



THE UNIVERSITY OF BRITISH COLUMBIA

**Peer-Reviewed Commentary on the Draft Statement:
Commentary 1 by Martin Schulz, Sauder School of Business**

Critical Comments on the UBC Freedom of Expression Statement Draft, November 8, 2017

Martin Schulz, Sauder School of Business, UBC, Nov 13, 2017

Note 1: Some of my comments contain critical political analysis recognizing the power structures and interests at UBC and its context, and thus might sound politically incorrect. My intentions are: Free and open discourse unencumbered by any limitations to freedom of expression.

Note 2: At this point, this analysis is merely a draft. A more comprehensive analysis and systematic critique of these developments at UBC is overdue.

Overall Comments:

- The biggest problem of the “UBC Freedom of Expression Statement” (UBC-FoES) is that it is full of mixed messages. It offers a lot of language in support of freedom of expression, but then it constrains it. It appears a bit like a Trojan Horse. Looking nice on the outside, but really hazardous in the inside. At the same time it is ambiguous – it raises more questions than it answers.
- It does not grant unconstrained freedom of expression.
- It is essentially a statement confirming that freedom of expression has limits at UBC.
- The limits set by the UBC-FoES statement can be interpreted in a large number of ways, which is likely to happen in a diverse context.
- I am not sure why UBC needs to issue statements/rules that can impinge on natural and charter rights of members. Why does UBC need to stick its head out so far? Is current law lacking constraints on freedom of expression, that UBC urgently needs to install? It involves a lot of resources. It seems it exposes UBC unnecessarily to legal hazards. Is there a ‘business case’ about issuing such statements?
- Shouldn’t universities grant more – not less – freedoms of expression than the rest of society because usually our community includes members with experience and expertise that can handle every legal form of expression. I do think we have the capacity to handle expressions that are too free to be “possible”. Who else would have that capacity?
- Why do we have an avalanche of rules and statements at UBC that combine conspicuous virtue signaling with potentially harsh constraints of our freedoms? The statements displayed in UBC-FoES look and feel like propaganda that is aimed at gaining support for silencing diverse ideas and views.
- Is the UBC-FoES statement a device that can be used to eliminate criticism of UBC authorities and their decisions? If we are limiting the right of individuals to speak up and to voice their opinions, this might lead down a slippery slope to silencing and punishing those who have alternate views to that of the University.

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<p>Freedom of expression matters. It fuels what good universities do.</p>	<ul style="list-style-type: none"> • This statement sounds a bit like a commercial.
<p>Especially in turbulent times, when facing challenges of contentious and divisive politics, economic uncertainty, terrorism, and environmental upheaval, the freedom to express and explore ideas must continue as our central mission. As one of the world's foremost universities, UBC must vigorously promote and defend the freedoms necessary for the successful pursuit and dissemination of knowledge. Freedom of expression is, however, one of a number of rights and freedoms each of us has. One person's freedom of expression cannot be allowed to trample the freedom or wellbeing of others.</p>	<ul style="list-style-type: none"> • "One person's freedom of expression cannot be allowed to trample the freedom or wellbeing of others." The UBC is making a strong claim here. How do you define wellbeing? Does it include the discomfort of being exposed to expressions of divergent or dissenting others? So we cannot mention topics like "existence", "death", "natural selection", "corruption", "elites", "fake news", "God", "Hell", "gay", "sex", "climate gate", etc because they can make others uncomfortable? • How do we get from "terrorism" to freedom of expression and wellbeing? Is this merely a rhetorical device to make readers scared and compliant? Should we not assume that intelligent readers will catch this? • Note: There are studies that show that criticism can affect health. Does this mean that we have to eliminate criticism at UBC? • Is this statement a device that can be used to eliminate criticism of UBC decision makers or their associates? • How do "turbulent times" relate to this argument? How does it lead to a need to put constraints on the freedom of expression? Asking people that they do not express their views will help in turbulent times? Whom will it help?
<p>For centuries, universities have held a special place in society. We are entrusted as guardians of the accumulated knowledge and wisdom of humanity, as trailblazers in advancing the frontiers of human knowledge and thought, and as leaders, mentors, and teachers in disseminating the fruits of this knowledge.</p>	<ul style="list-style-type: none"> • I am sorry, but this characterization misses the main point of why universities are so special: Universities are the only places in society where things can be radically questioned. And the reason for this is <i>academic freedom</i>. Academic freedom is the most critical strategic asset of universities. Without academic freedom, universities lose that special place in society. Academic freedom allows us to study anything that can lead us to a deeper understanding of the world. It makes universities places in which curiosity is respected and encouraged. And that is rare in the rest of society, and that is the reason why universities play such an important role. • I agree that universities hold a special place in society, but the rest of that statement is hard to follow. The role as guardians seems to slip away from universities as libraries are getting replaced with online databases and faculty are forced to focus on current fads and two-year impact factors. Professional associations and networks of scholars become increasingly important instead. • Who is actually "we" in this statement? All members of UBC? Or the view of a

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	<p>committee? At this point, the statement sounds like a concertive control norm. Is UBC aware of the pitfalls of concertive control systems?</p> <ul style="list-style-type: none"> • How about we have a bulletin board on which everyone can post their statements about how things should be at UBC?
<p>Central to this three-fold mission is the promotion of “the freest possible exchange of information, ideas, beliefs, and opinions in diverse forms” (see UBC Respectful Environment statement).</p>	<ul style="list-style-type: none"> • This statement includes ambiguous language about “the freest possible exchange”. The statement indicates that there are exchanges that are too free to be possible. The reader is informed that there are limits to freedom of expression (apparently articulated in the Respectful Environment Statement) but they are not presented at this point. • The UBC Respectful Environment statement contains significant constraints on academic freedom and freedom of expression. At the same time, it is full of hazardous ambiguities and gaps and contradictions.
<p>So, for example,</p> <ol style="list-style-type: none"> How can we safeguard the lessons of the past if objectionable parts of the historical record are suppressed? How can we create significant breakthroughs if entire lines of inquiry are forbidden? How can we equip students to tackle future challenges, if they are shielded from demanding, provocative thought? 	<ul style="list-style-type: none"> • These sound like important questions. • The suppression of historical records is extremely dysfunctional. It has enormous negative implications in larger contexts outside UBC. But I am not sure it is really a good example for freedom of expression at UBC. • I am not sure that there are many lines of inquiry that are “forbidden”. The problem is more insidious. Entire lines of inquiry are obstructed through policies which discriminate against research that does not conform with a template. I would add this example: <u>iv. How can we facilitate innovative research when our policies and systems discriminate against research that is novel, original, unusual, unpopular, risky, and unconventional?</u>
<p>Two principal reasons underlie our deep and abiding commitment to freedom of expression. First, pursuing ideas freely and openly moves us closer to truth, allowing all ideas to be criticized and tested, accepted and revised. Universities are communities of scholars where the free and open exchange of thought, belief, opinion, and expression is highly valued because it promotes better knowledge and understanding. Second, our scholarly community is composed of people with diverse histories and cultural viewpoints</p>	<ul style="list-style-type: none"> • Both reasons sound agreeable, but could be massively strengthened. • I do think this would be a good place to highlight the importance of <i>academic discourse</i> for the progress of thinking and the creation of new knowledge. It is an institutional practice that is central to the mission of academic institutions. It is also a method of inquiry which can be extremely powerful in contexts that respect academic freedom. • I would consider strengthening the point about UBC. It is so strong, it characterizes UBC throughout. We are an extremely diverse place, and thus we are committed to an extremely open discourse. It makes sense, and we really can

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<p>while also encompassing a wide array of disciplinary perspectives. This diversity makes universities, and especially UBC, a place unlike other institutions. When all the voices of a diverse university community can participate equally in intellectual exchanges, this provides a rich, vibrant resource that helps in promoting a wide spectrum of expertise and opportunities in the pursuit of excellence.</p>	<p>stand out on this dimension. And that is also a good reason to <i>not</i> put additional limitations on freedom of expression.</p> <ul style="list-style-type: none"> • BTW, I would make diversity the starting point of a lot of things at UBC. And it has to include diversity of thinking and knowledge production. We could be #1 in terms of diversity – including diversity of thinking, talent, research topics, approaches, methodologies, culture, disability, national background etc. At the same time, we make it the most inclusive university in the world. For both we need freedom of expression. It makes a diverse, inclusive community thrive. • I am aware that everyone uses language about “excellence”, but we should also take into account that it is a bit of an empty phrase, especially in a system that rewards not excellence but rather publication counts.
<p>Here is a significant example of why freedom of expression matters at UBC. A core challenge in Canada, and one to which UBC is committed to addressing, is the ongoing process of truth and reconciliation with Indigenous peoples. Our collective lack of a shared knowledge about the lasting effects of our colonial past acts as an impediment to the essential conversations and negotiations that progress on these multiple issues requires. This is exacerbated by historic power imbalances that make this a complicated, difficult engagement. It is an engagement that can only be tackled principally and ethically in a spirit of free and open dialogue and respect.</p>	<ul style="list-style-type: none"> • I agree that the history and concerns of the Indigenous peoples are indeed important. I think it is very good that UBC cares about this. • I would consider moving this topic to a different statement dedicated to truth and reconciliation. It entails significant moral obligations that are indeed complicated. Establishing free and open dialogue on this topic is challenging, but it is necessary. Still, it is not a prime example of freedom of expression. It is more a case about a history of oppression and paths to reconciliation. • A better example might be the shortage of critical studies on the policies and strategies of powerful organizations and players on which UBC depends, including the BC Government, crown corporations, large donors, associations, accreditation and ranking organizations, political parties, and funding agencies.
<p>Scholarly dialogue should help us make progress on difficult and complex problems like this. The</p>	<ul style="list-style-type: none"> • This paragraph sounds very agreeable, but it contradicts other provisions in other

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<p>intellectual richness of the university comes in recognizing alternatives, having contentious conversations, tackling stubborn assumptions, making brash conjectures, discussing uncomfortable facts, and engaging with sharp differences in values and visions. Scholarly work finds its dynamism in this engagement. It is the work that universities must do and do well (and, of course, we have not always done well as the need for truth and reconciliation highlights). Doing it well means holding open the idea that persuasion is still possible, that thought and evidence and reason can lead to solutions for the many grand challenges we face.</p>	<p>paragraphs of the statement.</p>
<p>The educational benefit of exposure to diverse understandings, views, opinions, and thoughts, when done appropriately and respectfully, comes in developing the skills of intellect and character, the inner resources and personal resilience, which allows one to successfully and constructively engage with a tumultuous and at times unsafe world. This necessitates scholarly spaces where critical thinking and incisive reasoning knows no bounds but is allowed to flourish unrestricted by who you are or to which social groups you might belong. The university works assiduously to create a place where people are physically safe. However, when confronting challenging ideas, ideas that question your deeply held beliefs, ideas that you might find noxious or offensive (or discovering that others find your deeply held beliefs noxious and offensive!), it is inevitable and appropriate to feel intellectually uncomfortable, even offended.</p>	<ul style="list-style-type: none"> • This paragraph contains a lot of strong assertions. Many sound quite agreeable. But it is also a mix of statements. It opens the loophole of “exposure to diverse understandings, views, opinions, and thoughts” that might not be done appropriately or respectfully. This can create massive problems when perceptions and standards of appropriateness and respect differ (which is highly likely in a diverse context). I am not sure how necessary it is for UBC to sanction additional limits on the freedom of expression that go beyond what the law already forbids (e.g., slander and violence are illegal forms of expression already). • I like the part about “scholarly spaces where critical thinking and incisive reasoning knows no bounds but is allowed to flourish unrestricted by who you are or to which social groups you might belong.”
<p>Creating and sustaining the conditions for such difficult discussions is hard, complex, and highly-charged. As former UBC President Stephen Toope correctly argued, “a tension exists between our community values of respect for human dignity and the special place of free expression that universities</p>	<ul style="list-style-type: none"> • Again I think this is too broad and ambiguous. It opens all kinds of questions, e.g, what events are considered “breaches of the peace”? When are “statements judged likely to incite breaches of the peace”? • “...such statements are, at root, attempts to stifle or prevent the freedom of expression of others”. Perhaps this is the case, but what about the UBC Freedom

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<p>protect.” Statements inciting hatred against identifiable groups, statements judged likely to incite breaches of the peace, and statements of a personal, ad hominem nature are foreign to the intellectual exchanges that strong universities must support and protect. This is so because such statements are, at root, attempts to stifle or prevent the freedom of expression of others, to dissuade any response or discussion.</p>	<p>of Expression Statement? Does it not contain provisions that will stifle or prevent the freedom of expression of people who question the authority of UBC officials?</p>
<p>Words can be used as weapons, aimed deliberately in pejorative ways to taint or stain the reputations and authority of others. Deliberate attempts to create a toxic environment must remain anathema to the practices of the university community. Freedom of expression rests on the potential of making positive, constructive contributions to the university community. Speech or artistic expression that harms the proper working conditions of the academic community, by for example using hate to dehumanize certain groups, is speech and expression that cannot be protected or condoned.</p>	<ul style="list-style-type: none"> • “Words can be used as weapons, aimed deliberately in pejorative ways to taint or stain the reputations and authority of others.” Why “authority”? So “authority” is shielded from questioning? Why should I want my “authority” as professor be shielded from questioning? Since when does authority need protection? Is this the spirit of oligarchy channeled by a UBC committee? • Is this statement mainly a device that aims to eliminate each and any form of criticism of UBC authorities? • “Freedom of expression rests on the potential of making positive, constructive contributions to the university community.” This is a strong claim. Not sure this is valid in all cases. At the very least, you need to include whistle-blower protections. • What is the meaning of ‘positive’ here? Is UBC trying to put statements like “this school uses unfair practices” or “this Dean could not care less” outside the freedom of expression? • You say “using hate to dehumanize certain groups, is speech and expression that cannot be protected or condoned”. Ok, but who would advocate “hate”? Is that a problem that UBC has? Are there people running around on campus with signs that express hate? Note, in the current political discourse, “hate” is a label attached to political opponents. It is a hypothesis about the motives of others. • So then what is the meaning and purpose of this statement about hate? At this point it only throws an ambiguous phrase into a political setting.
<p>UBC policies and practices work to promote the smoothest functioning of this scholarly community. From our academic freedom declaration, to our statement on a respectful environment, to our policies on harassment and discrimination, there are in place</p>	<ul style="list-style-type: none"> • “UBC policies and practices work to promote the smoothest functioning of this scholarly community.” What does this mean? The smoothest functioning is more important than freedom of expression? Policies and practices (and freedom of expression) are subordinate to expediency? • UBC practices and policies “recognize the importance of freedom of expression,

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<p>mechanisms intended to ensure that freedom of expression flourishes at UBC. Most fundamentally those policies and practices recognize the importance of freedom of expression, but they do so in the context of everyone’s fundamental right to equality. Freedom of expression does not trump all other rights. In the university community freedom of expression can only thrive constructively when accompanied by other rights, including the equality rights of equity, diversity, and inclusion.</p>	<p>but they do so in the context of everyone’s fundamental right to equality.” This statement seems to be rather ambiguous. So there is a fundamental right to equality and it constrains freedom of expression? Because we are equal we cannot express certain things?</p> <ul style="list-style-type: none"> • What is the difference between the “fundamental right to equality” and the “equality rights of equity”? • What is the “right to diversity”, and how does it affect freedom of expression? How come that freedom of expression can only thrive in a diverse community? Isn’t it the other way round? <i>A diverse community can only thrive if there is freedom of expression.</i> How come UBC turns this relationship around? • Is UBC sure there are not exceptions to its claim that freedom of expression can only thrive when it is accompanied by “rights of inclusion”? Isn’t the reverse claim much more valid? <i>An inclusive community can only thrive if there is freedom of expression.</i> How come UBC spins this relationship around?
<p>In all of this we share a collective responsibility. Each and every one of us has the responsibility to support, safeguard and preserve this central freedom of expression. Tuum est – it’s up to you!</p>	<ul style="list-style-type: none"> • “In all of this we share a collective responsibility.” Does this mean from now on we all have to follow the definition of freedom of expression articulated in the “UBC Freedom of Expression Statement 2017”?



THE UNIVERSITY OF BRITISH COLUMBIA

**Peer-Reviewed Commentary on the Draft Statement:
Commentary 2 by Elizabeth Hodgson, Department of English**

“Toward a Lived Freedom of Expression”

Elizabeth Hodgson, Professor
Department of English, UBC

My responses to the draft report on freedom of expression at UBC are inflected by my own extensive work on academic freedom across Canada and by my involvement at UBC in gender and labour politics.¹ I have learned in this work that there are common misconceptions around freedom of expression and its applications in a university setting; I think it might be helpful to address these in the context of this recent draft report. First, freedom of expression is not the same as academic freedom, though the two categories are often conflated. Nevertheless, a comparison of the two freedoms can be instructive. Second, freedom of expression, like academic freedom, is not a “natural” right; nor is it a neutral or disembodied term. Any policies regarding its uses or abuses would be wise to consider the material conditions, categories of privilege, and forms of embodiment available to or enacted upon the users or would-be users of this or any other kind of freedom. Lastly, UBC or any university campus is not one kind of collective. It may be helpful to consider that UBC is part workplace, part town, part credentialing authority and part mentoring community. All of these identities which a university campus inhabits affect its experiences of speech, especially public or collective speech.

Let me address these broader points in order.

- 1) Freedom of expression is not the same as academic freedom. Freedom of expression as a constitutional right is enshrined in the *Charter* and is available to any citizen or inhabitant of our country. It is limited in all instances by federal laws against defamation, hate-speech, vandalism, and other forms of verbal violence and harassment. A former Supreme Court justice has categorized these limitations as “offences against the public order, offences related to falsehood, offences against the person and reputation, offences against the administration of law and justice, and offences related to public morals and disorderly conduct.”²

Academic freedom is an *additional* protection granted to scholars and scholars-in-training to engage in fearless exploration of ideas as a necessary corollary of the intellectual risk-taking in which our society has agreed we should engage. Academic freedom is not enshrined in federal law, though many court decisions have recognized and upheld its importance. It is rather a safeguard provided by universities as employers so that academics can investigate, challenge, innovate and question without

fear of retribution.³ In UBC's case, academic freedom is enshrined in the university Calendar and in the Faculty Association's collective agreement.

The functional limitations or boundaries on academic freedom (beyond those that also apply to freedom of expression) are, simply put, peer review: that is, those of us who are scholars correct and teach each other. Martha Piper made this argument succinctly in 2001, and it is still a powerful explanation of how we manage academic freedom.⁴ When a scholar engages in public speech on any issue, the remedy to any errors in their speech is peer review. We add our critiques, our analysis, our counter-evidence, and we enable others to judge and find the truth. Every academic is trained incessantly in this system: we must gain the approval of our peers every time we publish our research, apply for a grant, seek promotion, or apply for a position, every time a student appeals a grade, and indeed every time we suggest curricular or program change. This system of requiring peer review bears its own institutional biases and limitations of which we must be constantly aware, but it is, I would suggest, the appropriately scaled correlative to our earned right to be protected by academic freedom.

This has some bearing on our responses to situations on campus in which freedom of expression is an issue. Insofar as freedom of expression in an academic context invokes many of the concepts of academic freedom, and insofar as the university community has a special role in being a concentration of academics engaged in teaching and learning, its appropriate response to an academic making an argument that we find "abhorrent," (to use the language of the UBC statement on academic freedom) is to provide rigorous peer review of the same. UBC's institutional role is to facilitate, foster, enable and encourage, structurally and financially, this kind of peer review. We could hold a conference, a teach-in, or write op-ed pieces or blog posts. We could provide respondents for speakers or set up town halls. These are all forms of peer review which make sense in a specifically academic context and which UBC should support.

- 2) An additional necessary correlative to the idea of "freedom", whether it be freedom of expression or academic freedom, is the reality that freedom is not a natural, universal, or disembodied reality. It is a hard-won, often-elusive, contingent privilege granted by our communities far more, and far more freely, to some than to others. Of all of the many markers of privilege which many of us enjoy, or of which many of us recognize our lack, "freedom" is perhaps the most casually misapplied sign. So in any conversation about freedom of expression, if we fail to recognize that the myth of freedom's universality is designed to elide the social inequalities of which our world is made, we will be missing its double-edged ideological value. Those of us who are women, or people of colour, casualized faculty, graduate students, LGBTQ people, EAL speakers and a host of other marginalized identities know all too well that our freedom is not the same as the

tenured white anglophone cis-male professor's. We know that we cannot safely take the same risks, will never make the same amount of money, will have to work harder for the same goals, and will be repeatedly ignored for positions of power.⁵ We know that we do not have the same resources to fight legal battles, to hire consultants, to milk our own ideas for profit or to defend ourselves against the attacks of others. Our freedom is not the same. If any of us pretend that this is not a reality, we are lying to ourselves. This is a very important proviso to our sometimes-unthinking celebration of individual freedoms. The draft statement on freedom of expression makes some useful comments in this direction, and I applaud them for starting to recognize the importance of this reality to our cultural discourses about rights and freedoms.

- 3) UBC, like any university campus, has many identities. As a workplace, UBC has unions and workplace contracts governing (and ideally protecting) its employees. As a credentialing institution, UBC has regulations governing student misconduct, academic standards and academic governance. As a town, UBC has policies and offices governing parking, social gatherings, clubs, housing, childcare, sustainability, crime and safety. As a mentoring environment, UBC has resident students, fellowships and scholarships, global exchange programs, visiting speakers, and a variety of forums for our community of learning. In each of these environments, freedom of expression as a federal right is applicable; so too are laws governing workplace harassment and discrimination; public safety and security; hate-speech and criminal harassment; and rights to managerial, quasi-municipal, and academic governance. When it comes to freedom of expression, then, UBC's responsibilities as one kind of institution may confront its responsibilities as another kind of institution. These are dilemmas which the university's governing and authority-bearing bodies, including the Senate, the Board, and the President, must own and manage.

II: Notes on the draft statement on freedom of expression

In response to these realities surrounding freedom of expression at UBC and other campuses, I have some specific recommendations, in particular in response to the draft statement.

- 1) The draft statement appears to rely in part on UBC's "respectful environment statement"⁶ as an appropriate source of advice on managing or policing freedom of expression. That statement is problematic in its current iteration, especially because it extends an otherwise-laudable emphasis on workplace harassment into a declaration about civilized speech between individuals. "Disrespectful" or "uncivil" speech is not necessarily the same as workplace harassment, often by a wide margin. Real workplace harassment is not just speech, and it is almost always enabled by toxic workplace structures, many of which in my experience UBC seems barely to understand, let alone

to address. The testable and enforceable bounds on freedom of expression in a workplace are not general statements about courtesy but our anti-discrimination and anti-harassment laws, our human rights codes, and our collective agreements. None of these are perfect, but they have collectivity and force in their favour, and they have a much more systematic understanding of the boundaries of civil behaviour than such individualized notions of “civility” or “respect.” To the extent that the draft statement acknowledges the relevance of these laws, it is to my mind more productive than when it invokes UBC’s statement on respectful environments.

- 2) That said, UBC also has an obligation to recognize that individuals under their purview may need active protection against the more pernicious and insidious forms of workplace harassment, especially those possible in a digital age. The statement would do well to emphasize this important and relevant safety concern. It is not sufficient to nod in the direction of harassment laws; it is necessary for UBC to be proactive in enforcing these laws in its jurisdictions.
- 3) Along these same lines, any policies or conversations or infrastructure designed to protect freedom of expression must acknowledge emphatically that “freedom of expression” is not available in the same way for everyone.⁷ Just as Canadian law acknowledges that a corrective bias may be needed to protect those who have been historically discriminated against, UBC should not fear to take a stand to differentially and constructively defend the freedom of expression of those with less privilege over those with more. As an institution uniquely positioned to understand these social dynamics, we have a responsibility to act according to what we know to be true and not to defer to false equivalencies. Insofar as the statement makes gestures in this direction, I applaud its efforts.
- 4) The best corrective in my experience to this risk of unequal freedom for us as members of the UBC community is the positive power of the collective. Unions have learned this long ago; many activist organizations have long known it; and increasingly, we the public have learned that the counterweight to privilege is our collective expression, within the law, of resistance and critique. The statement would do well to acknowledge that the collegial peer review which is a fundamental value in our academic community is a model on which we can draw in balancing the voices wishing to speak in or to UBC. In this respect, we all have a responsibility to support one another and extend any privilege we might have to those with less. We also have the right to demand of UBC as an institution that it take peer review and collective dissent seriously, at the Board, in Senate, in our Faculties, and in our community. The corporate ideology of brand loyalty can ONLY be applied in the university setting if we embrace diversity, debate, peer review, critique, as our ‘brand’. And that includes critiques of the institution itself.

¹ I was vice-president and president of the UBC Faculty Association from 2006-2010. I served on the national Academic Freedom & Tenure Committee of the Canadian Association of University Teachers from 2010-16.

² *Canadian Anti-hate Laws and Freedom of Expression*. Julian Walker, Library of Parliament. Background Paper. Publication No. 2010-31- E, 1 September 2010. Revised 27 March 2013.
<https://lop.parl.ca/Content/LOP/ResearchPublications/2010-31-e.pdf>, p. 2.

³ See CAUT Policy Statement on Academic Freedom: <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>

⁴ UBC Vancouver Senate minutes, October 17, 2001. p 12785-7.

⁵ For just one example of the research on these dynamics, see “Seeking Equity: Disrupting a History of Exclusionary Immigration Frameworks,” FERNANDO, SHANTI; RINALDI, JEN. *Canadian Ethnic Studies*. 2017, Vol. 49 Issue 3, p7-27. <http://web.b.ebscohost.com.ezproxy.library.ubc.ca/ehost/pdfviewer/pdfviewer?vid=22&sid=4ebd298e-3e43-47d7-be83-45f5a8df383f%40sessionmgr101>

⁶ <http://www.hr.ubc.ca/respectful-environment/>

⁷ See Sunera Thobani, “No Academic Exercise,” *R.A.C.E.link* Spring 2008, 3-9: 4.



**Peer-Reviewed Commentary on the Draft Statement:
Commentary 3 by Bernard Chan, M.A. student, Department
of Educational Studies**



Thank you, especially to members of the working group, for advancing this discussion about freedom of expression on our campus. Clearly, this conversation is important not only because of the precarious nature of the political and social environment we presently live in, but our approach to this issue – and the decisions we make – would play a role in shaping the future of higher education in the province and beyond.

In regards to this statement, I would like to comment on two issues in particular. First is the notion that "pursuing ideas freely and openly moves us closer to truth" (para. 5). I do not intend to embark on a lengthy discussion about the nature of "truth", but I believe due care should be taken in any declaration regarding the "truth". It is perhaps striking that the statement does not point to "the truth" or the "Truth", but we should be mindful that the pursuit of "truth" has subjected many peoples (including members of our community) to intellectual and even physical violence both in the past and present. In fact, it could be argued that many disputes concerning the freedom of expression on-campus and elsewhere stem from the supposedly irreconcilable perceptions of "truth" that individuals in a diverse community hold.

The second point I wish to comment on is the nature of "intellectual richness" (para. 7) and "scholarly spaces" (para. 8) in our community. Much has been said about the value of scholastic exchange and discussion, of "critical thinking", and "incisive reasoning" (para. 8) that is the cornerstone of the university, and for good reason. But inasmuch as the act of expression involves (obviously) expressing our thoughts, perhaps there should be just a little more emphasis placed on "listening"? In our desire to express ourselves, to make ourselves heard, have we forgotten the virtue and importance of "listening" to what others have to say?

Note that I used "listening" rather than "hearing", because listening may also a process of comprehending and reflecting upon the words of our counterparts. In this arena, perhaps we could also learn from the character for "listen" in Chinese: 「聽」. This character, if broken up, could be construed as follows: use one's ears to listen 「耳」; pay attention to your counterpart, as if s/he is king 「王」; observe as if one has ten eyes 「十／目」, listen attentively with one heart 「一／心」. Incidentally, the right hand side of the character also appears in "wisdom".

I have perhaps spoken too much on "listening", but my point in conclusion is this: perhaps the virtue of "listening" should also form part-and-parcel of our idea of expression and what it means to be part of a university community?

Thank you very much for reading, and for listening to my comments.



THE UNIVERSITY OF BRITISH COLUMBIA

**Peer-Reviewed Commentary on the Draft Statement:
Commentary 4 by Paul Russell, Department of Philosophy**



Hi Neil,

I am responding to your invitation to comment more formally on the draft statement on free speech that was presented in early November.

I believe the best thing I can do, given the amount of space available is to send a selection of comments that I sent to the *Globe & Mail* (Margaret Wente) when I was asked to comment on the draft a couple of weeks ago. Along with this I want to add a few suggestions about what needs to be done to amend this document and provide it with more appropriate and constructive content.

Comments to Wente 12th November, 2017:

In my view this is a feeble and troubling document that is unworthy of a university that wants to be taken seriously. What strikes me, in the first place, is that far from being a document that is emphasizing the need to protect free speech from illegitimate encroachment and restrictions, it gives lip service to the value of free speech and moves directly on to place heavy emphasis on the need for restricting it in face of competing claims. Apart from the heavy emphasis on considerations that serve to restrict and limit free speech, the considerations and claims cited are so loosely and vaguely described that they could well include claims not to cause distress, offend or even question and challenge the deeply held views of others. What constitutes being "threatened", "caused distress", or damaging a person's "wellbeing" has no significant content or boundaries. A massive wedge is opened up that could be seriously abused. The document may also be understood as suggesting that ideas and positions that are (subjectively) found to be "objectionable" (i.e. both in content and/or manner of expression) are *prima facie* subject to restriction - rather than protected unless harmful or disruptive under some clear interpretation.

Here are a couple of concrete examples that I think make clear that this document is dangerously vague:

1. I teach both philosophy of religion and political philosophy at UBC and often take up controversial and sensitive issues and topics. Someone might make a remark to the effect that "Muslim belief gives little or no proper weight to the value of freedom of expression". Given the vague qualifications and conditions attached to free speech and the ways in which it may be restricted, this document could easily be read as suggesting that remarks of this kind should be condemned and prohibited in the context of the university. Whether one finds comments of this kind sensible and credible or not, it is plainly the right of students and faculty to express views of this sort - although they will certainly offend and cause discomfort to those in the Muslim community, among others. It is significant that many who would object to remarks of this sort would not object to remarks such as "the Catholic religion/ Christian Evangelicals/ Conservative Party gives insufficient value to the importance of free speech."



The principles and boundaries here are arbitrary and a matter of a person's own ideological preferences and prejudices - the stance taken breeds and encourages hypocrisy of every kind.

2. It is also ironic to find all the usual clichés about "reconciliation" with Indigenous people and other such marginalized groups inserted into this document. However, much one may sympathize with some of these ideals and goals, it misses the crucial point at issue. Not everyone shares these ideals and goals, much less how they should be interpreted and implemented. Even if these critics are mistaken and misguided about these matters they have a right to express their views (subject to doing no harm or injury or being merely abusive). The draft document leaves the door wide open for individuals and groups to challenge and suppress all such discussion and debate on the ground that it is disrespectful, offensive, and contrary to the goals and aims of "reconciliation". The point of free speech is not primarily to achieve reconciliation but to allow divergent and contrary views to be heard and considered so that each individual may decide and judge for themselves where truth and reason rests.

In sum, the document says too much and too little at the same time. It is, in my view, an Orwellian monument to everything that is confused and evasive about the current understanding of free speech issues on the university campus. It camouflages the real problems and lends itself to serious abuse by those who are all too willing to limit and restrict free speech for their own ideological ends.

A few suggestions for amending and revising this document.

Along with several other colleagues and students, I would encourage the university to draw on the much more effective statement provided by the University of Chicago on this subject.

Here is a link to the Chicago Principles:

<https://freexpression.uchicago.edu/page/statement-principles-free-expression>

Among the key passages you should consider are these:

--- "This is not to say that this freedom is absolute. In narrowly-defined circumstances, the University may properly restrict expression, for example, that violates the law, is threatening, harassing, or defamatory, or invades substantial privacy or confidentiality interests. Moreover, the University may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University."

--- "Fundamentally, however, the University is committed to the principle that it may not restrict debate or deliberation because the ideas put forth are thought to be offensive, unwise, immoral, or wrong-headed. It is for the members of the University community to make those judgments for themselves."

--- "As a corollary to this commitment, members of the University community must also act in conformity with this principle. Although faculty, students and staff are free to criticize, contest



and condemn the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe."

This document places proper emphasis on the need to *protect* free speech rather than on the various claims for restricting and limiting it (something that is quite out of place in any adequate statement intended for this purpose). It also avoids confusing free speech with other issues and ends (such as "diversity", "inclusion", "equity", "reconciliation", etc.).

A document adequate to this purpose should include:

(a) A general statement of its aims, motivation and occasion. E.g. A brief explanation to its readers, and the university community in particular, that it aims to provide a general understanding of what is required and expected of freedom of expression on campus, with a view to reaching some general consensus about these matters. The key issues include why we value free speech, what special obligations the university has in relation to its function and role, and, most importantly, what threats to free speech are of particular concern and require some specific protection or set of protections.

(b) A brief account of what free speech is understood to be should also be included. This should begin by noting that free speech protects more than speech that is regarded as comfortable, pleasant, informed, insightful, constructive, and "correct". Views that may be judged stupid, ignorant, objectionable etc. should certainly be corrected and challenged, but they should not be suppressed by other (coercive) means, much less punished or sanctioned, by the university. Free speech is about the ability of members of the university community, and its guests, being able to state and discuss views that many may find objectionable from any number of points of view. Any one may choose not to listen or attend a talk, lecture or discussion - but those who choose to attend should not be prevented from expressing their views and should not aim to prevent others, who they disagree with, from expressing their own contrary opinions or values. Tolerance is not a matter of agreement, reconciliation, social equality, or creating a sense of shared community. It is a matter of allowing those we may deeply and fundamentally disagree with to express and assemble to share their views, on the sole condition that they allow others to do likewise within the bounds of the law (i.e. not harming or inciting harm to others, where harm is strictly and narrowly defined).

(c) Although some relevant boundaries and limits to free speech - beyond the limits of the law - are required for the proper functioning of the university, these limits and restrictions should include only contributions that are either directly disruptive of ordered discussion or that are found to be plainly abusive (e.g. obscenities, personal abuse and vitriol, etc.). While the university has an obligation to protect its all its members from being exposed to personal abuse or violent language (obscenities, derogatory names, etc.), this does not include stating views that may be found to be disturbing, uncomfortable, offensive, etc. These are not, as such, a proper or reasonable ground for prohibiting the speech or speaker from stating her or his views.



(d) The document should make clear what the relevant scope and boundaries of university authority and discipline do or do not extend to. E.g. If social media is not covered and included this should be made clear. If it does include social media of various kinds, it should be made clear what standards and expectations are being established and what measures will be used to support and enforce them.

Clearly, there is much else that could be said but I hope these remarks suffice to stimulate debate and discussion and improve the current draft, which is far from satisfactory.



Peer-Reviewed Commentary on the Draft Statement:

**Commentary 5 by Jordan Schroeder, 3rd year, Peter A. Allard
School of Law**



Neil Guppy and his team have attempted to draft a statement that reflects not only the benefits and necessity of free expression at a university, but also the importance of responding to expression that threatens the expression of others at the university. There are evident internal tensions within the document due to the difficulty in reconciling these ideas. And yet, it is clear that the ideas are not entirely irreconcilable. The document clears a good starting path, but could be improved by specifying and defining harmful types of speech in light of the end goal of freedom of expression, which is facilitating the robust exchange of ideas in order to better our society.

The statement can be broken up into two sections. The first section, consisting of paragraphs 1-7, articulate the importance of free expression and its necessity at the university. Here, the statement should be commended for connecting free expression to the core purpose of the university in paragraphs three and four. It should also be commended for affirming that although people can have stubborn assumptions or have different values, persuasion is possible. It also affirms that feeling intellectually uncomfortable and even offended is an unavoidable and beneficial part of the university experience. All of these elements make the first section a strong defence of free expression.

The second section examines the benefits of free expression in light of certain types of expression that can hinder the expression or rights of others. It recognizes that expression such as hate speech, dehumanization, or ad hominem attacks actually undermine the purpose of free expression articulated in the first section. These types of speech, the statement says, can also violate rights of others, such as equality rights.

There are undoubtedly many people that would say that the entire second section should be struck. I do not agree with this position. Freedom of expression is not an end in itself. It is more accurately described as a means to an end, as is articulated in the first section of the statement. At a university, free expression exists not simply so that one can say anything one wants with impunity, but for a higher purpose: so that we as a community may bring all of our ideas together, no matter how offensive and unpopular, and share them with each other; in doing so, we will then find the best ideas through reason and argument (as the statement affirms) and use those best ideas to make our society better.

It is beneficial for this exchange to be as free and open as possible. The more that this exchange is restricted, the more likely it is that ideas which are initially unpopular but nonetheless true could be precluded from ever seeing the light of day. The ideas that change the world are often unpopular or offensive at first, such as the idea of racial equality, or the idea that the earth revolves around the sun.

I believe that protecting this robust exchange of ideas that we use to better society should be the measure by which we create and judge all of our policies on freedom of expression. If we accept this premise, then some limits on expression must be accepted, because some types of expression do exist to hinder that exchange. The question is what those limits should be.



Here, the statement shows a shortcoming. It fails to define the terms it uses to identify harmful expression, including the terms “hate” (paragraphs 8 and 9), “wellbeing” (paragraph 2), and speech that “harms the proper working conditions of the academic community” (paragraph 9). What types of expression could be captured by these terms? An ambiguous term is the ally of any party wishing to suppress the expression of those they do not like, because the term can easily be stretched and abused to suit their ends. For example, could it be said that pointing out the privilege of white men is “hateful” to said group? Or could a group state that arguing that abortion is immoral injures the wellbeing of people on campus? And surely someone could say that an argument that men and women have biological personality differences compromises the proper working conditions of the academic community. And yet, all of these arguments are ones that the university must allow to take place if it is to fulfil its role so accurately expressed in the first section of the statement.

So, how should the terms be defined? Here, I cannot state a definitive position on behalf of the club because there is a great diversity of opinion on the matter. The most libertarian defenders of free expression would argue that only expression intending to incite violence against any person or group should be censored. Others might draw the line more conservatively and say that expression that is likely to cause violence against any person should also be censored. There are other types of expression, such as speech intended to defame a person and his/her reputation, which should undoubtedly be considered as well. I cannot say where the precise line should be drawn, only that the line drawn should be precise. As suggested above, the line should also be measured against the end goal of protecting our robust exchange of ideas that we use to make our society better. Furthermore, we should aim to allow as much expression as possible to ensure that no unpopular but potentially true ideas are precluded from being heard.

The discussion on the values of equity, diversity, and inclusion mentioned in paragraph 10 should be subjected to the same analysis. The club has no issue with affirming the right to equality. But again, we must carefully consider any restriction of speech in light of the university’s goal of protecting our robust exchange of ideas in an effort to better society. Speech that makes individuals or groups feel uncomfortable or offended must, as paragraph 7 of the statement affirms, be protected in the university setting. And if we truly believe that reason and truth will prevail in the free exchange of ideas, then we should believe that equality will be the product of free expression, not a casualty of it.

The prospect of such a policy of free expression is certainly uncomfortable. In the process of attempting to admit as many ideas as we can, we may find that some of those ideas are incorrect and anathema to our society. But we must still examine them in the belief that we will be able to reach that conclusion through argument instead of through censorship. We must trust, as stated in paragraph 6 of the statement, that “persuasion is still possible, that thought and evidence and reason can lead to solutions for the many grand challenges we face.”

The university has trusted in this idea for centuries, and it has brought us remarkably far. We must trust that it will continue to drive us forward.



**Peer-Reviewed Commentary on the Draft Statement:
Commentary 6 by Jessica Trach, M.A. student, Department
of Psychology**



Thank you to the working group for taking the time to prepare this statement, and to the university for allocating the resources for the group to do this important work.

This is an issue I have been grappling with while teaching courses on diversity and social justice within the Faculty of Education. A core concept that I tried to communicate to my students (who were training to become secondary and elementary teachers) was reflected in the draft statement - namely that it is ok to feel uncomfortable when you hear opinions that are different or in direct contradiction with your own, and that it is precisely this feeling of discomfort that is at the root of all learning. To see this truth reflected in draft statement on freedom of speech is gratifying to this early career scholar.

As a result of my background in educational and developmental psychology I hold the perspective that learning is fundamentally about growth and change, and change is an inherently uncomfortable experience. I also strongly believe that universities (as institutions of higher learning) have a responsibility to provide a safe forum for the discussion of complex ideas to promote both individual and societal change. Lastly, I feel equally strong in my conviction that we need to protect and support the vulnerable members of our community - those who are marginalized by systems of oppression, as well as those who are vulnerable to harm because of their personal life experiences.

To stifle learning for the sake of comfort is, to me, a missed opportunity for growth. However, we also know that safety is a basic human need (perhaps the most basic), and when people do not feel safe, they cannot learn.

I see these same values reflected in the draft statement on Freedom of Expression. What I do not see in the statement is any clear guidance on how to proceed when these values are in conflict, as they sometimes are. The question that remains in my mind after reading the statement is: how will the university determine when to stifle speech that seeks to stifle the rights and freedoms of others? Put another way, when is speech simply uncomfortable and when is it a violation of another's freedom to live and work in a safe environment? And how do universities protect the most vulnerable members of our communities, while simultaneously providing a forum for the safe expression of a variety of ideas, even when such ideas conflict with what is deemed as socially acceptable or appropriate?

To highlight the complexity of these issues, I would point to the recent examples from Laurier University, where a TA was chastised for hosting a class discussion about a video featuring Dr. Jordan Peterson's views on gender pronouns (without endorsing or negating Dr. Peterson's expressed opinions), as well as the University of Toronto who held a public debate about these same issues between Dr. Peterson, Dr. Mary Bryson and Prof. Brenda Cossman. In both cases students were provided with the opportunity to engage in the discussion or protest it, both of which can be potentially valuable learning experiences.



I recognize that the university's statement is meant to govern decisions made at the highest levels of the university community. Yet I would appreciate some guidance within the statement as to how to handle conflicts arising from diverse opinions that occur in the classroom, department, and faculty levels. For example, how to determine whether a department should host a speaker whose views are not consistent with the (generally) liberal views of the university community and a liberal Western society. How do we communicate to members of our community that giving such people airtime is not the same as condoning their statements? And how do we determine when to pull the plug if their views are taken to extreme (i.e., to the point of causing harm)?

These might be questions that are too finely nuanced for a broad university position statement to address. Nevertheless, I think further work and discussion around how to empower faculty, instructors, and campus leaders to facilitate these kinds of conversations is needed.

I have thought about these issues a lot over the past several months, and I do have some suggestions if the committee is interested in hearing them. First, we need a clear position statement from the university articulating what will and will not be tolerated, and how to tell where that line falls. Such a statement might be strengthened by providing definition of what it means to experience harm (e.g., physical, psychological, and emotional) that is distinct from "feeling uncomfortable" (which is a normal and necessary part of learning). Second, instructors, faculty, and TA's require support and training in a number of areas, including:

- 1) how to support engagement in civil discourse by providing opportunities for students to voice their opinions without fear of shame or stigma (e.g., establishing classroom norms, appropriate use of trigger warnings, instructor training in conflict mediation).
- 2) strategies that they can use to support students who are feeling uncomfortable in their classes (e.g., helping students to accurately label and manage emotions),
- 3) how to recognize when a student is experiencing higher than normal distress, and may require additional support beyond the classroom, and
- 4) how to access resources on campus that support vulnerable students (e.g., campus mental health and sexual assault services, as well as procedures for addressing bullying and harassment).

Thank you for taking the time to consider these comments. I look forward to hearing how these discussions continue to unfold.



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Peer-Reviewed Commentary on the Draft Statement:

Commentary 7 by Michael Treshow, Department of Critical Studies, UBC-Okanagan



The UBC draft statement on freedom of expression (“Freedom matters”) sets up the usual tension between freedom and respect. Freedom of expression, however, has primacy here: “It fuels what good universities do”. Respect is ancillary, a damper on that fuel, restraining it from becoming explosive. In this binary, the principle of respect seems, on the face of it, to have the function of protecting members of the community from hatred and violence; it is preventative, not allowing freedom to “trump all other rights.” The draft statement’s deeper anxiety, however, is less with human vulnerability than with the vulnerability of freedom of expression itself. When it quotes former President Stephen Toope, regarding the tension between “respect for human dignity and the special place of free expression that universities protect,” it promotes freedom of expression as the university’s privileged and proper concern, what it especially protects. Similarly, the draft statement concludes on the urgent note that each of us “has the responsibility to support, safeguard and preserve this central freedom of expression.” It does not apply the same urgency to “respect for human dignity.” The principle of respect seems here to be valued for its function of protecting freedom of expression, rather than for its intrinsic worth.

Although freedom of expression is central to the university, it does not belong to the university as such. It is a vital principle for democratic society at large. The university is right to champion it, of course, because it requires freedom of expression to pursue its academic mission of research and teaching. Research especially requires freedom of expression for pursuing questions that challenge, unsettle, or disrupt established paradigms, conventions, and dogmas. University teaching also thrives on the free play of ideas, but here another principle is at work, that of nurture. As an *alma mater*, a nourishing mother, the university seeks to provide its *alumnae/alumni* (those it nourishes) with a place of freedom. The word “school” has an instructive history, going back to Plato’s Academy. The Greek σχολή (*scholê*) meant leisure, rest, and ease. It is what lectures were called at the Academy, because they offered a time freed up from duty and care for the cultivation of wisdom. “School,” of course, has evolved into a word that means no such thing. Though it may have positive associations with learning, opportunity, and community, it is also, and especially, associated with stress, anxiety, and humiliation (“I got schooled!”). How the university can find its way to promoting *otium* (purposeful and productive leisure, the Latin equivalent of σχολή), instead of *negotium* (business and stress), is a larger and difficult question. (Certainly it would not be through trying to recreate Greek and Roman culture, where *otium* and σχολή were enabled by an economy dependent on slavery, and a political order based on patriarchy and aristocratic privilege.) On the more specific question of freedom of expression and the free play of ideas in the university’s current educational environment, freedom requires freedom from the impediments to freedom. Nothing is more inimical to freedom of expression and the free play of ideas than the threat of violence. Not just the direct threat, but also the more insidious implicit threat. And not just physical violence, but also mental and emotional violence. UBC’s draft statement begins to say something important when it observes that “Speech or artistic



expression that harms the proper working conditions of the academic community...cannot be protected or condoned." The "good university" prioritizes, promotes, and cultivates non-violent speech, as well as non-violent behaviour, in order that members of its community can speak freely, whether in the classroom, the lecture hall, the laboratory, the office, the boardroom, the conference, or the gymnasium. Freedom of speech depends upon freedom from hatred and invective. To be free it must be respectful.



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**Peer-Reviewed Commentary on the Draft Statement:
Commentary 8 by Paul J. Quirk, Department of Political
Science**



Whatever its intention, the draft policy fails to provide significant protection for free expression. UBC should adopt the University of Chicago Principles of Freedom of Expression. A strong free-expression policy is entirely compatible with appropriate efforts to promote inclusion and diversity. From a broad perspective, such a policy is even more important for the interests of liberals, radicals, and “social justice” activists than it is for conservatives. In addition, the University needs a strong free-expression policy to maintain the trust and respect of external constituencies and the general public.

1) The draft policy fails entirely to serve its ostensible purpose. It contains strong language on the centrality of free expression to the purposes of a university. But it then goes on to suggest several vaguely defined, potentially very broad grounds for constraints on expression—the existence of “other rights,” concern for “equality,” and some unspecified interests of indigenous people. It provides no criteria for identifying the kinds of expression that would harm these other rights or interests, or that would be denied protection as a result. Such a policy would fail to provide any reliable freedom of expression. With no criteria for resolving conflicts, it could be used to support any suppression of speech that any university or campus group would attempt to justify.

2) To provide a firm foundation for freedom of expression, UBC should adopt a statement consistent with or identical to the so-called University of Chicago Principles ([here](#)). Contrary to some perceptions, these principles are neither extreme nor even novel. They are essentially the principles that North American universities had generally followed with respect to campus expression from at least the 1960’s until many universities abandoned them in the face of demands for censorship in recent years. They essentially apply to a university the same obligations to protect freedom of expression that pertain to government in general in the United States or, with relatively minor differences, in Canada.

Rather than holding up an absolute or unqualified notion of freedom of expression, the Chicago Principles explicitly allow several kinds of exception:

The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.

There is no expectation that expression will always be constructive or entirely benign. These limited and carefully specified exceptions, however, will enable a university to restrict expression that would cause significant harm.

Most important, the Principles identify several grounds that the university may not use for suppressing speech:



[D]ebate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.

This sentence is crucial. These unacceptable grounds for suppressing speech are, in fact, precisely the grounds that have often been put forth for no-platforming, shutting down speakers, or imposing punishment for expressions of opinion on university campuses in recent years. A clear rejection of such censorship is central to any policy that seeks to defend freedom of expression.

Consistent with US Constitutional law, the Chicago Principles do not permit the suppression of speech on the basis of a judgment that it is “hate speech.” The UBC community may demand a ban on hate speech. In my view, a hate-speech provision that incorporated a strict definition of hate speech, consistent with the Canadian criminal code, would not be a major burden on freedom of expression.

3) A robust policy of freedom of expression is entirely compatible with fair and inclusive policies and practices toward disadvantaged or marginalized groups. The University may and should promote inclusiveness and diversity in various ways. And students, faculty, and others may and should criticize or protest conduct—and indeed, expression—that they regard as hostile to inclusion or diversity. Such criticism and protest are themselves important forms of free expression.

4) Support for freedom of expression does not imply or distinctively support any particular ideological position. In particular, it is not a conservative position. As one indicator, the black socialist activist and scholar Cornel West has coauthored an uncompromising Statement on Truth Seeking, Democracy, and Freedom of Thought and Expression, posted on a Princeton University website (see [here](#)), that has now been signed by some 4500 academics from across the political spectrum. From a broad perspective, advocates of social change are far more dependent on freedom of expression than are defenders of the status quo. This elementary observation is especially apparent in this period in the United States, when freedom of expression is under attack from a conservative authoritarian presidential administration. More than ever, thoughtful people on the left should firmly support the strongest conception of freedom of expression.

5) Universities' often egregious failures to ensure free expression on campus have contributed to a serious loss of trust and support in the wider society. In Canada, the leader of the Conservative Party has called for government action to require universities to protect freedom of speech. In the US, numerous state governments have enacted or are considering legislation for that purpose. The strong disapproval of universities' recent record on freedom of expression is indeed the predominant view of mainstream news media, commentators, political leaders, and the general public. A number of universities—most recently Wilfred Laurier University—have done themselves grave harm through their gross failures to protect



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free expression. Off-campus, hardly anyone supports such conduct, or will support universities that practice or tolerate it.



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**Peer-Reviewed Commentary on the Draft Statement:
Commentary 9 by Emma Cunliffe, Peter A. Allard School of Law**

Freedom of expression, academic freedom, and equality: seven institutional responsibilities

Dr Emma Cunliffe*
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Author's note: This brief paper has been written in response to the "Freedom of Expression Statement Draft" dated 8 November, 2017. I endorse the tenets of mutual respect and collective responsibility that are set out in that document. However, while the draft statement properly emphasizes collective responsibility for fostering freedom of expression, it does not expressly set out the university's institutional responsibilities. A clear statement of these responsibilities is necessary to ensure that institutional structures and decision-making processes protect and advance principles that are fundamental to academic culture. This paper represents my efforts to identify the institutional responsibilities that arise from the separate but related values of freedom of expression, academic freedom, and equality rights insofar as they apply to UBC.

1. Freedom of expression, academic freedom and equality rights are distinct¹ values² that have technical legal meanings.³ In Canada, each of these values has a different definition,

* Thank you to Lynn Smith and Margot Young for providing very helpful comments on earlier drafts of this paper. Of course, I take sole responsibility for the contents of this paper including any errors.

¹ In respect of the distinctions between freedom of expression and academic freedom, see Jacob Levy, "Safe Spaces, Academic Freedom and the University as Complex Association", Bleeding Heart Libertarians, March 2016 online: <http://bleedingheartlibertarians.com/2016/03/safe-spaces-academic-freedom-and-the-university-as-a-complex-association/>.

² The term "values" is used by the Supreme Court of Canada when describing the role of Charter rights and freedoms in administrative decision making, for example *Doré v Barreau du Québec*, 2012 SCC 2.

³ Freedom of expression is a fundamental freedom under s. 2(b) of the *Canadian Charter of Rights and Freedoms* [Charter]. Equality rights are protected by s. 15 of the Charter. There is detailed case law defining the scope and purpose of each of these provisions. (See for example *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 968 and 977 re freedom of expression; *Withler v Canada*, [2011] 1 SCR 396 at [31] – [37] re equality.) Under Canadian law, universities are not generally government actors for the purposes of the Charter: *McKinney v University of Guelph*, [1990] 3 SCR 229 at 275. In this respect (and others), Canadian public universities are in a different legal position from their American counterparts: *Rosenberger v University of Virginia*, (1995) 515 US 819 at 822; Levy, above note 1. However, public bodies that are not directly bound by the Charter have been required to consider "Charter values" in some aspects of their decision-making and subjected to judicial review with respect to whether "the decision-maker disproportionately, and therefore unreasonably, limited a Charter right." *Doré v Barreau du Québec*, 2012 SCC 2 at [6]. While the law is not entirely settled, the better view is probably that this requirement applies to some university processes: See *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at [55]. Academic freedom is recognised in UBC's academic calendar and the collective agreement between UBC and its faculty association. For more information about the legal status of this freedom at UBC, see Lynn Smith, "Academic Freedom: An Extended Excerpt from the Report of the Honourable Lynn Smith QC" online: https://academic.ubc.ca/sites/vpa.ubc.ca/files/documents/Smith_Academic_Freedom_History_and_Principles.pdf (Smith, "Academic Freedom").

history and potential for limitation than in other jurisdictions.⁴ Given the fundamental role of these values within universities and the prevalence of misunderstandings about their Canadian legal form, UBC's governors, senators, senior administrators and those charged with making institutional decisions (such as tenure & promotion decisions and student discipline decisions) should receive substantive training in their source, meaning and scope. This training should be designed, and ideally delivered, by a person who possesses appropriate teaching skills and who has academic expertise or exceptional professional experience with *freedom of expression, academic freedom, and equality rights*. To facilitate the university community's participation in academic governance and advance the understanding of these values among university members,⁵ the training materials should also be made available to the broader university community.

2. Under Canadian law, there is no hierarchy of rights and freedoms.⁶ For example, freedom of expression does not presumptively prevail over the right to equality, and *vice-versa*. UBC's governors, senators, senior administrators and decision-makers should receive substantive training in how to recognise and resolve situations in which rights and freedoms may come into conflict with one another.⁷ This training should be designed, and ideally delivered, by a person who possesses appropriate teaching skills and who has academic expertise or exceptional professional experience in *administrative decision-making and conflicts of rights and freedoms*. For the reasons set out above, these training materials should also be made available to the broader university community.

3. In some circumstances, the university may properly limit freedom of expression. At UBC, university administrators and other community members hold positive and reciprocal obligations to foster academic freedom. This obligation may require university administrators to respond when an expressive act threatens the academic freedom of those who reasonably feel

⁴ See for example *R v Keegstra*, [1990] 3 SCR 697 at 738 – 744; Kent Greenawalt, “Free Speech in the United States and Canada” (1992) 55 *Law and Contemporary Problems* 5; Frederick Schauer, “Free Speech and the Cultural Contingency of Constitutional Categories” (1992) 14 *Cardozo Law Review* 865; Stanley N Katz, “The Strange Birth and Unlikely History of Constitutional Equality” (1988) 75 *The Journal of American History* 747; Lynn Smith and William Black, “The Equality Rights”, (2013) 62 *SCLR* (2d) 301; Martha A Fineman, “Beyond Identities: The Limits of an Antidiscrimination Approach to Equality” (2012) 92 *Boston University Law Review* 1713; Michael Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999); Carolyn Sale, ““By Whose Definition?”: The University of Saskatchewan's Firing of a Dean and the Textual Battle to Define Academic Freedom in Canada” (2016) 29 *Journal of Historical Sociology* 23; Smith, “Academic Freedom”, *ibid*.

⁵ Throughout this paper, references to community members or members of the university are intended to have the same meaning as in the academic calendar.

⁶ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877.

⁷ See for example *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 at [29]; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 (now under appeal to the Supreme Court of Canada); *Reference re Same Sex Marriage*, 2004 SCC 79 at [50] and cases cited therein; Pierre Cloutier de Repentigny, “Of Diversity and Balancing of Rights: TWU v LSUC” *Canlii Connects* <http://canliiconnects.org/en/commentaries/42963>; *R v NS*, 2012 SCC 72; Frank Iacobucci, “Reconciling Rights’: The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 *SCLR* (2d) 137.

targeted by that expression.⁸ The nature of the necessary response is likely to vary with the circumstances. Beyond threats to academic freedom, there are additional circumstances in which the university may limit freedom of expression.⁹ As an institution of teaching and research, the university is also a workplace, a learning environment and – for an increasingly large number of community members – a home.¹⁰ Recognising that the university performs these multiple roles, the *Charter* value of equality, BC laws, the UBC Statement on Respectful Environment, and university policies establish obligations and administrative principles that help to inform when and how it is appropriate for a university administrator or decision-maker to regulate expression.¹¹

4. In some circumstances, it will be improper to restrict expression: “in the university, unconventional ideas and controversial opinions deserve special protection.”¹² For members of the university community, responding critically to ideas or forms of expression with which one disagrees is generally consistent with respecting another’s freedom of expression.¹³ In the course of academic discussions, “academic freedom must be accompanied by academic responsibility; that is, [participants] must act responsibly, base statements and opinions on fact and evidence, and use acceptable scholarly methods in the pursuit of truth. ... Peer review is the best system we know of to ensure that a scholar's work is evaluated by the dispassionate judgement and knowledge of experts, rather than by the court of public opinion or political policy.”¹⁴ While expressing respect for academic freedom, senior administrators and presidents can make clear

⁸ Lynn Smith, “Summary of the Fact-Finding Process and Conclusions Regarding Alleged Breaches of Academic Freedom and Other University Policies at the University of British Columbia” October 15, 2015 at p 5 (Smith, “Summary”). Online: <https://president.ubc.ca/files/2015/10/Summary-of-Process-and-Conclusions-Final.pdf>.

⁹ The purposes of freedom of expression help to inform the circumstances in which regulation may be proper. See *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 977 per Dickson CJ, Lamer and Wilson JJ, stating that these purposes include seeking truth, fostering participation in social and political decision-making, and cultivating diversity in individual self-fulfillment and human flourishing; *R v Keegstra*, [1990] 3 SCR 697 at 762 – 767 per Dickson CJ providing an example of how these purposes help to inform the circumstances in which freedom of expression may properly be limited.

¹⁰ See Richard Moon, “Demonstrations on Campus and The Case of Israeli Apartheid Week” in James Turk (ed) *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Lorimer, 2014) 185 at pp 194 – 198; Levy, above note 2.

¹¹ Online: <http://www.hr.ubc.ca/respectful-environment/files/UBC-Statement-on-Respectful-Environment-2014.pdf>. See also Moon, *ibid*; Levy, above note 2.

¹² Martha Piper, speech to the President’s Circle, October 9, 2001: https://senate.ubc.ca/sites/senate.ubc.ca/files/downloads/va_minutes_october2001.pdf; See also Stephen J Toope, *President’s Message to the UBC Community on Respectful Debate*. Online: <https://president.ubc.ca/featured/2017/04/06/presidents-message-to-the-ubc-community-on-respectful-debate-2/>.

¹³ See cases cited above, note 9. The same principle holds for academic freedom. Moon explains that academic freedom requires “the treatment of others in the academic community as interlocutors, as conversation partners who should be addressed and listened to.” Above note 10 at 186. American Civil Liberties Union, “Speech on Campus” online: <https://www.aclu.org/other/speech-campus>. Piper, *ibid*.

¹⁴ Piper, *ibid*; Levy, above note 2.

that repugnant and discriminatory views are not those of the university and that academic peers are the best judges of the scholarly merits of any given expression.¹⁵

5. Members of the university community and invited guests have the freedom to criticise UBC or its governance, and to raise concerns about academic freedom. This activity is protected as an exercise of academic freedom if it is performed honestly and in good faith, regardless of whether the person has research expertise in academic freedom.¹⁶ Governors, senators, university administrators and other university decision-makers must foster and respect this freedom even when it is uncomfortable or inconvenient to do so.

6. Members of the university should be supported in their activities and should not be expected to defend themselves without institutional support when they are criticised or threatened in connection with activities performed honestly and in good faith in the course of their role at the university.¹⁷ For example, faculty members who study or teach controversial or sensitive topics should be defended by university administrators against unfair criticism if such criticism is levelled at them, and should have timely access to training and institutional support.¹⁸

7. Proactively establishing a robust, diverse and inclusive institutional culture is indispensable to fostering a community that is resilient in the face of offensive expression.¹⁹ In addition to offering better training about legal responsibilities, the university should develop institutional policies and activities that advance substantive equality by ensuring that members of all backgrounds, identities and disciplines have equal opportunities to succeed at UBC. Designing institutional processes that include members of diverse backgrounds and value their input – while appropriately recognising and rewarding the work involved in participating in such processes – is one way to foster a more robust and inclusive culture.²⁰ Cluster hiring with appropriate internal processes and transitional support is another strategy by which the university

¹⁵ Speaking out against discriminatory expression helps to secure the academic freedom and dignity of targeted members of the university community, consistent with the UBC Statement on Respectful Environment, *ibid*, and Smith, Summary, above note 8. See also *R v Keegstra*, [1990] 3 SCR 697 at 756 – 758 per Dickson CJ. For further discussion of the importance of institutional responses, see ACLU, above note 13; Richard Cohen, “Colleges Must Uphold Free Speech but can Denounce Racist Speakers” Southern Poverty Law Centre, 26 October 2017 online: <https://www.splcenter.org/news/2017/10/26/splc-senate-colleges-must-uphold-free-speech-can-denounce-racist-speakers>

¹⁶ Smith, above note 4 at pp 19 – 21.

¹⁷ Smith, “Fact-Finding” above note 8 at p 7 – 8.

¹⁸ Jeannie Suk Gersen, “The Socratic Method in the Age of Trauma” (2017) 130 Harvard Law Review 2320 especially at 2339 – 2341.

¹⁹ ACLU, above note 15.

²⁰ Sara Ahmed, *Living a Feminist Life*, (Durham: Duke University Press, 2017) especially Part II; Shakil Choudhury, *Deep Diversity: Overcoming Us vs. Them* (Toronto: Between the Lines, 2015); Frances Henry et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017) especially at 310 – 316.

can advance diversity, research excellence and learning outcomes.²¹ Adopting culturally appropriate processes to implement the Calls to Action of the Truth & Reconciliation Commission of Canada within the university's activities should be a top institutional priority.²² Equality concerns also arise in respect of ostensibly neutral institutional policies. To take an example that is salient to freedom of expression, university activities regarding media engagement should recognise that the benefits and risks of public engagement are not equally distributed. Some groups and individuals (including young adults, Indigenous people, visible minorities, LGBTQ2S people and feminists) are more frequently targeted by serious forms of online harassment than others.²³ Whether considering how to encourage public engagement or establishing institutional procedures for responding to online threats and harassment, the university should ensure that it does not place disproportionate burdens on those who bear greater risks in this domain.

²¹ Urban Universities for HEALTH and the Association for Public and Land Grant Universities Advisory Committee on Faculty Cluster Hiring, *Faculty Cluster Hiring for Diversity and Institutional Climate* (2015) online: http://urbanuniversitiesforhealth.org/media/documents/Faculty_Cluster_Hiring_Report.pdf; Beth McMurtrie, "The Promise and Peril of Cluster Hiring", *The Chronicle of Higher Education*, 3 March 2016.

²² Truth and Reconciliation Commission of Canada, *Calls to Action* online: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

²³ Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online* (Data & Society Research: 2017) online: http://centerformediajustice.org/wp-content/uploads/2017/07/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf; Pew Research Centre, *Online Harassment* (2014) online: http://www.centralvalleybusinesstimes.com/links/PI_OnlineHarassment_102214-1.pdf; Ruth Lewis, Michael Rowe, Clare Wiper, "Online Abuse of Feminists as an Emerging Form of Violence Against Women and Girls" (2016) 57 *British Journal of Criminology* 1462; George Veletsianos, *Social Media in Academia: Networked Scholars* (London: Routledge, 2016) chapter 8; Irfan Chaudhry, "#Hashtagging Hate: Using Twitter to Track Racism Online" (2015) 20 *First Monday*; Jamie Bartlett et al, *Anti-Social Media* (Demos, 2014) online: https://www.demos.co.uk/files/DEMOS_Anti-social_Media.pdf?1391774638; Mary Beard, "The Public Voice of Women" (2014) 36 *The London Review of Books* 11; Lise Gotell and Emily Dutton, "Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape", (2016) 5 *International Journal for Crime, Justice and Social Democracy* 65; Elizabeth Sheehy, "Defending Battered Women in the Media", (2016) 5 *International Journal for Crime, Justice and Social Democracy* 81.