death threats. Moon quotes Andrea Slane, who describes the burden on the victim as the “high degree of personal commitment” required from an individual to see a complaint through to its conclusion. Therefore, those few individuals who have actually filed section 13 complaints and followed through with the process “can be considered activists in the area of online hate.”¹⁰⁵

The complaint procedure, which exists within an adversarial structure, may therefore be an inappropriate framework to respond to claims of systemic discrimination. The spread of racism involves public and private interactions, which are not simply bilateral transactions between individuals but have wide social implications. The plaintiff often embodies the victim, the spokesperson, and the beneficiary in one person. Transforming the adjudicative structure of human rights tribunals could involve a tribunal where the victim is not an individual, but a group of which the spokesperson is not necessarily a member. This could provide a remedy by which all members of a particular group benefit from the institution of prohibitions on racial harassment, even though not everyone has individually suffered from the harassment.¹⁰⁶ Such a structure would also cause the wrongdoer to disappear, and focus instead on the bodies or stakeholders capable of achieving reform in the area.¹⁰⁷

In sum, due to the significant drawbacks of confronting hate speech within the confines of the criminal justice system, it is in the public’s interest that incidents of hateful expression remain under the purview of *both* human rights law *and* criminal law. Remedial human rights legislation can offer broad public interest remedies beyond those available under criminal law. Meanwhile, it is worth reflecting on how the complaints process through the CHRC could be reformed so that public wrongs such as hate speech are not left to individuals to rectify. Structural changes to the adjudication system could place greater

¹⁰⁴ *Ibid* at 38.

¹⁰⁵ *Ibid*, citing Andrea Slane, “Combatting Hate on the Internet: Current Canadian Efforts and the Recommendations of Non-Governmental Organizations to Improve upon Them” (2007) Department of Justice Canada, online: <<https://shared.uoit.ca/shared/faculty/fssh/documents/Combatting%20Hate%20on%20the%20Internet.pdf>> .

¹⁰⁶ Sandra Fredman, *Discrimination Law*, 2nd ed (Oxford: Oxford University Press, 2011) at 294.

¹⁰⁷ *Ibid*.

responsibility on government bodies and powerful stakeholders to enforce the law rather than on private citizens.

V. TACKLING THE PROBLEM: THE LIMITS OF THE LAW

Whatever our profession—minister, civil servant, administrator, professor, building superintendent, publisher—each of us has an important role to play in the fight against racism and racial discrimination.”

—Esmeralda Thornhill¹⁰⁸

Due to the ubiquitous nature of the Internet and the ability to disseminate expressions instantaneously, widely, and anonymously, cyber racism may appear uncontrollable. Nevertheless, the persistent nature of the problem demands efforts to conceive of comprehensive and creative responses which extend beyond the reach of the law.¹⁰⁹

Firstly, condemning cyber racism should not be equated with a condemnation of the Internet or digital media, one obvious reason being that the Internet is not going anywhere anytime soon. As stated by Professor MacKay: “[f]or many young people, being connected to the online world is as important as breathing—or at least a close second.”¹¹⁰ Moreover, as noted by researchers in the field, the participatory quality of digital media means that though the Internet is an inherent part of the problem, it nevertheless remains an important part of the solution. In forming ways to address cyber racism, stakeholders must appreciate that technology is an important tool for social change. Digital media can spark innovation, open people’s minds to new ideas and possibilities, and allow for greater citizen participation in social issues. People use the Internet to explore, to create, and to dissent. Young people are using technology to stand up for themselves, and for each other—technology can give them agency and allow them to contribute to their social futures.¹¹¹

¹⁰⁸ Esmeralda Thornhill, “Fight Racism Starting with the School” (1984) 2:3 *Currents* 3 at 4.

¹⁰⁹ MacKay recognizes this in his latest article (MacKay, “Ally or Enemy,” *supra* note 58 at 50), stating that:

Laws are only one of many responses that are needed and legal responses need to be supplemented by education, prevention programs, adequate supports for victims and effective interventions for the cyberbullies themselves. It is a community problem and it needs a community response from many different segments of our society.

¹¹⁰ *Ibid* at 9. The Senate Standing Committee on Human Rights quotes MacKay in their Cyberbullying Report as follows: “In a Canada-wide study it was found that the number one reason young people did not tell adults, including their parents, about being bullied or cyberbullied was not what you would think—it will get worse—but rather fear of losing access to the internet. ““If I tell my parents, they will tell me to disconnect and it will be gone.”” Kids would rather put up with bullying than be disconnected from that important reality, see: Standing Senate Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (December 2012) at 33 (Chair: Mobina S.B. Jaffer).

Secondly, I follow the lead of experts in the field who have emphasized the importance of *preventative* rather than punitive measures in the education, policy, and legal sphere.¹¹² This principle was recognized on the international level during the World Summit on the Information Society. The summit produced the “Geneva Declaration of Principles and Plan of Action,” which called for preventative measures to tackle abuse of information and communication technologies for acts motivated by racism, xenophobia, and related intolerance.¹¹³ Another initiative, the Child Online Protection launched by the International Telecommunications Union in collaboration with other UN agencies, has similar goals.¹¹⁴ UNICEF has also begun several initiatives to help teach children, parents, and teachers how to better protect themselves against online abuse.¹¹⁵

According to UN Secretary-General Ban Ki-moon, these initiatives had the goal of empowering children and young people through education and awareness, providing advice and safety tips for parents and educators, and offering information for policy-makers and industry to formulate national and international strategies.¹¹⁶ The discussion of how to achieve these goals is an urgent one. Significantly, Ki-moon identifies various stakeholders, and states that parents, the Internet industry, and policy-makers have a responsibility to teach children how to protect themselves, to curb the proliferation of hate speech, and to re-examine the balance of human rights and basic freedoms in the context of cyber hate.¹¹⁷ As noted by Dr. MacKay, “[t]here is no doubt that legal responses must be paired with educational initiatives, prevention strategies and attitude changing communications, at all levels.”¹¹⁸

Finally, while the Internet industry certainly plays a role in allowing greater protection in certain situations, website administrators are not the source of the problem. Internet filters or protection measures, therefore, are usually only useful for addressing overt forms of cyber racism. Energy directed towards combating Internet industries would be better directed towards the users of these

¹¹¹ For example, teenagers in Georgia have created an app where users can log their interactions with the police, including details about the incident and a description of the officer. These types of initiatives are ground breaking, and are part of the way forward: Michael Silverberg, “Three Georgia teens made an app to crowdsource police accountability,” *Quartz* (18 August 18 2014), online: Quartz

< qz.com/250652/three-georgia-teens-made-an-app-to-crowdsource-police-accountability > .
¹¹² Shaheen Shariff, *Sexting and Cyberbullying: Defining the Line for Digitally Empowered Kids* (New York: Cambridge University Press, 2014).

¹¹³ Ki-moon, *supra* note 39.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ MacKay, “Ally or Enemy,” *supra* note 58 at 3.

technologies, i.e., towards encouraging the critical thinking skills needed to develop digital media literacy, an approach I explore in the following section.

(a) The School: An Arena for the Exchange of Ideas

[D]espite our good intentions the terms with which we describe the problems of racial discrimination embody the same discriminatory concepts and values, and legitimize the very injustices and inequalities that they are trying to eradicate. Our terminological tools need therefore to be re-evaluated and corrected.”

—Esmerelda Thornhill ¹¹⁹

While it may be argued that school curricula are no longer overtly racist due to the advent of Canadian multicultural policies, this does not mean that the institutional culture of schools does not remain problematic, for “[t]he school is a microcosm of society, and a racist society will exhibit power struggles in school.”¹²⁰ As Ghosh notes: “the problem of Eurocentric educational systems across Canada does produce racist effects, largely through textbooks’ non-recognition and mis-recognition of the contribution of groups of people.”¹²¹ Indeed, the systemic nature of the problem makes it clear that simply changing school curricula is not the answer; rather, the very discourse around race needs to be changed. Ghosh describes the target as being the “hidden curriculum,” which refers to the socialization process in schooling—a curriculum that is taught without being formally ascribed. It emanates from the social, political, and cultural environments of the society and must be understood in relation to the overall societal power structures that influence the education system.¹²²

Likewise, Canadian human rights commissions have recognized that racism can be embedded in school policies—just as it is in certain legislation. In discussing the education sector, the Quebec Commission Report states that the discrimination factors that help to explain the educational problems of racialized students cannot be reduced to merely a series of individual decisions. Therefore, while discrimination of students can be partly based on individual decisions affected by prejudice, such discrimination emanates from organizational models or institutional structures that, though facially neutral, are not adapted to the needs of certain groups or are clearly harmful to them.¹²³

Though some school board policies recognize race as a basis of discrimination, most subsume discussions of racial harassment under the umbrella of “bullying” which can serve to bypass the discussion of race. Changing the discourse around race is one part of changing the practices that

¹¹⁹ Thornhill, *supra* note 107 at 3.

¹²⁰ Ratna Ghosh, “Racism: A Hidden Curriculum” (2010) 48:4 *Education Canada* 26 at 27.

¹²¹ *Ibid* at 28.

¹²² *Ibid* at 27.

¹²³ *CDPDJ Report*, *supra* note 13 at 57.

perpetuate racism in schools. It is the role of educational administrators at both the provincial and national level to devise strategies and policies addressing not only school curricula, but also the very conversation being had. However, the following discussion will not focus on teaching race literacy, but rather, will emphasize the role of legal literacy and digital media literacy in empowering young people. The educational approach proposed involves a multiple-literacies program.¹²⁴

(b) Confronting Racism: The Multiple Literacies Approach

Bullying is a major social issue throughout the world and is one of the symptoms of a deeper problem in our society: the deterioration of respectful and responsible human relations. The magnitude of the problem is daunting and there are no simple solutions on the horizon. There are, however, some effective strategies.”

—A. Wayne Mackay¹²⁵

Canadian courts have articulated that beyond legislative reform, institutions—especially schools—can play a critical role in shifting societal views. In *Attis v. New Brunswick School District No. 15*, the Supreme Court of Canada stated the following, worth repeating in full:

A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.¹²⁶

In the context of racial and religious discrimination, Chief Justice Dickson has stated that: “discriminatory ideas can best be met with information and education programmes extolling the merits of tolerance and cooperation between racial and religious groups.”¹²⁷ I use this statement to support the argument that schools must incorporate discussions on race and equality in the context of lessons on digital media and online communication.

There is no doubt that Canadian youth do not wait for a visit to the library to find answers to their questions—there are ways around that online. It follows that when researching issues related to race, national, or ethnic origins, or religion, “the Internet is often the first, and sometimes only, source that young

¹²⁴ Inspired by Richard Kahn & Douglas Kellner, “Reconstructing Technoliteracy: A Multiple Literacies Approach” (2005) 2:3 *E-Learning & Digital Media* 238.

¹²⁵ MacKay, *Task Force Report*, *supra* note 3 at 1.

¹²⁶ *Attis v. New Brunswick School District No. 15*, 1996 CarswellNB 125, 1996 CarswellNB 125F, (*sub nom.* Ross v. New Brunswick School District No. 15) [1996] 1 S.C.R. 825, [1996] S.C.J. No. 40 (S.C.C.) at para. 42.

¹²⁷ *Keegstra*, *supra* note 1 at 784.

people consult.”¹²⁸ The presence of racism online critically informs the ideas and perspectives adopted by young people, and directly affects their learning. As Daniels articulated in her writing on cyber racism, “[w]hether it is youth of color exploring the history and political struggles of their own racial and ethnic heritage [or] white youth attempting to understand diverse ‘others,’” search engines are often the first and only information destinations for young researchers.¹²⁹

Schools, therefore, are starting points for instituting systemic remedies at both the organizational and pedagogical level. Because race can be an emotional and personal topic for students and instructors, pedagogical experts on teaching race have emphasized the development of critical thinking skills; the exploration of other people’s lived experiences; and a supportive communicative climate in the classroom. Though this might sound idealistic but unattainable, scholars in the fields of education, law, and Internet technologies, who recognize that schools have a critical role to play in tackling cyber racism, have already begun groundbreaking work from which legislators and educators could take inspiration.¹³⁰

(i) **Legal Literacy**

The challenge lies in helping youth come to their own recognition of ethical and legal boundaries when encountering negative forms of online information, and fostering leadership among all stakeholders, young and old, towards social responsibility and digital citizenship.

—Define the Line¹³¹

Curbing the proliferation on cyber racism requires tackling the problem at its source. Finding ways to develop legal awareness among school-age children is a necessary first step. The Canadian Bar Association defines legal literacy as the ability to understand words used in a legal context, to draw conclusions from them, and then to use those conclusions to take action.¹³² Legal literacy provides an important educational imperative because it demonstrates that neither Internet filters nor zero-tolerance policies imposed by schools are sustainable solutions to addressing cyber racism. Instead, the focus is on granting youth agency. Encouraging legal literacy programs in schools has the potential to

¹²⁸ Daniels, *supra* note 40 at 8.

¹²⁹ *Ibid* at 9.

¹³⁰ Define the Line, “Digital Citizenship,” (Montreal: Define the Line), online: < www.mcgill.ca/definetheline/digital-citizenship > .

¹³¹ *Ibid*.

¹³² See, e.g., course materials for LSGT (Legal Studies) 249 Athabasca University: Archie Zariski, *What is Legal Literacy? Examining the Concept and Objectives of Legal Literacy* (Faculty of Humanities and Social Sciences, Athabasca University, 2011), online: < www.athabascau.ca/syllabi/lgst/docs/LGST249_sample.pdf > .

empower youth by helping them to better understand the potential ramifications of their actions online.

Research shows that education can play a strong role in promoting legal literacy and dignity of human beings.¹³³ Schools should be expected to teach basic legal principles. An understanding of substantive legal principles should include a critical consideration of notions about equality; freedom of expression; freedom of religion and conscience; the right to life, liberty, and security; the right to be free from unreasonable search and seizure; and reasonable accommodation of differences to the point of undue hardship.¹³⁴ According to Dr. Shaheen Shariff, a researcher at McGill University who has spent the last ten years encouraging digital citizenship, legal principles and doctrines can be critical elements of creating a democratic school system and healthy learning environment, “[h]ence the fact that many educators ignore its relevance, places them in compromised positions when censorship controversies are brought to the courts.”¹³⁵

In Shariff’s latest book entitled *Sexting and Cyberbullying: Defining the Line for Digitally Empowered Kids*, Shariff examines the line between online joking and legal ramifications.¹³⁶ Dr. Shariff does not demonize the use of the Internet or social media but focuses instead on preventative legal and educational responses to issues implicit in the world of online communication. Research produced by Dr. Shariff and the Define the Line research team encourages the development of digitally empowered generations.¹³⁷ The creation of digital citizens is realized through the incorporation of legal literacy programs, which seek comprehensive ways to address cyberbullying. In this context, legal literacy is defined as an understanding of where the law defines the line between joking, teasing, or harmless actions and criminal behaviours.¹³⁸

What is needed is support to help youth define reasonable and realistic boundaries of responsibility and accountability; and education that raises awareness of the serious impact of cyberbullying and cyber-lurking/voyeurism, with a view to providing an alternative online information that is entertaining—but does not demean or dehumanize others.¹³⁹

¹³³ S.S. Patil & Lavanya C., “A Study on Legal Literacy among Secondary School Students” (2012) 2:7 Indian Streams Research J 1.

¹³⁴ For a comprehensive discussion of the importance of incorporating legal principles in classroom teachings, see Shaheen Shariff & Leanne Johnny, *Censorship! ...or...Selection? Confronting a Curriculum of Orthodoxy through Pluralistic Models*, (Rotterdam, The Netherlands: Sense Publishers, 2007).

¹³⁵ *Ibid* at 49.

¹³⁶ Shariff, *supra* note 111.

¹³⁷ *Ibid* at 6.

¹³⁸ Define the Line, *supra* note 130.

¹³⁹ *Ibid*.

While young people may think little of the consequences attached to their actions, they must be made aware that they can be serious. This discussion can happen in the context of rights, privacy, and mutual respect. In an interview with Philip Alpert, a US teen who was put on the sex offender registry after having distributed nude images of his ex-girlfriend through email, he says:

I wasn't thinking at all. Had I thought about it, I might have realized this is probably illegal, but I certainly wouldn't have known all the ramifications of it. . . You might assume it was illegal, but you don't really know. Kids don't go to a library and research this stuff.¹⁴⁰

Though his case primarily serves to problematize the application of traditional child pornography laws to minors, his statement nevertheless demonstrates that in order to protect youth from using the Internet in a way that may harm themselves or others, they must be given legal literacy tools. As noted by the author who conducted the interview, the issue of Internet safety “merits a social response rather than criminal prosecution . . . Solutions to the problems raised by sexting . . . should include education and the involvement of community stakeholders.”¹⁴¹

(ii) Digital Media Literacy

Developing digital citizens among youth requires that they be given the opportunity to enhance their online proficiency and creativity, rather than simply being told “how not to use the Internet.” This is because a narrow focus on the negative aspects of digital communications usage among youth “ignores the potential benefits of digital media, and the possibility for youth to engage in socially responsible digital behaviour.”¹⁴² Digital media lessons to enhance online proficiency can be integrated into other lessons.

The first advocates for multiple literacies explain that the approach combines traditional print literacy with critical media literacy to create lessons on to how to access, navigate, create, and participate in digital media.¹⁴³ Daniels conceives digital media literacy to involve lessons of tolerance and social justice, which can offer “a depth of understanding about race, racism, and multiple, intersecting forms of oppression and civil rights in the digital era.”¹⁴⁴ Parents and school administrators must also be aware of the legal risks of their online actions in order to provide positive examples to younger people.

¹⁴⁰ Robert D Richards & Clay Calvert, “When Sex and Cell Phone Collide: Inside the Prosecution of a Teen Sexting Case” (2009) 32:1 *Hastings Comm & Ent LJ* 1 at 16.

¹⁴¹ *Ibid* at 10.

¹⁴² Define the Line, *supra* note 130.

¹⁴³ Kahn & Kellner, *supra* note 124 at 242; see also Daniels, *supra* note 40 at 190.

¹⁴⁴ Daniels, *supra* note 40 at 9.

CONCLUSION

Laws, standards, and organizational policies whose effects—which are often subtle—are to reinforce the exclusion or marginalization of racialized minorities must be scrutinized as part of sincere anti-racism efforts.¹⁴⁵ Indeed, progress can stem from constitutional conflicts and courageous legal responses. Human rights legislation can have a transformative impact if the focus is on systemic barriers.¹⁴⁶ Decisions discussed in this article demonstrate that the interaction between various human rights frameworks can increase the possibility for systemic problems to be identified and remedied. What makes cyber racism so ripe for legal discussion is that it represents a social and technological phenomenon that goes beyond what the law can aptly address. Overall, the issue of online racism needs to be addressed through social and institutional mechanisms, for there exists no one size fits all statute. Furthermore, various stakeholders have a role to play in eliminating the prejudices that help sustain systemic discrimination, and promoting human dignity for all.

¹⁴⁵ *CDPDJ Report*, *supra* note 13 at 3.

¹⁴⁶ Dianne Pothier, “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010) 4:1 *McGill J.L. & Health* 17 at 22.