

RECONCILING VALUABLE INTERESTS; OR ACADEMIC FREEDOM AS ACADEMIC RESPONSIBILITY

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The rationales underlying the guarantee of freedom of expression in society at large are equally applicable to the university setting. Freedom of expression is necessary both for democratic government and the determination of what matters in the university. It is essential for the search for "Truth" through an open exchange of ideas as well as the advancement of knowledge and creativity. It is similarly indispensable for individual autonomy and growth.¹ This commentary focuses primarily on the second of these rationales as it is played out in the classroom and to a lesser extent, elsewhere on the campus.

In feminist terms, we might say that the exchange of ideas, the assertion of "new" ideas, or the new formulation of old ideas, reveals the partiality of "Truth" and supplements bit by bit the incomplete truth we now generally believe. More significantly, it can change the conceptualization of "Truth" (of what we mean when we talk about what is true and false). And yet for many, the truth about freedom of expression remains fixed, static, and closed to the evolution to which expression itself is expected to contribute. For many of us, free expression is a partial truth because it fails to recognize that there are other equally salient values which are integral to the Canadian political and social fabric, including a commitment to equality.

The centrality given to the value of freedom of expression, the appealing imagery of the free flow of ideas, and the not coincidental metaphor of "the marketplace of ideas", have developed only recently in the world's history. Contemporary understanding of the right of free speech evolved in conjunction with the rise of the ideology of individualism, as a reaction against the strength of stultifying custom, and coincident with the development of laissez-faire economics: it is now a virtue in itself rather than a reaction. The earlier picture of the individual breaking free from the strictures of society, boldly asserting his (most definitely) individuality has been displaced by that of the autonomy-seeking individual quite separate from both "society" and other individuals. Rather than having to justify some scope of individual action as against the overpowering claims of society, we now have to justify infringements on the freedom of individuals to act and, even more so, to speak as they wish. The claim to

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¹Found in various forms in many places, but specifically in Robert Sharpe, "Commercial Expression and the Charter" (1987), 37 U.T.L.J. 229, as cited in *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712 [hereinafter *Ford*].

academic freedom represents the epitome of the free speech debate, and professors in particular are quite rightly chary of yielding any ground.

While academic freedom is usually associated with “academics” (ie. professors) either in the classroom or in their writing, the issue of free speech in the academy can take other forms, including the Forum of which these comments are a part. My comments, therefore, begin with reference to three examples of expression outside the classroom here at the University of New Brunswick (U.N.B.) which illustrate the complex interaction of the exercise of free speech and its control: this Forum, a *Brunswickan* column and a “rights” conference.

This Forum’s purpose is reflected in its form: the authors, including myself, are freely expressing ourselves about freedom of expression. The Forum complements the “When Rights Collide” conference.² The Conference itself arose out of the controversy at U.N.B. in which a professor of mathematics used the student newspaper, the *Brunswickan*, to castigate young women who go to “boys” rooms and to assert the inevitability of young men’s rapacity.

The editors of this Forum had the power to be deliberately selective in the views about expression they wished represented. I believe that they chose to seek a diverse range of opinions, the parameters of which not everyone will agree were correct; nor will everyone agree on the choice of actual authors to represent those views. Disagreement about the nature of these issues is in the nature of the exercise – the process of inviting opinion is what matters here and simple disagreement about these choices is not as relevant as the reasons for making different choices, either initially in the invitations or finally in the selection of the pieces for publication.

The organizers of the Conference also set the tone and direction of the proceedings, whether deliberately or otherwise, with their choice of the title, the keynote speaker the first evening of the conference and the speakers and arrangement of the panel the next day. The keynote speaker, Alan Borovoy, is a deservedly well-known advocate of freedom of expression who is willing to brook little constraint on free speech. The direction established on the first evening was reinforced by two of the three major speakers the next day. For the most part, those of us disagreeing with the tone were forced to express our views as best we could – our ability to be heard was dependent upon our willingness to force ourselves upon the audience.³ No doubt there are those who would see this arrangement as poetic justice – that those who question the primacy of free speech would have the harder time in freeing their speech; seen from “the other side”,

²Held 28-29 September 1994 at the University of New Brunswick (Fredericton) [hereinafter Conference]. The papers presented at the Conference also appear in this volume.

³I declare my conflict of interest here, as one of the “local” or home-grown panellists.

however, those most likely to speak for marginalized groups were themselves marginalized by the sanction granted to the absolutist view of freedom of expression.

The editors of the *Brunswickan* used their power to publish the column once it was submitted to them. They also subsequently chose to publish a considerable number of letters to the editor which expressed outrage at the original column, because either the writers saw it as an invitation to or a condonation of rape or they resented the implication that they were unable to prevent themselves from raping. There is no doubt that the subject matter had an airing in the best free speech tradition: an unpopular view was exposed to public calumny and the "Truth" revealed.

I do not believe that the *Brunswickan* editors were irresponsible in publishing the original column⁴, but I am not convinced that they had an obligation to do so to comply with some abstract principle of providing a forum for expression of all views, no matter how reprehensible.⁵ In selecting pieces for publication, the editors presumably think about encouraging controversy, and perhaps both the contribution a particular piece will make to the circulation of ideas and the accuracy of the views expressed. It is unlikely that the editors published the column carelessly or without thought. It is possible that had they thought ahead and published responses at the same time, much of the fallout might have been avoided, but then they would have been vulnerable to accusations that they were attempting to minimize the impact and the legitimacy of the original column, as they would have been. In short, there are pragmatic considerations to the exercise of speech or in determining to which speech one will give life. Those who take on responsibility for controlling the flow of speech, whether they edit student newspapers, academic journals or organize conferences, must be concerned with not only what is said, but also what is not said – hence the requirement for equal time in election broadcasts – and with form as well as content.

⁴Although *quaere* whether they might have been had they solicited it.

⁵To use a trite example, one wonders how readily the editors would have published a column which said that blacks who enter white neighbourhoods should expect to be lynched; interestingly, this might provoke less concern for the very reason that it does not have a credible basis in either Canadian or more specifically, U.N.B. society, while the danger that young women entering young men's rooms might be sexually assaulted does have a basis in reality (a view which, I hasten to add, does not lead to the conclusion that young women who do so deserve what they get, and is not based on the assumption that all young men will sexually assault young women). The notion that one should or that (and this is different) it is legitimate to repress views which are "reprehensible" (or "evil" in the political sense) is criticized on the basis that doing so imposes a particular viewpoint and therefore contradicts liberalism: Andrew Altman, "Liberalism and Campus Hate Speech" in John Arthur and Amy Shapiro, eds., *Campus Wars: Multiculturalism and the Politics of Difference* (Boulder: Westview Press, 1995 [sic]) 122.

Now I turn to the classroom and speak deliberately as a member of faculty. One of the most important worksites, the classroom, is still a relatively insular place, despite what may be perceived to be growing incursions on it. Like Mr. Borovoy at the Conference, the professor holds the stage, establishing the main characters, painting the scenery and determining the range and rhythm of the play. Like those in the audience questioning Mr. Borovoy, or those on the panel the next day, the students who wish to challenge the professor are “outsiders” who are required to “disrupt” the flow of the play, to insinuate themselves against the professor and quite likely against many of their classmates.

On the other hand, the classroom permits a more discursive analysis, a more free-flowing exchange of ideas which can be revisited, clarified, reformulated and reconsidered than does either the written word or the time-limited conference. I say “permits” not “guarantees” – for even the best intentioned professor will battle limitations of time, their own and the students’ energy, and interest as well as the too common proclivity of their listeners and others, to leap before they really hear. As well, too many of us are not well-intentioned at all, but rather self-indulgent, self-identified proprietors of our little plot of cultivated ideas.

The professor’s claim to academic freedom is better seen as a willingness to accept “academic responsibility” – a commitment to critically assessing ideas, to challenging their own cultural and political assumptions, and to persuading students to think harder and to question their beliefs. It is my responsibility to provide the means by which students add to their pile of truths and sometimes upset it. It is hoped that when the cairn of truths is reconstituted, it does not look quite the same as it did before it fell down. The privilege we enjoy as teachers to work and play with words and ideas demands that we accept the obligation to exercise that privilege not as an individual right, but as a form of public service.

It is fundamental to the university that professors have the opportunity to advance ideas, and that the dominant views not be allowed to stifle the dissenting views. Freedom of speech in the university is in a sense our stock-in-trade: we sell words and ideas. We like to think that we are sowing the ground for the growth of new ideas and that we are searching for “Truth”. We might even like to think that universities are meant to be subversive places.

Universities today, however, sometimes seem rather meagre substitutes for their predecessors, whether compared to that in Athens (with all its faults) or to those in the late 1960s where student radicals, with a scattering of professors, literally stormed the barricades, action flowing quickly after words. Their legacy, unfortunately, is the market-driven, technologically sophisticated human laboratory we call a “university” today, where long-distance education is the byword of progress and human interaction is “byt[t]en” to metaphorical death. More important, technological wizardry has brought new challenges to the equality/speech discourse – technology has leaped ahead, surpassing our efforts

to counteract the impact of hate messages. A report in *The Globe and Mail* declares that “[f]ringe groups are increasingly going on-line, gathering converts and seeking validation on the Internet. The network’s far-flung links and low-cost communications are a boon to backwater groups that can’t afford to use direct mail to make their pitches”.⁶ This report referred to events in the United States, but it triggered my memory of an earlier news story about the use of electronic bulletin boards for obscene messages and the futile efforts of Canadian universities to prevent their dissemination across campuses.

While “anti-discrimination or harassment policies” are debated, hate material traverses the academic electronic lines with impunity. Society’s capacity to thrill itself with its inventions often outdistances its capacity to respond to the moral or ethical ramifications, whether the discovery be the atom bomb, reproductive technology, biogenetics or the Internet. These developments suggest that efforts to exert a rigid control, to define in detail the parameters of appropriate or inappropriate speech are doomed to fail; they will simply be bypassed. But in my view, pre-emptive control is the wrong approach. I do not adhere to “[t]he liberal principle of viewpoint-neutrality”⁷; on the contrary, I see no value to permitting people to spew hatred against particular groups, and I believe the university could impose penalties on persons responsible for inviting hate-mongers on campus. Similarly, when guests in a classroom speak hatred, the professor is obligated to speak against it; the privileges accruing to a guest dissipate as the guest abuses them. Speech and conduct which are meant to be racist, sexist and homophobic – that which is “evil” and not merely deficient – are in fact inimical to the academic mission of advancing knowledge.⁸ There will always be disagreement

⁶The [*Toronto Globe and Mail* (13 December 1994) A18.

⁷This view “holds that those in authority should not be permitted to limit speech on the ground that it expresses a viewpoint that is wrong, evil, or otherwise deficient” and that it is sufficient, therefore, to say that regulations against racism, sexism, homophobia, are not viewpoint-neutral in order to reject them (that is, they are saying racism is bad, while there are people who believe in those views): see Altman, *supra* note 5 at 123.

⁸Certain kinds of expression are actually inimical to the democratic process, since hate propaganda argues “for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics”: *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 764, Dickson C.J.C. [hereinafter *Keegstra*]. For example, Dr. Lionel Jeffries (by all accounts) is racist but, more importantly, teaches racism; the efforts of New York City College to remove him as head of its black studies program have so far failed because doing so has been considered an infringement of his freedom of speech. Part of me (the part of me that wants to deal with the “real” issue and not an issue in the air) questions how racism assists in the advancement of knowledge (regardless of its source); yet I confess that that part of me attracted to the abstract acknowledges that one person’s racism may be another person’s truth. City College has gradually been increasing its offerings in black studies courses in other departments, an approach somewhat analogous to equal time broadcasts or the *Brunswickan* publishing the views opposing those of the mathematics professor. See Richard Pérez-Pena, “Battle Over Black Studies” *The New York Times* (29 December 1994) B1.

on the kind of language which constitutes hatred. For example, the determination of whether speech is racist must be made contextually. I part company with many whose views I otherwise share in believing these terms should be reserved for clear examples and that severe penalties should be reserved for intentional racism, sexism or homophobia. As an example, the term "racism" has become debased coinage and must be distinguished from language which is better characterized as unpleasant, annoying or offensive: it is hard to sanction everything, as we are forced to do when the net is cast too broadly, for then we end up sanctioning almost nothing.

This does not mean that students, and others in the university, must endure other lesser forms of harassment; it is appropriate for the university to establish policies which permit complaints for various forms of harassment, whether it be a course of negative or hostile comment in the classroom about a particular group, a pattern of rejection or belittlement of the views expressed by members of a particular group or any similar conduct. These policies should clearly set out the rights and obligations of both those subject to the policy and those invoking it, and should contain a mechanism for determining whether a *prima facie* case of harassment has been made out by the complainant. Anti-harassment policies reflect the university's commitment to equality and help to evolve a culture of equality among members of its community.

Most significantly, our commitment to freedom of speech in society generally and in the academic context in particular must be tempered by a culture which treats other values as having equal prominence with speech. Here I speak especially of equality. Strict constructionists will argue that equality is not possible without an essentially unfettered freedom of expression, that nothing protects us more than the ability to speak out against oppression. This assumes in part that oppression comes from the state,⁹ as it sometimes, but not always, does. Yet this uni-directional view, while appealing in its simplicity because we can always get the "right" answer, is deceptive because it ignores the effect demeaning expression can have both on the its subjects and on the perception of those individuals by others. Their efforts to counter speech which attacks their integrity will be seen as defensive and presumptively self-serving.

Thus one can fairly argue that interference with academic freedom is an interference with our right as professors to express unpopular or disturbing (as in subversive or challenging) ideas, but one can equally argue that a failure to ensure that our teaching and other work does not rely on the denial of the integrity of

⁹Justice McLachlin alludes to this view which "ascribes to freedom of expression a central role as the pivotal freedom on which all others depend. Without the freedom to comment and criticize, other fundamental rights and freedoms may be subverted by the state. This argument gives freedom of expression an enhanced status in relation to other rights." See *Keegstra, ibid.* at 802.

others is a failure to comply with our academic responsibility. Our freedom and our responsibility are not incompatible; they complement each other. Academic freedom should not be seen as an invitation to exercise a form of academic licentiousness, but as an opportunity to weigh the consequences of the exercise of our freedom before we exercise it, not afterwards.¹⁰

The point is that words are not neutral; in certain formats or configurations, they become weapons. They can alter people's lives. While language or expression may be necessary to the individual's expression of self or identity,¹¹ language can also be an assault on identity. Certain words hurled in anger, words which are almost epithets, or words which are meant to wound, are merely a substitute for a slap across the face, or worse. Yet we allow words where we would not allow the display of knives or guns.

Although I believe strongly that as professors, we have responsibilities as speakers to consider the impact of our speech, the responsibility lies not only on the speaker. This is true in society generally, as well as in the academic context. If speech has a societal value, we all share the onus of ensuring that it is used wisely and maintained effectively. As listeners, we have a responsibility to live up to the term: to listen and not to jump to conclusions, to inquire about intention, and to be aware of context. We should be aware that learning often comes from seeing analogies, taking things to extremes, and being forced to defend one's views. The recipient of speech needs to know that satire can be a formidable weapon which can turn words around and show their power. The recipient has an

¹⁰In other words, the analysis should not presume the primacy of free expression against which equality is required to justify an incursion. In both *Butler* and *Keegstra*, for example, the issue directly before the Court was whether the provision of the Criminal Code under which the accused were charged contravened the Charter's guarantee of freedom of expression. In both cases, the Court held that the accused's freedom of expression had been impaired, but that the impairment was justified under section 1 of the Charter. Part of the justification was the impact the expression had on the equality rights of particular groups, women in *Butler* and Jews in *Keegstra*: *R. v. Butler*, [1992] 1 S.C.R. 452; *Keegstra*, *supra* note 8. Equality's claim was not strong enough against Ernst Zundel's anti-Semitism, however: *R. v. Zundel*, [1992] 2 S.C.R. 731. If we began by saying that equality is the reference point and that hate literature detracts from it, we would ask: does the value of hate literature justify a limitation on equality? Phrased that way, the answer seems easier and the issues more accurately joined. The purpose of hate literature is to hurt others, to deny their validity or even the value of their existence, and not merely to debate ideas or "truths".

¹¹*Ford*, *supra* note 1.

obligation to be aware and questioning.¹² The danger to the value of free speech from lazy listeners is as serious as the danger to equality from cavalier speakers.

Most of us are vulnerable to being hurt by the expressions of others even while we benefit from our own: few of us are located in one place along a continuum of those who make the greater claim on the value of free speech or on the value of equality; at different times, in different places, we make both claims. We are all the givers and receivers (or targets) of messages. As an academic, I want my freedom untrammelled, but as a feminist, I want to restrain speech which I believe is intended to undermine the equality of particular groups in society. As an academic feminist, I choose to believe that there is a better solution, albeit one which is more complicated and more onerous on all of us at times. I confess that ultimately I want to be able to claim that we feminists did not deny speech, although we certainly wanted to change it, because I am only too aware that there is an ebb and flow to these things; we taste, enjoy and then discard, a kind of ideas à la mode. Nothing is forever and the cycle comes round again.

¹²In a speech on a U.S. college campus, Louis Farrakhan claimed that "You can't be a racist by talking – only by acting" as a way of defending his own anti-Semitic and anti-white statements. An editorial cartoon which used the word "nigger" in the mouth of a member of the Ku Klux Klan drew outraged cries of racism even though its purpose was to show that Farrakhan's statement had hurt blacks and was wrong. All the critics saw was the word without the intent. (*The Boston Sunday Globe* (13 February 1994) 73). Many of those protesting the Royal Ontario Museum exhibit on the colonization of parts of Africa by missionaries and military refused to acknowledge that the exhibit was intended to be a condemnation of colonization and of the British colonizers; for them, to show pictures of the colonization was sufficient to disrupt the curator's classroom where she taught at the University of Toronto.