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Expressive Freedom and Ethical Responsibility at Canadian Universities

Liberté d'expression et responsabilité éthique dans les universités canadiennes

Katja Thieme

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Expressive Freedom and Ethical Responsibility at Canadian Universities

by Katja Thieme

Abstract: This article reviews recent government incursions on questions of free speech at universities and colleges in Ontario and Alberta and presents the challenge they pose to university autonomy. Inherent in university autonomy is the possibility—or the obligation—that universities make decisions based on ethical responsibilities that can extend beyond the limits of current law. As a case study of university autonomy in matters of expressive freedom, I highlight events at the University of British Columbia, which leads me to a discussion of how questions of ethical responsibility have been raised particularly in relation to the speech protection of transgender members of the university. A central issue is the need for universities to adjudicate when free speech rights meet related responsibilities with which they can conflict. I detail how, for instance, the invitation of some anti-trans speakers can pose such a conflict and should lead university communities to consider adjusting their responses in extreme cases so as to be able to more autonomously regulate hateful speech beyond applicable law.

Keywords: academic freedom; Canadian universities; dignitary safety; freedom of expression; trans rights

Author: Katja Thieme analyzes contemporary and historical genres of academic and political writing. In previous publications, she studied the discourse of the Canadian women's suffrage movement, method descriptions in academic writing on Indigenous studies and Canadian literature, and practices of citation in research articles on trans studies. She teaches on discourse analysis, research writing, and political movements as an uninvited guest on the unceded, ancestral, and traditional territory of the Musqueam, Tsleil-Waututh, and Squamish nations. She tweets—somewhat irreverently—at @Katja_Thieme.

Introduction

In public conversations about freedom of expression at universities, participants speak from a range of positions. Some are university members and others might not have set foot on a campus for a very long time. Some are versed in relevant scholarship and legal analyses, others speak from exclusively political conviction. Concepts like free speech, academic freedom, freedom of inquiry are employed in sometimes discriminating, sometimes confounding ways. The stakes seem high and the topic of freedom of expression is widely recognized as of continued importance. I side with the many scholars who assess that while there is no crisis of free speech on Canadian campuses, conditions for public discourse are sometimes fraught and it is worth analyzing in more detail what factors keep members of university communities from asserting their expressive freedom (Moon 2014; MacKinnon 2018). Researchers who endorse strong free speech protections highlight what are still lesser known issues related to campus free speech—for instance, the limits to speech that are experienced by contingent academic labour (Barrett 2018), how managerial avenues, like student conduct codes, serve to discipline dissent (Brulé 2016), and the way free speech rights are used to legitimize opposition to the rights of people with marginalized identities (Cossman 2018).

Most policy work on Canadian campuses is robust in its support of freedom of expression but, at the same time, it is vague and stops at general declarations of the importance of free speech (Go et al. 2021). There is strong support for free expression on Canadian campuses and many universities have recently experienced cases where commitment to expressive freedom has been tested and more widely discussed. Several of these cases have circled

around questions of trans rights. Given both the precarity of trans lives and universities' professed commitment to inclusion, I argue that there are "edge cases" where universities need to be prepared to assert their autonomous decision-making against what more absolutist notions of free speech and permissive interpretations of the law suggest. Analytical work is needed to buttress university decisions in relation to these more extreme scenarios.

Given the recent range of protests against guest speakers at Canadian campuses, universities have an ongoing need to tackle the questions, "what restrictions—if any—should there be on campus speech," and what are consistent ways in which universities as collegially governed academic communities can manage such restrictions (McDonald 2020, 34)? In order to sharpen our understanding of this need, my analysis works its way from a broader context across higher education in Ontario and Alberta toward a concrete case study at the University of British Columbia in Vancouver.

We need to give more consideration to the details that allow us not only to see but also to act where universities' declarations regarding freedom of expression hit their limits. What are the key concepts and principles that help ascertain these limits? With that question in mind, first I will review recent government incursions on questions of campus free speech in two Canadian provinces in order to highlight the need for institutional autonomy in decisions that may result in speech restriction. Second, as an example of university autonomy in matters of expressive freedom, I focus on events at the University of British Columbia, leading to a discussion of how questions of ethical responsibility have been raised in relation to free speech protection at that institution. Third, I pinpoint as a central issue the need for universities to adjudicate when free speech rights meet other responsibilities with which expressive freedom can conflict. Fourth, I detail how, for instance, the invitation of some anti-trans speakers can pose such a conflict and should lead university communities to consider adjusting their responses in line with more just approaches.

Mandated Free Speech Policies

On August 30, 2018, the Progressive Conservative government in Ontario, under Doug Ford's leadership, took the unprecedented step of mandating that each publicly funded university and college develop and publish a free

speech policy (Office of the Premier 2018). Within four months, universities and colleges were to have completed the process and developed a policy that was to include the following: (1) a definition of free speech, (2) principles based on the University of Chicago Statement, (3) student discipline measures that apply to students whose actions contravene the policy (e.g., ongoing disruptive protesting), (4) the condition that financial support and recognition of official student groups is dependent on compliance with the policy, and (5) reference to existing mechanisms that handle complaints and ensure compliance (Office of the Premier 2018). Were a postsecondary institution to not comply, the directive threatened reductions in operating funds in proportion to the severity of the non-compliance.

Government communications related to this directive implied a free speech crisis which it seemed to oddly restrict to higher education campuses. As far as one could tell from press statements and news reporting, the government's demand did not present relevant facts that would establish the existence of such a crisis, nor its confinement to university and college campuses as opposed to its presence in society at large.

The Ontario government directive challenged institutional autonomy. Jim Turk, former director of the Canadian Association of University Teachers and current director of the Centre for Free Expression at Toronto Metropolitan University, called the directive an "unprecedented abuse of university autonomy" (Giovannetti and Hauen 2018). Turk clarified that in overriding institutional autonomy, this directive undermined what was a "bulwark for real free speech and academic freedom on campus" (Turk 2018). Relying on his years of experience investigating this question, Turk asserted there was no free speech crisis on Canadian campuses; in fact, there was "more freedom of expression on university campuses than anywhere else in Canada." The Ford government directive looked like "a deliberate political measure, borrowed from the American right and alt-right" (Turk 2018). Particularly, the "threat to cut funding casts aside a longstanding Canadian tradition" in which university autonomy is guarded by a system-wide approach to funding rather than deal with the budgets of separate universities individually (Turk 2020, 33). Turk places this in contrast to the United States, where "legislatures not infrequently use the real threat of cutting individual university budgets to ensure universities bend to their political will" (Turk 2020, 33).

The Public Service Alliance of Canada, a large public sector union, called the alleged crisis, vaguely evoked in Progressive Conservative commentary, an “ideological fiction” advanced to “justify interference in the academic governance and autonomy of Ontario’s universities and colleges” (Public Service Alliance of Canada 2018). In his historical analysis of conservative governments’ interventions in campus debates, Dax D’Orazio identifies the Ontario policy as a “significant departure from the status quo of higher education policy in Canada” (D’Orazio 2021, 534).

Student organizations at Ontario universities were most concerned with the disciplinary measures that the directive required. It implied that students who “actively protest could be expelled under the mandate” and that left-wing students who protested right-wing or white nationalist figures would be targeted (Lam and Takagi 2018). Several student societies resisted the directive, pointing to the limits it placed on student dissent and the implied invitation of hateful speech and discrimination onto campus (Fung 2018; Lam and Takagi 2018; Paglinawan 2018; Ulysses 2018). Indeed, several months later—in a political and legal battle in which Doug Ford’s government attempted to force student unions to make their membership fees optional—the premier voiced open hostility toward student societies and protests: “I think we all know what kind of crazy Marxist nonsense student unions get up to” (Canadian Press 2019).

In contrast to student unions, the administrative leadership of Ontario’s universities and colleges did not resist this challenge to their institutions’ autonomy. At Wilfrid Laurier University—which, after a public controversy around the instructions a teaching assistant had received (Lamoureux 2017), had previously produced a new statement on freedom of speech—the provost, Robert Gordon, even “welcomed the policy, including the threat of funding cuts for non-compliance, as an added ‘incentive’” (Giovannetti and Hauen 2018). Perhaps the acquiescence of university and college leadership reflected the truth that their institutions were not, in fact, in a free speech crisis and that many of them already had their own policies which, in their general and vague nature, did not pose a conflict with the government’s demands (Freedom of Speech—Higher Education Quality Council of Ontario n.d.). By that same general and vague nature, the directive and resultant policies do not “illuminate how to address disagreement” among members

of the university, and they offer “no ‘solution’ to the alleged campus speech ‘problem’” that seems to be of such concern (Braley-Rattai and Bezanson 2020, 67).

In May 2019, Alberta premier Jason Kenney and his United Conservative Party government indicated that they would follow in Ontario’s footsteps (Wyton 2019). On July 4, 2019, the Advanced Education Minister, Demetrios Nicolaidis, requested in a letter to colleges and universities that they adopt the Chicago Statement or a policy compliant with the spirit of the Chicago Statement, and set a deadline of December 15 that same year (Cameron 2020, 9). Nicolaidis hoped to work with post-secondary institutions in a “collaborative and collegial manner” and, unlike Ontario, did not anticipate that there would be penalties for institutions that did not comply (Wyton 2019). The Alberta government’s instruction also did not explicitly target student activism and protest. When questioned about the need for imposing such a policy on universities and colleges, Nicolaidis alleged that there had been numerous instances of free speech violations in Alberta; he did not offer any examples (Davis 2019; Wyton 2019).

By November 2019, all 26 publicly funded institutions had submitted their draft policies, which, upon government approval, they were expected to implement and comply with (Babych 2019). In December, the Alberta government proudly announced that the province’s post-secondary institutions “reinforced their commitment to free and open dialogue by developing policies that align with the principles of the University of Chicago Statement” (Government of Alberta 2019).

Constitutional scholar Jamie Cameron has singled out the Ontario directive as “one of the most ominous” of the “panoply of state-based coercive measures” which that premier put into place (Cameron 2020, 7). In contrast, when the Chicago Statement was developed, it was a product of autonomous university governance (Zimmer and Isaacs 2014). Cameron astutely states that the actions of the governments of Ontario and Alberta “transformed the Chicago Statement from a policy for internal governance into a diktat of the state” (Cameron 2020, 7). It is troubling, notes Cameron, that colleges and universities in two provinces “have accepted their subservience to the government on campus free speech” (Cameron 2020, 12). Thus repositioned, the Chicago principles become “a top-down ploy to protect and promote conservative voices on campus” (Cameron 2020, 9).

The actions of these two provincial governments are of a piece with the goals of other conservative political leaders in English-speaking countries—including, at the time these mandates were introduced, Andrew Scheer in Canada, Jo Johnson in the UK, and Donald Trump in the US—threatening to cut post-secondary funding or fine universities if they limit forms of debate (Turk 2018). Taking a historical view, D’Orazio has compellingly linked the Ontario and Alberta policies to the practices of US Republican politicians beginning with Ronald Reagan’s “successful mobilization of campus unrest” in his 1967 campaign for California governor (D’Orazio 2021, 534). D’Orazio identifies a pattern of conservative politicians “eager to mobilize and sharpen unsympathetic public opinion by portraying the campus as a breeding ground for radical politics,” an approach that through its frequent use has become widely considered as effective (D’Orazio 2021, 536). Broadly, these free speech policies can be placed within a trend of “cultural conservatism and the right’s manufactured free speech ‘crisis’” (Scatamburlo-D’Annibale 2021, 2).

These efforts by the Ontario and Alberta governments go against the autonomous status of universities and colleges and, in addition, against the need for Canadian institutions to think through implications of free speech within Canadian legal and historical frameworks. Any demands to have free speech policies in line with the US-based Chicago Statement are questionable in that they import constitutional principles from another country’s jurisdiction—the First Amendment is unique to the United States.

In other words, the Chicago principles are a “copycat policy framework” that is positioned to respond to manufactured campus free-speech crises as “a copycat political strategy” (D’Orazio 2021, 546). Rather, Canadian post-secondary institutions should think about freedom of expression from within Canadian law as well as in relation to the history with which concepts like freedom of expression, academic freedom, university governance, and university autonomy have developed within Canadian contexts (Horn 1999). Legal conditions in Canada and the US also differ in that US courts have linked the constitutional right to free speech to academic freedom, whereas in Canadian universities academic freedom is primarily protected by collective agreements and courts have found limited applicability of the Charter right to free expression (Lynk 2020; Braley-Rattai and Bezanson 2020).

Canadian universities and colleges also need to be able to weigh free speech concerns against other values and obligations (Brulé 2020; Hamill 2021; McDonald 2020). Freedom of expression is never unlimited. Reactionary efforts to restrict the rights of trans people currently play a central role in the manufacturing of free speech crises—in the Canadian context see, for instance, the case of Jordan Peterson (Ashley 2018; Cossman 2018; Stacy 2020)—and resultant political campaigns pose a challenge to the university community and its responsibility to its trans members.

In the following sections, I highlight in more detail the questions that university values of inclusion and prevention of harm pose to what are usually general and often absolutist free speech policies.

Academic Freedom and Freedom of Expression at UBC

At the University of British Columbia, work on a new free speech statement was partly precipitated by a 2015 controversy following the sudden resignation of the president, Arvind Gupta. Jennifer Berdahl, who had written a somewhat speculative blog post on Gupta’s resignation, was asked by the chair of the board of governors, by her division chair, and by members of the dean’s office to consider the damage her blog post had done to her school as well as the distress that her responses had caused the chair of the board of governors. Berdahl noted she “never felt more gagged or threatened after expressing scholarly viewpoints and analysis of current events” (Berdahl 2015). As a full, tenured professor, she imagined how terrifying her experience would be without those protections: “I would have retracted my post, or not have written it at all. I would avoid studying and speaking on controversial topics” (Berdahl 2015).

A subsequent fact-finding process and report by the Hon. Lynn Smith found that there was no infringement on Berdahl’s academic freedom and that none of the individual reactions to the blog post contravened either the UBC Collective Agreement or its Statement on Respectful Environment (Smith 2015). When taking the reactions together, however, “UBC failed in its obligation to protect and support Dr. Berdahl’s academic freedom” (Smith 2015, 1). Smith’s report provided some clarity on the definition of academic freedom at UBC and on the application of different UBC documents to issues of

public speech, including the Collective Agreement, the Statement on Respectful Environment, and policies relating to fundraising and donations, discrimination and harassment, and equity.

The report has been a valuable part of ongoing discussions about the relationship between academic freedom and freedom of expression on UBC campus. For instance, when Smith emphasizes university members' positive and reciprocal duty to protect academic freedom, that duty may "require university administrators to respond when an expressive act threatens the academic freedom of those who reasonably feel targeted by that expression" (Cunliffe 2017, 2–3). As Alison Braley-Rattai and Kate Bezanson note, "expressive rights themselves are at times in conflict in university settings" and resultant conflicts require resolution (Braley-Rattai and Bezanson 2020, 71). More generally, Anver Saloojee argues that rethinking the relationship between academic freedom and the public good requires recognition of "the deleterious effects of discrimination, exclusion and gate-keeping" where "effects of racism and sexism are corrosive" (Saloojee 2014, 215).

It is somewhat of a custom in any discussion on free speech on campus to pair together and tease apart the two freedoms—what is academic freedom, what is freedom of expression, and how do they relate? It suits us to keep the need to protect academic freedom in sight when analyzing public speech on campus. As Braley-Rattai and Bezanson explain, whereas academic freedom is concerned with "the legitimacy of intellectual contribution," freedom of expression "does not depend for its legitimacy upon the particular expertise of the speaker" (Braley-Rattai and Bezanson 2020, 72).

In a thorough analysis of events at UBC, Peter MacKinnon also parses the differences between concepts of academic freedom and freedom of expression, including how different academic organizations hold different views on academic freedom. He contrasts the concepts of academic freedom espoused by Universities Canada and the Canadian Association of University Teachers, where the former sees academic freedom rooted in teaching and research and the latter also extends it to criticism of the university and its governance (MacKinnon 2018, 16). As Martha Piper asserted when she was president of UBC, among the responsibilities accompanying academic freedom are to "base statements and opinions on fact and evidence" and to "use acceptable scholarly methods in

the pursuit of truth"; the assessment of what statements meet the facts and what evidence and methods are acceptable and responsible rests with one's academic peers and the practice of peer review (Piper 2001, 12785). Lynn Smith sums up that academic freedom confers the responsibility to "obey the law," to "maintain a respectful environment," to "act in good faith," and to "protect the exercise of academic freedom" (Smith 2015, 17).

In September 2017, the then new UBC president, Santa Ono, convened a working group to consider the issue of freedom of expression, "not as an institutional effort to create or change policy, but as an educational and aspirational effort" (Freedom Matters 2018). The statement starts by describing the need to provide "an environment in which people are comfortable to question the status quo, to challenge old assumptions, and to debate difficult issues." The Freedom Matters statement emphasizes that learning and research are the central goals of the university and that they require an "inclusive, collaborative, and innovative" environment (Freedom Matters 2018). The statement then asserts that freedom of expression inside university spaces cannot be limited only by criminal law and the BC Human Rights Code. Rather, it must hold in balance "legal and moral responsibilities" as it works to provide "a respectful, constructive, and inclusive environment for all" (Freedom Matters 2018).

The question then is at what point and how should academic institutions use their autonomy when regulating expression in a way that is limited by more than the law? This question is controversial and strong arguments have been made against such regulation (Heinze 2018). Some of that hesitancy may be grounded in the fact that regulating speech in excess of federal and provincial law can incur legal challenge, as has happened when UBC cited safety and security concerns in the cancellation of an event that featured far-right provocateur Andy Ngo (Alden and Ha 2020; Dickson 2019). That universities need to maintain an inclusive environment as a necessary circumstance for a productive use of freedom of expression has been highlighted in most scholarship on the topic. For instance, education scholar Sigal Ben-Porath argues that campus free speech "deserves its own place within the debate on free speech" because of the role universities and colleges play as centres of knowledge-production and because of shifts in the social function of universities (Ben-Porath 2017, 31). Ben-Porath emphasizes an inclusive freedom: in a situation where intellec-

tual exchange is “not the focus for everyone,” a “collective effort to avoid harm” is needed for “constructing a free and equal community of inquiry” (Ben-Porath 2017, 40). She cherishes the ideal of such a free and equal community, and acknowledges that there are “hurdles and barriers that are unequally distributed across different groups” (Ben-Porath 2017, 69).

However, despite recognizing that there are conflicts arising, for instance for those whose fundamental ways of existing are continually brought into question through some people’s speech, most scholarship simply mentions such conflict but falls short of addressing it. In the end, more absolutist free speech practices that are assumed or asserted in policy, as in the Chicago Statement, are often perceived to occupy a superior place. The work of pushing back against speech that, for instance, valorizes white supremacy, racism, transphobia, or misogyny is frequently delegated to those who are most vulnerable to the harm and intimidation this speech produces. Increasingly, scholarship on expressive rights recognizes that on the question of hate speech, a targeted group’s vulnerability due to systemic discrimination should be taken into account (Gelber 2021; Maitra and McGowan 2010). When we add to this dynamic the affordances of current digital platforms, then an idealized liberal notion which only allows for more speech as appropriate counter to hateful speech is neither sufficient nor effective; we work under conditions where the cost of rebuttal seems to continuously multiply (Bérubé and Ruth 2022).

The committee that wrote the Chicago principles explicitly states in its report that “it is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose” (Zimmer and Isaacs 2014). The statement does not conceive of situations where core values that are a premise for open discussion, necessary research, and inclusive teaching, can come under such concerted attack that a more assertive stance is required from a university community as whole, including from its administration (Wilson and Kamola 2021). The Chicago committee’s advice is to fight it out as individual members and to absolve the university of a role in resolving conflicts between competing rights. In this idealized scenario, university members are asked not to “obstruct or otherwise interfere with the freedom of others to express views” (Zimmer and Isaacs 2014).

What about the conflicts of rights and responsibilities that are not resolvable without recourse to authority within the university community? As far as public university space is concerned, a 2019 decision by the BC Human Rights Tribunal found that transphobic flyers distributed by Bill Whatcott in Vancouver as well as on UBC campus injured the dignity of then-NDP candidate Morgane Oger (Dunphy 2019). What if accepting only civil lawsuits and criminal procedure—which are temporally distant, unpredictable, and expensive remedies—places too high a cost on those exposed to systemic disadvantage and thereby more likely harmed by hateful speech? A university has an obligation—without imposing prohibitive legal costs on individuals—to respond to conflicts that arise between guidelines and policies the university itself has set.

Conflicts of Rights and Responsibilities

We are at an impasse when most arguments that explicitly mention impediments to inclusive practices of speech and discussion shy away from considering what approaches might remedy these conflicts. Some university policies might assert or imply an absolutist value to free speech, positioning it as a power higher than other values and rights—like those of freedom from discrimination and harassment or academic freedom—and of deserving more outspoken support from the university and its administration. As Emma Cunliffe reminds us, under Canadian law, “there is no hierarchy of rights and freedoms” (Cunliffe 2017, 2). She recommends that university members in leadership positions receive “substantive training in how to recognise and resolve situations in which rights and freedoms may come into conflict with one another” (Cunliffe 2017, 2). Pierre Trudel, too, notes that limits to freedom of expression emanate not only from law but also from a university’s own regulations (Trudel 2021).

The repeatedly stated commitment to creating an inclusive environment for learning, teaching, and research requires some outer limits to the kind of speech that can be invited into university settings. These settings might be university buildings but are also online meeting places, including when these are facilitated by private companies. The Canadian Criminal Code and the BC Human Rights Code are not written with the university’s particular mandate of learning and research in mind. As Madison McDonald argues, universities cannot limit the

refusal of a platform to only “those who make overt calls for violence or hate speech—taking inclusivity seriously requires a more refined policy” (McDonald 2020, 42). Constitutional scholar Margot Young asserts, “advocacy for free expression cannot render our many statements to inclusivity and diversity meaningless” (Young 2019, 3). The Supreme Court of Canada “has recognized that the harms of inequality are legitimate reason to limit expression” (Young 2019, 3). The Freedom Matters statement at UBC acknowledges that restriction can be justified but is not able to provide policy.

Several times in the past years, UBC has come up against situations where clearly stated concerns over the detrimental nature of certain speech were raised and needed to be addressed. This was the case with events planned or carried out that featured well-known white supremacists, anti-trans campaigners, and far-right propagandists such as Stephan Molyneux, Lauren Southern, Meghan Murphy, or Andy Ngo. In several cases, these events did not go ahead, but this was not due to the substantial concerns or the researched evidence that were brought forward against the invited speaker in question. Rather, it was security assessments that led to a limit on speech being asserted.

Security concerns should not be the leading mechanism that define for us what the outer limits are for speakers who come with entrenched and reactionary political campaigns that challenge the rights of some university members or go against the mandate of research and teaching that organizes the university. Nor should it be the profit-oriented decisions by private companies that assert limits to speech through decisions that lie entirely outside of the institutions whose speech they limit (Lytvynenko 2020). We need more appropriate measures and cannot leave it in the hands of individuals or companies to assert the mandate of our universities and colleges, and to resolve conflicts we encounter between different rights and values. We need to be able to arrive at these measures through processes that are based in collegial governance and that secure institutional autonomy away from the direct influence of provincial and federal governments and private companies.

Anti-Trans Speakers

Jenn Smith is a critic of curricular resources on sexual orientation and gender identity (SOGI) that have been

made available for public schools in British Columbia. These resources were developed and promoted following the 2016 amendment to the BC Human Rights Code which added gender identity or expression to the list of protected grounds. Through 2019, Smith toured parts of British Columbia with a series of talks that opposed SOGI resources (Takeuchi 2019). On June 23, 2019, that tour brought Smith to the campus of the University of British Columbia, invited by the Canadian Christian Lobby, a group with no association to the university.

In addition to the fact that Smith’s talk was identified by critics as a case of “anti-transgender hate speech,” there was the issue that Smith had collaborated with members of the Soldiers of Odin—a far-right organization and hate group (Archambault and Veilleux-Lepage 2019)—at a previous event on Vancouver Island (MacLeod 2019; UBC Students Against Bigotry 2019; UBC Students For Freedom of Expression 2019; Vikander and Seucharan 2019). Neither of these facts, along with public and private calls to stop the event, moved the university’s administration to cancel the booking.

More than seven months after Jenn Smith’s talk was held, reporting on documents obtained via a freedom of information request revealed some details about the uptake of the letters that had been sent to the president (*PressProgress* 2020; Thieme 2022). In advance of the event, the university’s president informed the chair of the board of governors that the provost and vice president “feels strongly that this is an academic freedom issue” and that “about half of individuals weighing in on this event have asked that the event occur” (*PressProgress* 2020). This information was relayed by the board chair to the university’s faculty association, stating “there have been communications received by UBC that are opposed to the event proceeding, as well as an almost equal number in favour,” and the board chair emphasized that the administration sees the event as protected under both academic freedom and freedom of expression (*PressProgress* 2020).

Perhaps it sounds odd that someone who is invited by an organization outside the university to give a talk via an external booking of university space is seen to be protected by the university’s concept of academic freedom. The claim that Smith has academic freedom is rooted in the 1977 UBC Vancouver Senate policy on academic freedom which asserts that academic freedom “extends not only to the regular members of the University, but to all

who are invited to participate in its forum,” and which warns that suppression of this freedom “whether by institutions of the state, the officers of the University, or the actions of private individuals ... cannot be tolerated” (Academic Freedom: Introduction n.d.). That policy is currently under revision (Izen 2022; UBC Senate n.d.).

It is an open question whether Smith can be said to have been invited to participate in the university forum when it was an external booking that brought Smith there. We could also argue that this statement, contained in the UBC Vancouver calendar, more accurately describes freedom of expression that generally pertains on campus rather than academic freedom, given that it does not reference any obligations and responsibilities that distinguish academic from expressive freedom (Smith 2015; MacKinnon 2018). In the UBC Vancouver calendar, this statement on academic freedom is followed by a brief statement on “Freedom from Harassment and Discrimination,” which also does not link the exercise of academic freedom to responsibilities on the part of any speaker. Rather, it commits the university to “ensuring all members of the University community—students, faculty, staff, and visitors—are able to study and work in an environment of tolerance and mutual respect that is free from harassment and discrimination” (Academic Freedom: Freedom from Harassment and Discrimination n.d.). The statement leaves unclear how infringement on the ability to study and work in a respectful environment might be assessed and subsequently addressed.

The question of what forms of intolerance, disrespect, harassment, and discrimination unduly limit someone’s ability to work and study in a university environment hinges on the concept of harm—how harm is related to speech, how one type of harm is parsed from another, and how some types of harm are used to justify limitation on speech. Relying on notions like epistemic injustice, argumentation injustice, and epistemic exploitation, and bringing them together with Ben-Porath’s distinction between intellectual safety and dignitary safety, i.e. protection of someone’s dignity (Ben-Porath 2017; Berenstain 2016; Fricker 2007; Kapusta 2018), D’Orazio pursues a conceptualization of harm that aims to “distinguish between reasonable disagreement” and “morally culpable harm” in an academic environment (D’Orazio 2020, 17). Following Ben-Porath’s separation of dignitary from intellectual aspects of speech, D’Orazio wishes to steer the conversation away from

“elastic conceptualizations” of harm toward a distinction between personal experience expressed in testimony and normative claims expressed in argumentation (D’Orazio 2020, 3). Each of these conceptualizations contains its own ethical imperative. In relation to testimony, it is credibility that is at issue; in relation to argumentation, it is agreement. University research and teaching is dedicated to assessing argumentative merit, and it is necessary that when a speaker’s argumentation is challenged, it does not invalidate their identity or experience.

In a piece that reflects on her identity and experience as a trans woman, Siobhan O’Leary fleshes out why inviting anti-trans speakers like Jenn Smith or Meghan Murphy can impede a university’s mandate of enabling learning and knowledge-making, particularly for its transgender faculty, students, and staff. O’Leary points out that pain inflicted by transphobic speech like Meghan Murphy’s is not knowable to a cisgender audience except through the words and reactions of trans people (O’Leary 2020). The testimony of trans people tells cisgender audiences what the effects of this speech are on their ability to work and live in community, including in academic community. We live in an environment where there is a cultivated incredulity towards the experiences of trans people; that incredulity is often hostile and aggressive. O’Leary astutely observes that in discussions of Murphy’s right to speak there is a shift—a shift away from whether Murphy’s claims are morally right or wrong toward what is factually right or wrong about how persistent misgendering affects trans people. This shift has the effect of casting perpetual doubt on trans women’s experience while side-stepping the need to challenge anti-trans speech on ethical grounds.

We should not abandon the ethical ground. In discussions of expressive freedom, we need to be able to state how speech like Murphy’s is not only factually wrong but also ethically objectionable. For instance, Grace Lavery highlights that when Murphy insists on misgendering others, she casts trans life as “an implied violation” of the free speech rights of trans-exclusionary feminists (Lavery 2019, 125). That trans folk can choose and that others are obliged to recognize their chosen legal gender is, to Murphy, an assault on “the simple reporting of facts,” or, as Lavery puts it, the social existence of trans women becomes “an apparently intolerable affront to the speech of others” (Lavery 2019, 128). “Trans existence poses a symbolic threat,” Florence Ashley observes, a threat that is frequently met with accusations of

deception as well as with violence and harassment (Ashley 2018, 15; Bettcher 2007). “Misgendering is a diluted response” to that perceived threat; it serves to deny the authenticity of trans existence and expose trans existence as deceptive (Ashley 2018, 15).

The claim to free speech that Murphy makes in asserting a right to misgender others is a customized weapon in the arsenal of anti-trans harassment: given the effects of misgendering on the dignitary safety of trans and gender variant people, “repeated intentional misgendering” is a harmful and ethically unacceptable act (McDonald 2020, 38). O’Leary also points out how when Murphy repeatedly describes trans women as delusional, insane, stupid, and dishonest, their speech is being pre-empted. Speaking as a trans woman, O’Leary (2020) rightfully asks, “How could I argue in such an environment? I am not being invited to speak. I am being told . . . [I am] nothing but play-acting. To debate this is to suffer it.”

Murphy is well known for her anti-trans campaigning and for her insistence on presenting trans rights in false opposition to the rights of cisgender women. Bookings of her events at universities and libraries in Vancouver and Toronto have led to more public discussion of the questions my project addresses (Joaquin, Perrier, and Lenti 2019). Murphy has expressed her views in many media and it has become widely known that her work poses persistent challenge to others’ dignitary safety. In a case like Murphy’s, those tasked with deciding the outer bounds of acceptable speech for university speakers have at their disposal a panoply of the invited speaker’s history of public statements as they consider whether to disapprove the invitation.

As Murphy’s work stands out in the aggressiveness of its refusal to treat trans people as rightful interlocutors, it is also situated within a society with an “alarming rate of harassment, discrimination, and violence” against trans people (Ashley 2018, 2). The speech-denying tendencies of anti-trans speakers are not limited to the exact words they themselves say. Their hateful potential unfolds within a social and political context of pervasive violence against trans people. This violence has become heightened in both the United States and Canada through increased campaigns to pass anti-trans legislation and prevent queer and trans expression (Martinez 2023; McGinn 2023).

To be very clear, the challenge that anti-trans campaigns and their speakers pose to the expressive freedom of trans folk at our universities is not a question of their speech being impolite, uncivil, or offensive. It is a challenge to trans people’s dignitary safety. As Elizabeth Brulé (2020, 25) asserts, it is “trans students, staff and faculty’s right to be shielded from dignity harms within their learning environment.” Prevention of dignity harms is in line with universities’ stated commitment to equity, diversity, and inclusion and attendant policies, all of which currently contribute to legitimizing higher education. Threats to dignitary safety are of a systemic nature. There is a “disciplinary structure to gender which informs transantagonism and from which transantagonistic attitudes rationally flow,” Ashley points out (2018, 5).

The pervasiveness of this disciplinary structure and its systemic threats to trans survival and well-being mean that “exclusive focus on anti-discrimination and hate crime laws maintains a facade of equality which obscures the violence and inequality” that shape trans existence (Ashley 2018, 7). Absolutist attitudes to free speech and academic freedom do not take account of the systemic nature of violence against trans people. While the concept of freedom of expression will always be crucial, other values also have a role in universities “shaping its limits and articulating its boundaries” (Evans and Stone 2021, 6). Systemic violence presents a perpetual challenge to the dignitary safety of those targeted by it and thus hinders their ability to participate in university activities, including its public speech. Speech in a university setting can be limited accordingly with policy that is “impartially drawn, fairly enforced, no broader than necessary and reasonably clear” (Evans and Stone 2021, 8).

Conclusion: The Possibility of Less Harmful Process

O’Leary, Lavery, and Ashley’s writing quoted above are only three of many examples of trans scholars testifying to the harmful effects of aggressively anti-trans speakers being invited to hold forth under the banner of free speech, in university environments and elsewhere. Given the credibility of these testimonials, where we need to engage in argumentation is about determining the point and process by which the university community will act in barring the propagation of anti-trans campaigns at university events inside university spaces. As academic communities—with our legislated goals of research and

learning, along with our ethical responsibility and stated goals for inclusion—we have the tools and the expertise to assess when rare and specific cases of invited speakers contravene our mandate. In cases where they do, we can assert some constrained but crucial outer limits for speech.

As I conclude, I want to loop back to academic freedom. In his book *What Snowflakes Get Right*, Ulrich Baer makes a clear case for how academic freedom is linked to a university's ability to assert far outer limits of speech (Baer 2019). As he argues, we can only speak of freedom of expression if equal participation is possible among members of a community. In the cases of speech that is directed aggressively and repeatedly against marginalized groups in our university community, their ability to do academic work and to speak publicly is challenged and their academic and expressive freedom are curtailed. In other words, the far outer limits for invited speech are limits that we need to be prepared to assert in order to maintain academic freedom and institutional autonomy.

Under conditions of both institutional autonomy and shared governance, Canadian universities can and should be able to design fair procedures that take evidence of a guest speaker's claims into account and measure it against the university's mandate for research, learning, and inclusion. With such a process, a university body should be able to decide to deny the request to allow a certain speaker to hold an event inside a university building, particularly when that speaker's work aggressively undermines a university's claims for inclusion and diversity.

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