DEFENDING ACADEMIC FREEDOM FOR THE UNCIVIL SCHOLAR

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Does academic freedom protect uncivil, offensive and abrasive scholarly expression? With universities under social and political scrutiny, this question is pivotal. In Ridd v James Cook University, the High Court regarded a requirement of civility as incompatible with the purpose of academic freedom. This article develops the Court's view, defends the uncivil scholar and designs a framework for disputes over 'norm-breaching expression'. Most university enterprise agreements do not require scholars to be civil in exercising academic freedom. However, this legal position requires a normative foundation. This article applies deliberative systems theory to argue that an entitlement to turn to incivility may support the scholar's democratic function. However, uncivil scholarly expression faces a powerful objection: that it is harmful to colleagues, students, the university or communities more broadly. This article suggests a framework for parsing these disputes under the terms of the Model Code on Freedom of Speech and Academic Freedom.

I INTRODUCTION

When the High Court had the opportunity in *Ridd v James Cook University* ('*Ridd*') to consider what academic freedom entails in Australian universities, the Court denied the existence of any '"right" of others to respect or courtesy' from scholars.[1] A scholar is not obliged to be polite. Whether disrespectful or uncivil expression is compatible with academic freedom was not determinative in *Ridd*. Nonetheless, the Court held that 'the purpose' of academic freedom 'must permit of expression that departs from those civil norms'.[2] This article develops the Court's view, defends the uncivil scholar and designs a principled framework for disputes over uncivil scholarly expression.

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1 (2021) 274 CLR 495, 520 [33] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) ('*Ridd*').

2 Ibid.

Following codification in recent years, academic freedom rules do not require civility of the scholar per se. However, with the social and political role of universities under scrutiny,[3] a doctrinal justification for scholarly incivility is insufficient. I employ deliberative systems theory to argue that uncivil scholarly expression honours the democratic purpose of academic freedom. I then apply this framework to work through the powerful objection that uncivil exercises of academic freedom tend to face: that these expressions cause harms that override the interest in academic freedom.

This article provides a timely treatment of the claimed trade-off between academic freedom and prevention of harm. In particular, the conflict in Gaza has seen elevated global political interest in university responses to claims of harm.[4] In Australia, this has seen, for example, the University of Sydney ('USYD') accept in principle a recommendation to introduce a 'New Civility Rule' that would require 'each person utilising a word or phrase … to identify to the audience the context in which it is used'.[5] Universities have faced heightened public and political scrutiny for their management of claims of harm.[6]

Academic freedom – the freedom afforded to scholars and their institutions and activities – attracts broad rhetorical support in universities.[7] However, scholars are often scrutinised for instances of inflammatory speech. Universities are frequently criticised for being hotbeds of radicalism,[8] out of touch ivory towers[9] or purveyors of censorious sanctimony.[10] Critics of universities pick up claims of harm and offence and use them to pillory universities either for permitting this speech and tolerating the harm this speech causes, or for punishing this speech and siding with censorship. Academic freedom – as phrase, concept or totem – haunts these debates.

I term these boundary cases of uncivil scholarly speech 'norm-breaching expression': communicative acts done with an intention to communicate an earnestly held scholarly perspective, but made in forms contrary to social and

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3 Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) ch 1. Government intervention is increasingly pronounced: see, eg, Australian Universities Accord Panel, *Australian Universities Accord* (Final Report, 25 February 2024) 32–3, 234–40 <https://www.education.gov.au/australian-universities-accord/resources/final-report>.

4 In the United States, the presidents of several prestigious universities resigned over alleged mishandling of harm claims arising from protests: 'A Look at College Presidents Who Have Resigned under Pressure over Their Handling of Gaza Protests', *Associated Press* (online, 16 August 2024) <https://apnews.com/article/college-president-resign-shafik-magill-gay-59fe4e1ea31c92f6f180a33a02b336e3>.

5 Bruce Hodgkinson, *University of Sydney External Review Report* (Report, November 2024) 56.

6 Note for instance, observations by the Vice-Chancellor of the Australian National University that the University had been called to testify before the Senate for only the third time in its history: Evidence to Education and Employment Legislation Committee, Parliament of Australia, Canberra, 7 November 2024, 109 (Genevieve Bell).

7 Glyn Davis, 'Special Pleading: Free Speech and Australian Universities', *The Conversation* (online, 4 December 2018) <https://theconversation.com/special-pleading-free-speech-and-australian-universities-108170>.

8 Evans and Stone (n 3) 11–44.

9 Ibid 32.

10 Evan Smith, '50 Years of Snowflakes', *8AM Playbook* (online, 4 November 2018) <https://www.researchresearch.com/news/article/?articleId=1378065>.

scholarly norms. This speech genre has proven uniquely capable of provoking harm claims. I consider the legal and moral implications of this speech.

Academic freedom in Australia has received only modest recent scholarly attention,[11] limited mostly to a smattering of commentary on *Ridd*.[12] Claims of harm have gone largely unaddressed in the literature despite their dominant role in public discourse.[13] Powerful arguments made by American scholars have limited doctrinal significance in Australia given variations in protection for freedom of expression and general employment law between American and Australian jurisdictions.[14]

My argument has three parts. In Part II, I develop the doctrinal claim, alluded to in *Ridd*, that academic freedom protects norm-breaching expression. I pay particular attention to the emerging role of the 'French Model Code' ('FMC') on academic freedom and freedom of speech produced by former Chief Justice Robert French.[15] I argue that codification of academic freedom has brought norm-breaching expression inside the ambit of academic freedom. I also examine two recent superior court decisions that considered whether norm-breaching expression is a protected exercise of academic freedom: the *Ridd* case and *University of Sydney v National Tertiary Education Industry Union* ('*Anderson*').[16]

In Part III, I make a normative argument that the democratic purpose of academic freedom requires protecting norm-breaching expression. I use a deliberative systems theoretical frame. This frame considers that legitimacy in a political system arises from the synergies between the interconnected components of a democracy. I argue that academic freedom enables broader deliberative conditions. Academic freedom, therefore, is not an individual or bilateral matter between scholar and university. Scholarship is a public activity with implications for democracy.[17] I build an analogy to deliberative approaches to civil disobedience and produce a framework to justify norm-breaching expression. This frame exposes how academic freedom and norm-breaching expression are not minor issues of university governance; they have broader democratic significance.

In Part IV, I apply my doctrinal and normative findings to the 'harm objection': the argument that norm-breaching expression may cause harms that override any other normative interest in the scholar's freedom. I argue that harm objections

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11 Evans and Stone (n 3) represents a thorough consideration of the issue; however, it predates the *Ridd* (n 1) decision.

12 See, eg, Pnina Levine and Rob Guthrie, 'The *Ridd* Case and the Model Code for the Protection of Free Speech and Academic Freedom: Wins for Academic Freedom or Losses for University Codes of Conduct and Respectful and Courteous Behaviour?' (2020) 47(2) *University of Western Australia Law Review* 310.

13 Philip Mendes, 'Academic Freedom Is a Red Herring when Discussing Antisemitism', *The Jewish Independent* (online, 5 March 2024) <https://thejewishindependent.com.au/feedback-academic-freedom-is-a-red-herring-when-discussing-antisemitism>; Emily Johnson and Stephanie Zhang, 'Academic Freedom to Hate' [2019] (7) *Farrago* 14–15, 14. The question of civility is briefly addressed in Evans and Stone (n 3) 94.

14 See generally Reshmi Dutt-Ballerstadt and Kakali Bhattacharya (eds), *Civility, Free Speech, and Academic Freedom in Higher Education: Faculty on the Margins* (Routledge, 2021) <https://doi.org/10.4324/9780429282041>.

15 Robert S French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019) 295–300.

16 *Ridd* (n 1); (2024) 304 FCR 18 ('*Anderson*').

17 Evans and Stone (n 3) 74–9.

should be analysed with the democratic role of norm-breaching expression and academic freedom in mind. Norm-breaching expression should be subject to sanction only when the interests of deliberation demand it. I demonstrate that the FMC favours this form of analysis.

In summary, this article provides a legal then theoretical justification for norm-breaching expression before turning to address the harm problem. Conceptualised in another way, this article replies to three leading objections to norm-breaching expression: that in positive legal terms, it is not an exercise of academic freedom (Part II); that in normative terms, it should not merit the protection of academic freedom (Part III); and lastly, that in policy terms, it is too harmful to be an exercise of academic freedom (Part IV).

II ACADEMIC FREEDOM, NORM-BREACHING EXPRESSION AND LAW

In 1931, John Anderson, Challis Professor of Philosophy at the University of Sydney, set the patriotic sensibilities of interwar New South Wales ('NSW') alight. He described the aphorism 'your King and Country need you' as superstitious. He argued war memorials were idolatrous monuments that served to quash critical discussion of war.[18] The Opposition Leader, Lieutenant Colonel Bruxner, moved a resolution in the NSW Parliament to censure the comments, stating that the Opposition intended to 'get him out'.[19] The University's Chancellor described the Professor's views as 'a distinct breach of his obligations' and 'opposed to what is considered to be Christian and customary', rendering him 'wholly unfit to occupy his Chair'.[20] The Vice-Chancellor opposed censure but conceded that the views were 'unnecessarily provocative'.[21] In declining to issue any censure, the University Senate resolved that they

> in the past relied, and must continue to rely, on the intellectual integrity, and the good taste and the good sense of its staff to approach all problems in an objective, disinterested, and scientific a spirit as possible, and so to state and argue them so as not to inflame people's minds to no good purpose.[22]

The absence of legal arguments in the debate is striking when compared to academic freedom debates today. In Australia today, academic freedom is framed as a set of 'legal freedoms' that 'may be conditioned in certain circumstances by other legal freedoms, rights and duties'.[23] Abroad, academic freedom has often resisted

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18 Jim Jackson, 'Legal Rights to Academic Freedom in Australian Universities' (PhD Thesis, University of Sydney, March 2002) 120 ('Legal Rights to Academic Freedom').

19 Ibid 121, quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 July 1931, 4267 (Lieutenant Colonel Bruxner, Leader of the Opposition).

20 Jackson, 'Legal Rights to Academic Freedom' (n 18) 124.

21 Ibid 125.

22 Ibid 139.

23 Anthony Connolly, 'Academic Freedom at ANU: Balancing Rights and Responsibilities', *ANU Reporter* (online, 27 June 2024) <https://reporter.anu.edu.au/all-stories/academic-freedom-at-anu-balancing-rights-and-responsibilities>.

codification and juridification. Essayist Louis Menand describes academic freedom in the United States as 'an understanding, not a law. It can't just be invoked.'[24]

In this Part, I chart the arc of Australian academic freedom from abstraction to law and show that the High Court's comments on norm-breaching expression in *Ridd* are not restricted to that case. I make three arguments to this end. First, I demonstrate that academic freedom in Australia has become a codified and juridified 'right'. Second, I define norm-breaching expression and show how courts have struggled to reconcile this norm-breaching speech and academic freedom. Finally, I demonstrate that codification opens the possibility that norm-breaching expression increasingly will be treated as a protected exercise of academic freedom.

A How Academic Freedom Became Law

1 Historical Development

Academic freedom is intertwined with the history of the university. The modern Australian university traces its lineage to institutions of medieval Europe. Higher education existed across societies, from Islamic madrasas to Imperial China's Confucian schools.[25] However, from the 12th century onwards, a new species of scholarly institution appeared in Europe, characterised by autonomy. The term 'university' arose from '*universitas*', a guild, either of 'masters' or of students.[26] These guilds operated to limit clerical and political intervention in scholarly affairs.[27]

The concept of the research university only took hold in the early 19th century. Following the Napoleonic Wars, Prussian King Frederick William III initiated a radical program of reform premised on Enlightenment thinking. It troubled Prussians that 'while France had undergone almost two decades of revolutionary change, their state and society had remained relatively static' or even 'hopelessly antiquated'.[28] In 1810, the King appointed Wilhelm von Humboldt to reform the Prussian education system. The higher education institutions that Humboldt's reforms produced were characterised by governing autonomy from the state and unity of teaching and research.[29]

However, a contradiction plagued these institutions. They were autonomous but dependent upon the state for funding. In a preliminary sense, academic freedom can initially be seen as a concept to broker this state–university relationship: a state guarantee of non-interference.

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24 Louis Menand, 'Academic Freedom under Fire', *The New Yorker* (online, 29 April 2024) <https://www.newyorker.com/magazine/2024/05/06/academic-freedom-under-fire>.

25 Harold Perkin, 'History of Universities' in Philip G Altbach (ed), *International Higher Education: An Encyclopedia* (Garland Publishing, 1991) vol 1, 169, 169.

26 Ibid 173.

27 Ibid.

28 Marion W Gray, 'Prussia in Transition: Society and Politics under the Stein Reform Ministry of 1808' (1986) 76(1) *Transactions of the American Philosophical Society* 1, 1 <https://doi.org/10.2307/1006408>.

29 See Ian McNeely, 'The Unity of Teaching and Research: Humboldt's Educational Revolution' [2002] (Fall) *Oregon Humanities* 32.

In the modern era, academic freedom is widely accepted to have a central place in universities. It is described as the 'defining characteristic of universities'.[30] Douglas Copland, the first Vice-Chancellor of the Australian National University ('ANU'), described 'the establishment and maintenance of academic freedom' as 'more important than the actual research and teaching done inside the walls of a university'.[31]

Yet despite near-universal acclaim, as French noted, '[a]cademic freedom has … apparently no settled definition'.[32] As Eric Barendt argues, '[a]cademic freedom seems to be different from … established rights' as '[d]oubts are expressed not only in respect of borderline claims, as with freedom of speech or personal privacy, but with regard to its central meaning'.[33] Few principles of academic freedom are uncontested. Academic freedom is a 'defining characteristic' but it lacks defining characteristics of its own.

With few global exceptions, academic freedom does not usually derive from bills of rights or other superior legal documents.[34] Australia is still one of the few jurisdictions where academic freedom has found its way into documents that courts interpret (such as enterprise agreements), and even then only in recent decades.[35] Therefore, the judiciary of the common law world has had limited opportunity to refine academic freedom into a cohesive concept capable of definition. Moreover, in the absence of refined legal definition, academic freedom has become tethered to the professional values of academia, taking on a totemic significance as a 'north star' for the social and political aspirations of academic inquiry.[36]

Academic freedom has variously been said to include freedoms of:

- the institution from interference;[37]
- academic staff to teach and research;[38]
- academic staff to govern academic affairs and to critique university governance;[39]

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30 French (n 15) 114.

31 SG Foster and Margaret M Varghese, *The Making of The Australian National University: 1946–1996* (ANU Press, 2009) 113 <https://doi.org/10.22459/MANU.08.2009>.

32 French (n 15) 18. See also Edmund L Pincoffs, 'Introduction' in Edmund L Pincoffs (ed), *The Concept of Academic Freedom* (University of Texas Press, 1975) vii <https://doi.org/10.7560/710160-001>.

33 Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 2010) 16.

34 Cf *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5(3).

35 Jim Jackson, 'Express Rights to Academic Freedom in Australian Public University Employment' (2005) 9 *Southern Cross University Law Review* 107, 125–8 ('Express Rights to Academic Freedom').

36 See, eg, American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (1915) principles 2, 3 ('*1915 Declaration*').

37 Bill Swannie, 'Protection from Institutional Censorship: An Essential Aspect of Academic Freedom' (2022) 45(4) *University of New South Wales Law Journal* 1489, 1491 <https://doi.org/10.53637/DHIC5747>; Adrienne Stone, 'The Meaning of Academic Freedom: The Significance of *Ridd v James Cook University*' (2021) 43(2) *Sydney Law Review* 241, 253; Committee on Freedom of Expression, University of Chicago, *Report of the Committee on Freedom of Expression* (Report, 2015).

38 *1915 Declaration* (n 36); *Education Reform Act 1988* (UK) s 202(2).

39 Stone (n 37) 25. See generally Leon Trakman, 'Modelling University Governance' (2008) 62(1–2) *Higher Education Quarterly* 63 <https://doi.org/10.1111/j.1468-2273.2008.00384.x>.

- academic staff to comment publicly;[40]
- staff to engage in professional and representative bodies;[41] and
- students to learn and debate in class.[42]

The FMC definition of academic freedom provides an inclusive definition of academic freedom, including:

> - the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
> - the freedom of academic staff and students to express their opinions in relation to [their] higher education provider …[43]

For the purposes of this article, I adopt the FMC definition of academic freedom as suitable.

B Juridification and Codification

In the past decades, academic freedom has shifted from a social norm to a matter of law capable of judicial consideration. Juridification has been driven by three key factors: the statutory context, the industrial context and, most recently, codification following the FMC.

1 Statutory Context

Australia's 37 public universities were created by statutes of state, territory and federal parliaments. These are, in form, state institutions. Yet 'the idea that universities should be collectively governed by academics' was a feature of the German and Oxbridge traditions 'which influenced Australian universities in spirit'.[44] This legacy sees Australian universities act as quasi-democratic bodies, with a residual attachment to their autonomy.[45]

Governments retain substantial influence. First, the legislature can alter the university's governing act. Second, the governing acts permit ministers to appoint members to the governing councils.[46] Third, universities are subject to a regulatory regime: the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) established the higher education regulator – the Tertiary Education Quality and

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40 The *Ridd* (n 1) and *Anderson* (n 16) cases both are in this class. See, eg, Australian National University, 'Policy: Academic Expertise and Public Debate' (Policy, 15 November 2022) principle 2 ('ANU Academic Expertise and Debate Policy'); University of Sydney, 'Public Comment and Social Media Policy 2025' (Policy, 2 June 2025) cls 2.1(1), (3) ('USYD Public Comment Policy'); Evans and Stone (n 3) 101.

41 French (n 15) 119, quoting United Nations Educational, Scientific and Cultural Organization, *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, 29th sess (11 November 1997) 10 [27]; University of New South Wales, 'Code of Conduct and Values' (17 May 2024); Australian National University, 'Policy: Academic Freedom and Freedom of Speech' (Policy Statement, 28 October 2021) 2; *Australian National University Enterprise Agreement 2023–2026* cl 20.2(d).

42 Evans and Stone (n 3) 89.

43 Sally Walker, *Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Report, December 2020) 49.

44 Evans and Stone (n 3) 96.

45 Foster and Varghese (n 31) 113.

46 See, eg, *Australian National University Act 1991* (Cth) s 10(1)(q).

Standards Agency.[47] The *Higher Education Support Act 2003* (Cth) ('*Higher Education Support Act*') and its regulations create a set of standards against which universities must report and accredit.[48] The proposed Australian Tertiary Education Commission would expand this oversight.[49] If academic freedom encompasses institutional autonomy, in Australia, this autonomy exists beneath the possibility of state intervention.

Academic freedom is strung through this web of regulation. Under the *Higher Education Support Act*, a higher education provider 'must have a policy that upholds freedom of speech and academic freedom'.[50] *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) requires that universities take 'steps to develop and maintain an institutional environment in which freedom of speech and academic freedom are upheld and protected'.[51] However, these regulations provide negligible rights of relief to scholars who feel their academic freedom has been restrained. Enforcement is limited to discrete actions by the regulator or intervention by government.[52]

'Soft law' plays a more dominant role. Universities maintain community policies on general conduct and public comment.[53] Policies typically are binding on the university, staff members and students.[54] While these policies vary in form, the substance is comparable. These policies typically set out principles endorsing 'honesty',[55] 'integrity'[56] and 'respect',[57] and denouncing 'bullying', 'harassment' and 'discrimination'.[58] Public comment policies typically encourage academic staff to make comments within their expertise,[59] while praising professionalism and accuracy.[60]

In practice, we might doubt how many scholars are aware of these policies and their particulars. Perhaps these policies are largely descriptive of the social and professional norms that most scholars would accept.

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47 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 132.
48 Ibid ss 35–6.
49 Department of Education (Cth), 'Australian Tertiary Education Commission: Implementation Consultation Paper' (Paper, 17 June 2024).
50 *Higher Education Support Act 2003* (Cth) s 19-115.
51 *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) standard 6.1.4.
52 Deloitte Access Economics, *Review of the Impact of the TEQSA Act on the Higher Education Sector* (Report, March 2017) pt 2.2.3.
53 See, eg, 'ANU Academic Expertise and Debate Policy' (n 40) principle 2; 'USYD Public Comment Policy' (n 40) pt 2.
54 See, eg, Australian National University, 'Policy Governance' (Policy Statement, 30 November 2023) 2 (definition of 'policy').
55 See, eg, University of Queensland, 'Staff Code of Conduct Policy' (Policy, 4 May 2023) s 10(b).
56 Ibid s 10(b).
57 Ibid s 10(c).
58 Ibid s 10(g).
59 'USYD Public Comment Policy' (n 40) cl 2.1(1)(a).
60 Ibid cl 2.1(2)(d)(i).

2 Industrial Context

Enterprise agreements become salient at the point of a dispute arising between the university and a staff member. All Australian public universities have enterprise agreements negotiated with the National Tertiary Education Union ('NTEU').[61] All agreements contain provisions on academic freedom. There is variety in these clauses, but some agreements include academic freedom clauses that mimic the FMC text with precision,[62] or substantially draw an FMC-style policy into the operation of the agreement.[63] A managerial decision that breached these clauses would represent a breach of the *Fair Work Act 2009* (Cth).[64]

While the clauses vary, there is a sectoral trend towards increased enterprise agreement protection for academic freedom.[65] The NTEU historically operated a national strategy of 'leading sites' and nationally-integrated demands where the Union negotiated to align agreement clauses to the national 'high watermark' established at another university (a 'leading site').[66] National coordination remains evident in NTEU campaigns.[67] Generally, there is substantial commonality between university enterprise agreements and where there is discrepancy, clauses will often trend towards uniformity over time.

3 The FMC

On 14 November 2018, Minister for Education, Dan Tehan, announced that former Chief Justice Robert French would review the 'rules and regulations protecting freedom of speech on university campuses'.[68] The review followed events that conservative commentators framed as a free speech crisis at Australian universities.[69] These included protests at USYD against Bettina Arndt,[70] a

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61 'About', *National Tertiary Education Union* (Web Page) <https://www.nteu.au/NTEU/About.aspx>.

62 *UWA Academic Employees Enterprise Agreement 2023* cl 5; *Curtin University Enterprise Bargaining Agreement 2022–2025* cl 20; *Charles Darwin University and Union Enterprise Agreement 2022* cl 70.

63 *Macquarie University Academic Staff Enterprise Agreement 2023* cl 23; *University of Melbourne Enterprise Agreement 2024* cl 2.13.

64 *Fair Work Act 2009* (Cth) s 50.

65 Jackson, 'Express Rights to Academic Freedom' (n 35) 125–32. See also the less expansive academic freedom protections in the previous agreements that the agreements in above n 62 replaced: *The University of Western Australia Academic Employees Agreement 2017* cl 5; *Curtin University Academic, Professional and General Staff Agreement 2017–2021* cl 60; *Charles Darwin University and Union Enterprise Agreement 2018* cl 68.

66 Melissa Slee, 'Learning to Navigate Enterprise Bargaining: The Process of Innovation and Adaptation in the Union Movement' (2014) 24(3) *Labour and Industry* 217, 225 <https://doi.org/10.1080/10301763.2014.961679>.

67 Ibid. See also 'Log of Claims: Who Decides What Goes in It?', *National Tertiary Education Union* (Web Page) <https://www.nteu.au/branch/Bargaining_FAQ/Bargaining_FAQ_items/Log_of_Claims_what_goes_in_it.aspx>

68 Dan Tehan, 'Review into University Freedom of Speech' (Media Release, 14 November 2018) <https://webarchive.nla.gov.au/awa/20210630075543/https://ministers.dese.gov.au/tehan/review-university-freedom-speech>.

69 Matthew Lesh, Institute of Public Affairs, *Free Speech on Campus Audit 2018* (Report, December 2018) <https://ipa.org.au/wp-content/uploads/2018/12/Free-Speech-on-Campus-Audit-2018.pdf>.

70 Millie Roberts, 'Protestors Confront Attendees at Bettina Arndt Talk', *Honi Soit* (online, 11 September 2018) <https://honisoit.com/2018/09/protest-breaks-out-at-controversial-bettina-arndt-talk/>.

commentator who disputes the prevalence of sexual violence, and the decision of ANU to reject a donation to advance the study of Western Civilisation.[71]

The review ultimately focused on academic freedom.[72] French proposed a 'model code', covering academic freedom and freedom of speech.[73] It was left to universities to incorporate the French Model Code into their internal policies. While adoption of the FMC was not required, Universities Australia indicated that universities would adopt it.[74]

A review of implementation conducted in 2020 found that 33 universities had implemented the code while eight had yet to implement the code.[75] Since then, seven remaining universities appear to have implemented the code in substantial measure. I call these academic freedom and freedom of speech policies that universities have adopted 'FMC policies'. They typically adopt the terms of the FMC with minimal changes.

The FMC comprises:

- an objects section stating that academic freedom is 'paramount';
- a definitions section, defining academic freedom and 'the duty to foster the wellbeing of staff and students';
- an operation section that instructs on how the code is to operate in relation to other governing documents; and
- a principles section that provides the substantial mechanisms of the code.[76]

The principles provide that the exercise of academic freedom shall not attract a penalty, except according to law and in service of 'the reasonable and proportionate regulation of conduct' necessary to discharge named purposes.[77] These permitted purposes are the university's teaching and research activities, its duty to foster the wellbeing of students and staff and its legal duties. The FMC functions as a backstop against incursion upon academic freedom, including by universities' own policies.

The FMC gives academic freedom specific content while freedom of speech appears to take its content from common law heritage. Academic freedom is defined but freedom of speech is not. In the report, French canvasses the traditional common law position that freedom of speech is both a presumption and a right.[78] Unlike academic freedom, freedom of speech is enjoyed by all, inside and outside

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71 Gareth Evans and Brian Schmidt, 'ANU Stood Up for Academic Freedom in Rejecting Western Civilisation Degree', *The Conversation* (online, 30 June 2018) <https://theconversation.com/anu-stood-up-for-academic-freedom-in-rejecting-western-civilisation-degree-99189>.

72 French (n 15) 18–19.

73 Ibid 229. Minor changes were made to the draft Code by the University Chancellors' Council ('UCC'), including French in his capacity as Chancellor of the University of Western Australia. These changes can be found in markup in appendix B to Walker (n 43): at 48–54. The UCC version was implemented (subject in some cases to further revisions) by universities. Save that a clearer distinction was made between academic freedom and freedom of speech, the differences between the drafts are not especially material for the purposes of this article.

74 Walker (n 43) 1.

75 Ibid 5.

76 French (n 15) 295–300.

77 Ibid 298.

78 Ibid 100–2.

universities. The role of freedom of speech in the FMC might be to protect the legacy of universities as spaces for public debate, for instance with respect to the history of universities as sites of protest.[79]

Despite the term 'academic freedom' seemingly placing the concept alongside more established 'rights', it is in a formal sense nothing more than a commitment by universities to fetter their powers as employers. Academic freedom grants no special immunity from prosecution or civil suit. No constitutional norm restrains government from encroaching on the expression of scholars more than other citizens. Academic freedom has no formal content outside the scholars' employment relationship. As compared to freedom of speech, this is the distinguishing quality of academic freedom and the essence of its fragility. Where another employer might discipline an employee for wading into public controversy or bringing the employer into disrepute, the university commits to restraint. The protection of academic freedom is flimsy. This underscores the urgent need to build strong normative arguments to match legal arguments for academic freedom. If the case in favour of academic freedom is not overwhelming, it is only too easy to erode.

C Norm-Breaching Expression

In this section I define 'norm-breaching expression', a dominant but under-examined class of academic freedom boundary cases. I then introduce the *Ridd* and *Anderson* cases, where courts determined whether norm-breaching expressions were protected exercises of academic freedom. I conclude this section by setting out the emerging position of norm-breaching expression under university policies and enterprise agreements.

As noted previously, I define norm-breaching expression as communicative acts done with an intention to communicate an earnestly held scholarly perspective, but made in forms contrary to social and scholarly norms. Some examples of norm-breaching expression might include invective critique of colleagues' research (the *Ridd* case); inflammatory and provocative expressions of the scholar's expertise (the *Anderson* case); use of unprofessional or obscene language in academic or public debates or while engaging in intramural speech or; use of terminology regarded as insensitive.

We can immediately distinguish norm-breaching expression from some impermissible speech genres. Norm-breaching expression is distinct from bullying or harassment in that it is an expression of a scholarly opinion, that is, an informed opinion with some connection to the scholar's expertise or to the governance of the scholar's institution. Expertise is difficult to enclose.[80] Scholarly and political

79 Sirianne Dahlum and Tore Wig both canvas the cultural history of universities as sites of protest and establish a possible causal link between universities and political activity: Sirianne Dahlum and Tore Wig, 'Chaos on Campus: Universities and Mass Political Protest' (2021) 54(1) *Comparative Political Studies* 3 <https://doi.org/10.1177/0010414020919902>.

80 Evans and Stone (n 3) 101.

opinions may blur.[81] This demands further research.[82] However, a scholar who knowingly propagates misinformation or disinformation will surely have a weak claim to be expressing an earnest scholarly opinion. Similarly, a scholar who makes a comment with no rational connection to their expertise will only enjoy the protections of freedom of speech. I readily concede that there will be boundary cases where the scholarly nature of the opinion is in dispute. These cases are currently ambiguous in respect of academic freedom.

This can be understood through a form and content distinction. I address this article towards expressions that broadly contain scholarly content but where the form of expression is said to exclude the protection of academic freedom. Future research might consider cases where the content itself is said to be unscholarly. To chart a path through the form question, I defer the question of content for future inquiry.

For my immediate purposes, it suffices to say that there may be extreme cases that could not sensibly be described as scholarly opinions. Norm-breaching expression also does not extend to unlawful expression, for instance vilification or incitement. As noted earlier, academic freedom has no legal content beyond the employment relationship, so it cannot licence criminality or civil offences.

1 Case Law

In *Ridd* and *Anderson*, the High Court and Federal Court respectively ruled on whether courtesy and respect are conditions of enjoyment of academic freedom, or 'intellectual freedom' as it was termed in both cases.[83] In *Ridd*, the High Court found academic freedom's purpose demands tolerating norm-breaching.[84] The *Anderson* decision underscores that enterprise agreements remain critical. Both cases precede the FMC however provide insight into how courts contemplate academic freedom and norm-breaching expression.

(a) Ridd

Peter Ridd was a marine geophysicist employed at James Cook University ('JCU').[85] In 2015 and 2017, Ridd made a series of abrasive comments to journalists regarding his colleagues at JCU and the Great Barrier Reef Marine Park Authority.[86] These comments disputed research on the impact of anthropogenic climate change on the Great Barrier Reef.[87]

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81 Ibid.

82 Cf Pnina Levine and Haydn Rigby's discussion of reasonableness in cases of intramural criticism: Pnina Levine and Haydn Rigby, 'To What Extent Should Academic Freedom Allow Academics to Criticise Their Universities?' (2022) 48(1) *Monash University Law Review* 131.

83 The Court confirmed nothing turned on any difference between the two terms: *Ridd* (n 1) 518 [29] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

84 Ibid 518–20 [28]–[33].

85 Ibid 506 [1].

86 Ibid 523 [42]–[43], 524–5 [48].

87 Peter Ridd had raised a 'reproducibility crisis' in this research: Piers Larcombe and Peter Ridd, 'The Need for a Formalised System of Quality Control for Environmental Policy-Science' (2018) 126 *Marine Pollution Bulletin* 449 <https://doi.org/10.1016/j.marpolbul.2017.11.038>.

The legal question before the High Court was whether the JCU Enterprise Agreement's ('JCU Agreement') protection for staff to express unpopular and controversial views prevailed over undertakings in the University's Code of Conduct regarding acting with respect and courtesy.[88] The Court held that the enterprise agreement protections for academic freedom prevailed over the Code of Conduct undertakings regarding social norms.

The High Court observed that the academic freedom clause in the JCU Agreement provided a number of exceptions to academic freedom for harassment, bullying, vilification and intimidation, all of which were similarly prohibited by the Code of Conduct.[89] The Court also observed that the Code of Conduct contained a number of further prohibited behaviours that were omitted from the JCU Agreement's academic freedom clause.[90] All conduct prohibited by the JCU Agreement was prohibited by the Code of Conduct but the reverse was not true. The Court found the JCU Agreement 'was drafted specifically to preserve' academic freedom subject to narrow restrictions.[91] Moreover, the JCU Agreement expressly provided that the Code of Conduct was not intended to detract from the academic freedom provisions.[92]

The Court also weighed the historical and normative content of academic freedom. This was possible as enterprise agreements are interpreted with reference to their meaning in their industrial context.[93] This gave the Court a means – perhaps an excuse – to embed the decision in a less textual analysis. The Court briefly noted two arguments for academic freedom: an instrumental argument about enabling truth-seeking and an ethical argument in favour of truth-telling.[94] The Court considered that 'however desirable courtesy and respect might be, the purpose of intellectual freedom must permit of expression that departs from those civil norms'.[95]

The Court refuted the suggestion that the academic freedom provisions did not conflict with the code of conduct provisions, observing that '[t]he content of speech that expresses an opinion will often be inseparable from the strength of conviction … which is tied to the manner of expression'.[96]

(b) Anderson

Tim Anderson was a political economist at USYD. In 2017 and 2018, he made a number of provocative social media posts and presented a slide in a seminar on '[r]eading [c]ontroversies' that depicted an Israeli flag overlaid with a swastika as a commentary on media coverage of the Palestinian cause.[97]

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88 *Ridd* (n 1) 514 [17]–[18] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
89 Ibid 517 [25].
90 Ibid 516–17 [24]–[25].
91 Ibid 516 [23].
92 Ibid 517 [26]–[27].
93 Ibid 514 [17], citing *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, 440 [57] (French J).
94 *Ridd* (n 1) 519 [31] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
95 Ibid 520 [33].
96 Ibid 520 [34].
97 *Anderson* (n 16) 40 [85] (Kennett J).

The USYD Enterprise Agreement clause qualified 'intellectual freedom' by a requirement that its exercise be 'responsible' and 'in accordance with the highest ethical, professional and legal standards'.[98] These concepts are absent from the FMC and were more weakly phrased in the JCU Agreement interpreted in *Ridd*.[99]

Anderson's superimposition of the swastika upon the Israeli flag was, in Lee J's view, 'self-evidently offensive' and therefore 'could not amount to an exercise of intellectual freedom which was … "responsible"'.[100] In contrast, in *Ridd*, the provision Ridd was alleged to have breached was outside the JCU Agreement, in the policy-level Code of Conduct. Anderson therefore could not benefit from the same argument about construction of enterprise agreements.

(c) Analysis

The courts ruled against both Ridd and Anderson. The final outcomes are not of central importance for present purposes as the decisions turned on matters peripheral to academic freedom. Following the commencement of disciplinary proceedings, Ridd and Anderson each disclosed confidential information and antagonised the disciplinary process.[101] In *Ridd*, this latter conduct was sufficient to give a lawful justification for his dismissal.[102]

However, following the FMC, the cases are important as indications of how courts reason through academic freedom. The *Ridd* decision confirms two pivotal matters. First, code of conduct provisions provide no valid basis for an allegation of misconduct unless the enterprise agreement intends as much. Second, the court can consider the historical and normative purpose of academic freedom in constructing clauses of the enterprise agreement. Anderson was disadvantaged by an agreement less favourable to norm-breaching expression, demonstrating the primacy of enterprise agreements. The insights from *Ridd* and *Anderson* reveal how norm-breaching expression may be treated by a court applying an FMC policy. FMC provisions, which treat norm-breaching expression favourably, appear poised to govern academic freedom issues going forward.

2 Why FMC Terms Apply

Three factors will likely see rules mimicking the FMC increasingly determine academic freedom disputes.

First, there is a trend towards greater protection for academic freedom in university enterprise agreements.[103] As *Ridd* clarified, the greater the contemplated protection for academic freedom in the enterprise agreement, the less likely restrictive code of conduct clauses will be enforceable.[104] Three universities lead

98 Ibid 44 [107].
99 French (n 15) 229–36; *Ridd* (n 1) 511–12 [13] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
100 *Anderson* (n 16) 33 [54] (Lee J).
101 Ibid 43 [99] (Kennett J).
102 *Ridd* (n 1) 529–30 [65] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
103 Jackson, 'Express Rights to Academic Freedom' (n 35) 125–32.
104 *Ridd* (n 1) 516–17 (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

the sector with academic freedom clauses that mirror the text of the FMC.[105] Others have clauses that commit to exercising powers under the agreement in accordance with FMC policies.[106] Over time, the sector will likely shift towards FMC academic freedom clauses. The NTEU's 'leading sites' strategy discussed earlier will tend to align the sector over time. Moreover, there is every incentive for universities to harmonise enterprise agreement clauses with FMC policies to avoid conflicts of authority. Disputes about inconsistency between policies and enterprise agreements can produce expensive, time-consuming litigation – indeed, *Ridd* was such a case.

Second, the university codes of conduct, which provide a foundation for adverse action against employees, are interpreted to be consistent with FMC policies. The FMC provides that it prevails over non-statutory policies to the extent of any inconsistency.[107] An allegation of misconduct founded in a university code of conduct would be without basis to the extent that the code of conduct is inconsistent with the FMC policy. Consider a claim of misconduct for norm-breaching expression premised on a code of conduct clause prohibiting staff from engaging in 'unruly' behaviour. The decision-maker could only rely on a code of conduct to penalise the alleged breach if the prohibition on unruly behaviour was 'reasonable and proportionate regulation of conduct' necessary to discharge the university's teaching and research activities or its duty to foster the wellbeing of students and staff.[108] As I discuss in Part IV, the FMC definition of the latter duty is favourable to norm-breaching expression. The FMC 'filters' codes of conduct to advantage academic freedom.

Last, FMC policies contain a clause requiring that the university have regard to FMC compliance in reviewing and drafting policies and/or statutory instruments.[109] If honoured, this would align university policies to FMC principles over time.

These factors are complementary. For a prohibitive rule in a code of conduct to support an allegation of misconduct, the rule in the code of conduct and its application must not be inconsistent with the FMC policy. The rule must then be 'picked up' by the text of the enterprise agreement. With more favourable agreements and FMC policies adopted across the sector, only rules prohibiting extreme forms of misconduct will survive this interpretative exercise.

The trend I have identified is also subject to political and administrative interference. As I observed, the protection of academic freedom is flimsy. Building a normative case – as I do in Part III – is necessary to buttress the political case for generous academic freedom.

3 FMC and Norm-Breaching Expression

If FMC-style instruments will increasingly govern academic freedom disputes, the next question is how the FMC treats norm-breaching expression. The FMC

105 See above n 62.
106 See above n 63.
107 Cf University of Sydney, *Charter of Freedom of Speech and Academic Freedom* (9 December 2019) 2.
108 French (n 15) 298.
109 Ibid 297.

drafting favours norm-breaching expression being treated as a protected exercise of academic freedom.

The FMC recognises that universities have a duty to protect staff and student wellbeing and the university may make 'reasonable and proportionate regulation' of academic freedom to achieve this.[110] However, the FMC *excludes* from the definition of the duty to protect staff and student wellbeing 'protect[ing] any person from feeling offended or shocked or insulted by the lawful speech of another'.[111] This drafting places the emphasis on objective harms – such as 'unfair adverse discrimination' and behaviour 'likely to humiliate or intimidate' other people[112] – and avoids consideration of less serious or subjective claims of harm such as offence and shock. Lee J's reasoning that Anderson's comments' offensive quality made them an irresponsible exercise not protected by academic freedom would not be possible in an FMC environment because 'offence' is not per se an actionable harm under the Code.

The FMC also gives limited credence to operational or reputational concerns that university administrators might weigh against the interests of the scholar. Norm-breaching expression can provoke protest or media interest that administrators may resent. The Code recognises a right to impose 'reasonable and proportional regulation' of academic freedom but only in favour of the 'discharge of the university's teaching and research activities' and 'to give effect to its legal duties'.[113] Critical media coverage, for example, may not impose on teaching, research or legal duties. An act might be unfavourable to the reputation of a university's teaching or research, such as Ridd's critique of his colleagues' research, while not preventing the university 'discharging' those activities. The boundary French sets is that academic freedom cannot obstruct that which academic freedom exists to protect – teaching and research. Norm-breaching expression is unlikely to create operational obstacles.

Last, there is an absence of terms in the Code that have been used to impose upon norm-breaching expression. The key provision in *Anderson* required exercises of academic freedom to honour the highest professional and scholarly standards.[114] *Anderson* indicates these terms bear negatively upon norm-breaching expression. This language is absent from the Code. Similarly, there is no language requiring civility, collegiality or restraint.

D Conclusion

Norm-breaching expression has emerged as an exercise of academic freedom protected by the FMC. This appears to be a deliberate drafting decision as French commented that it 'does not require much imagination' to understand how requirements of respect and civility could impose upon expression.[115]

110 Ibid 298.
111 Ibid 297.
112 Ibid.
113 Ibid 298.
114 *Anderson* (n 16) 22 [12] (Perram J).
115 French (n 15) 218.

In the next Part, I propose that this is an incomplete justification. True as it may be that civility is an uncertain and invidious standard, the more compelling argument against civility conditioning academic freedom comes from the essence of the deliberative democratic system.

III DELIBERATIVE SYSTEMS SCHEMATIC

Might norm-breaching expression be normatively justifiable? Might tolerance of an uncivil scholar enable their democratic role? In Part II, I demonstrated that norm-breaching expression is a protected exercise of academic freedom. In this Part, I argue that this legal position is necessary and desirable. I frame this argument through deliberative systems literature on civil disobedience, a comparable prosocial norm-breaching activity. I demonstrate that norm-breaching expression is justifiable when deliberation has failed.

This Part has three sections. First, I define deliberative systems theory and defend its application to universities. Second, I make a novel argument that deliberative systems theory can justify academic freedom as improving broader deliberation. Third, I build an analogy to the deliberative literature on civil disobedience to present three deliberative justifications for a scholar's use of norm-breaching expression: exclusion from participation, distortion and information failure.

This Part serves three purposes. First, the *Ridd* decision confirmed that courts consider a broader normative perspective in interpreting the meaning of academic freedom in enterprise agreements.[116] A more complete normative case could advance the protection of academic freedom. Second, as demonstrated in the previous Part, the legal protection for academic freedom – and certainly norm-breaching expression – is tenuous and exists at the pleasure of legislatures and university administrators. It is therefore imperative to build a normative political case for academic freedom and norm-breaching expression within it. Third, a compelling justification for norm-breaching expression as an exercise of academic freedom has yet to be made in the Australian context, nor has deliberative systems theory been applied to academic freedom in Australia.[117]

116 *Ridd* (n 1) 518–20 [28]–[33] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

117 Deliberative scholars have long addressed the role of universities in democracy. For example, Jürgen Habermas identified universities as among institutions on the 'inner periphery' of deliberative decision-making in society: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (MIT Press, 1996) 355 ('*Between Facts and Norms*'). Less attention has been given to the potential for deliberative theory to guide the internal decisions of the university. Roger Mourad examines deliberative democracy in questions of higher education pedagogy and research organisation, however, does not address academic freedom substantially: Roger Mourad, 'Deliberative Democracy in Higher Education: The Role of Critical Spaces across Universities' (2022) 18(1) *Journal of Deliberative Democracy* 1 <https://doi.org/10.16997/jdd.954>.

A Deliberative Systems and Universities

The power of reason animates deliberative democratic theory and motivates universities. Deliberative systems theory is an insightful theoretical lens for universities, and grounds my novel deliberative argument for academic freedom.

Deliberative systems theory is a strand of deliberative democratic theory. Deliberative democracy provides an account of how democracy might embody the 'will of the people'.[118] Rather than finding democratic legitimacy solely in the tallying of voters' preferences, deliberative democrats argue that 'legitimate lawmaking issues from the public deliberation of citizens'.[119] Deliberative democrats prize 'political autonomy based on the practical reasoning of citizens' – that is, deliberation.[120] Deliberation is understood as 'a more specific kind of communicative action, involving the public use of reason to diagnose complex issues and resolve shared problems'.[121]

As deliberative approaches moved from 'theoretical statement' to 'working theory' with practical application,[122] deliberative theory took a 'systemic' turn.[123] This systemic turn developed an approach to understanding deliberative democracy in 'macro' forms. At scale, a deliberative democracy is not a set of perfected institutions but 'a complex and dynamic pattern of human practices which are not themselves deliberative democracy',[124] an insight also picked up by some who preceded the systems strand.[125] A system in this context means 'a set of distinguishable, differentiated, but to some degree interdependent parts … connected in such a way as to form a complex whole'.[126] Deliberative systems scholars see a democracy as such a system. Deliberative qualities '[emerge] from the interactions', rather than being something 'injected' into democracy through 'relatively elite or management-controlled processes'.[127] A deliberative

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118 James Bohman and William Rehg, 'Introduction' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997) ix, ix <https://doi.org/10.7551/mitpress/2324.003.0002>.

119 Ibid. See also Ron Levy and Hoi Kong, 'Introduction: Fusion and Creation' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 1, 1 <https://doi.org/10.1017/9781108289474.001>.

120 Bohman and Rehg (n 118) ix.

121 William Smith, 'Deliberative Democratic Disobedience' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press, 2021) 105, 106 <https://doi.org/10.1017/9781108775748.005>.

122 Simone Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307, 307 <https://doi.org/10.1146/annurev.polisci.6.121901.085538>.

123 John S Dryzek and Simon Niemeyer, 'Deliberative Turns' in John S Dryzek (ed), *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010) 3, 6–8 <https://doi.org/10.1093/acprof:oso/9780199562947.003.0001>.

124 John Parkinson, 'Deliberative Systems' in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 432, 432 <https://doi.org/10.1093/oxfordhb/9780198747369.013.8> ('Deliberative Systems').

125 Habermas, *Between Facts and Norms* (n 117) 354.

126 Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1, 4 <https://doi.org/10.1017/CBO9781139178914.002>.

127 Parkinson, 'Deliberative Systems' (n 124) 440–1.

systems insight shows that deliberative norm-breaching in one part of the system can correct a deficiency in another part of a system: '[T]wo wrongs can make a right'.[128] The legitimating function of deliberation is diffused through the system and its interacting parts.[129]

Why apply deliberative approaches to universities? Deliberation is at the heart of the commonly accepted objectives of the modern university, to 'further human endeavour through the distribution of knowledge'.[130] Disciplined reason-giving and open-minded exchanges of ideas might produce outcomes that benefit society. The systems strand of deliberative democracy permits taking into account 'not only a particular forum or innovation but also the role of that forum or innovation in the larger deliberative system'.[131] Deliberative systems theory accounts for universities in relation to a broader polity.

B Deliberative Systems and Academic Freedom

How does deliberative systems theory conceive of academic freedom? I argue that academic freedom is essential to deliberative systems because scholars have a social function to mediate the social and political regulation of truth. This role can only be done with substantial expressive freedom and implies an entitlement to turn to norm-breaching expression.

Deliberativists have often admitted a role for state intervention in matters of truth and mistruth, particularly when mistruth has negative social and political consequences.[132] For instance, deliberative scholars are often sympathetic to truth in political advertising laws as tools to improve failures of deliberation. This tolerance for regulating speech flows from the proposition that the force of rational argument is undermined when that force is built on insincerity or dishonesty.[133] Deliberative democrats admit that while some things are uncertain, many things are known with high degrees of certainty to be true and untrue. Wilful dissent from known certainties can be restricted when it causes social or political harm, for example, false claims about the 2020 United States election results.

The deliberative position contrasts with the 'absolutist' position on expressive freedoms that predominates in United States First Amendment jurisprudence. In *United States v Alvarez*, the Supreme Court of the United States struck down an act criminalising making knowingly false claims to military honours.[134] The Court preferred that speech be self-regulated by the citizenry with a 'common

128 Mansbridge et al (n 126) 3.

129 John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 6–8.

130 Universities Australia, 'Strategic Plan 2017–2021' (Plan) 2 <https://universitiesaustralia.edu.au/wp-content/uploads/2021/09/Universities-Australia-Strategic-Plan-2017-2021.pdf>.

131 Mansbridge et al (n 126) 6.

132 See, eg, Simone Chambers, 'Truth, Deliberative Democracy, and the Virtues of Accuracy: Is Fake News Destroying the Public Sphere?' (2021) 69(1) *Political Studies* 147 <https://doi.org/10.1177/0032321719890811>.

133 Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017) 99 <https://doi.org/10.4324/9781315890159>.

134 567 US 709 (2012).

understanding that some false statements are inevitable if there is to be an open and vigorous expression of views'.[135] The Court preferred that citizens, not the state, decide what they credit and discredit in public debate.

The absolutists have at least one argument opposing deliberative democrats that has substantial force. This argument is a form of Hayekian knowledge problem. Knowledge in a society is dispersed and 'every individual has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left' to that individual.[136] A quintessential example is Copernicus and Galileo promoting the heliocentric (sun-centred) model of the universe to the chagrin of the Catholic Church which defended a geocentric (earth-centred) model. If regulation of truth and mistruth in various contexts is permitted, a future Galileo may be so persecuted as to prevent their 'unique information' gaining deserved attention.

Academic freedom provides a compelling means for deliberative democrats to respond to the absolutists' knowledge problem argument. I argue that deliberative democrats should defend unique liberties for scholars on the grounds that they have a social function to prove and disprove certainties. Scholars should enjoy 'special' expressive freedoms to test received wisdom and enable a society to know more things with more certainty. Scholarly methods operate as a further counterbalance. The scholar enjoys greater expressive freedoms but is trained to use this freedom judiciously and under the collective supervision of their colleagues.[137]

As an example, the deliberative democrat might favour restrictions on false claims of medical injury from vaccination. However, the deliberative democrat would also admit that a medical researcher should be at liberty to test these claimed injuries and, if they were to validate the concerns, 'sound the alarm' on the given vaccine.

Elsewhere, social and political liberties and courtesies are granted to and withdrawn from professions to fulfil their democratic role. Journalists can show curiosity that would be condemned as intrusive from another profession. Politicians are deprived of the courtesy not to be subjected to heated professional criticism in public. Similarly, scholars are (or should be) tolerated when they frustrate things we believe to be true.

My argument provides a novel deliberative systems justification for academic freedom. However, it is consonant with other deliberative justifications for academic freedom. Deliberativist Michael Lynch argues that research plays a '"supply-side" role in the space of reasons'.[138] Scholars 'supply' reasons by producing new or better-tested reasons. Lynch also argues that universities function as an 'engine of dissent' to elevate 'diversity of opinions and minority viewpoints'.[139]

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135 Ibid 718 (Kennedy J, Roberts CJ, Ginsburg and Sotomayor JJ joining). See also Levy and Orr (n 133) 102.

136 FA Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519, 521–2.

137 On scholarly methods in academic freedom, see Evans and Stone (n 3) 79–81.

138 Michael P Lynch, 'Academic Freedom and the Politics of Truth' in Jennifer Lackey (ed), *Academic Freedom* (Oxford University Press, 2018) 23, 32 <https://doi.org/10.1093/oso/9780198791508.003.0002>.

139 Ibid 33.

Contained within my argument are the seeds of a case for norm-breaching expression. Ideally, new information or views that the scholar elevates will be dutifully incorporated into deliberations. Yet, as I will explore next, the social role of challenging certainties may demand that the scholar breach norms in order to get attention.

C Deliberative Systems and Norm-Breaching Expression

When can a scholar justify reaching for norm-breaching expression? I argue that when deliberation fails, the scholar is released from fidelity to some social and formal norms governing expression. This may be necessary to achieve their social role of testing certainties. I make this argument through an analogy to civil disobedience, relying especially on the work of deliberative theorist William Smith who has extensively mapped civil disobedience in deliberative democracy.

Smith names three normative principles that characterise successful democratic deliberation: participation, distortion and information.[140] He argues that civil disobedience may be justified when one or more of these criteria fail. Disobedience is not justifiable until conventional methods are spent, a principle deliberative democrat Archon Fung calls 'exhaustion'.[141]

Civil disobedience is 'a constrained, communicative protest, contrary to law, that people engage in to support a change in governmental or nongovernmental practices'.[142] While civil disobedience is restricted to unlawful acts, norm-breaching expression only breaches soft law or social norms. The difference is insignificant; the essence is that the act is done with a willingness to bear consequences. Deliberative theorist Kimberley Brownlee describes this experience of sanction as a principle of 'non-evasion' where 'we bear the risks of honouring our convictions'.[143] Social or behavioural norms, both codified and uncodified, are comparable to law in this regard.

Disobedience in the deliberative frame contests deliberative failures that cannot be corrected using conventional deliberative communication.[144] Civil disobedience stimulates deliberation.[145] Smith describes civil disobedience as 'deliberative contestation' in that it aims to contribute to continued public deliberation while also contesting the failures of the deliberation.[146] Fung labels this perspective 'fidelity', a commitment by the disruptor to the value of deliberative process. Disobedience is a prosocial act in the sense of being productive and socially beneficial.[147] The

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140 William Smith, 'Democracy, Deliberation and Disobedience' (2004) 10(4) *Res Publica* 353, 356–60 <https://doi.org/10.1007/s11158-004-2327-5>.

141 Archon Fung, 'Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World' (2005) 33(3) *Political Theory* 397, 403 <https://doi.org/10.1177/0090591704271990>.

142 Smith, 'Deliberative Democratic Disobedience' (n 121) 106.

143 Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press, 2012) 37 <https://doi.org/10.1093/acprof:oso/9780199592944.001.0001>.

144 Smith, 'Deliberative Democratic Disobedience' (n 121) 107.

145 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 363.

146 Ibid.

147 Mark Diaz et al, 'Accounting for Offensive Speech as a Practice of Resistance' in Kanika Narang et al (eds), *The Sixth Workshop on Online Abuse and Harms: Proceedings of the Workshop* (Association for

failure of a criterion of successful deliberation gives rise to an attached justification for civil disobedience.

I note that these failures may occur in systems of different scales. While the discussion lends itself to contemplation of deliberative failure in a political community at large, the failure may occur within an academic discipline, a university community or potentially even within a university faculty or department.

I will now set out Smith's states of failed deliberation that justify civil disobedience. Throughout, I make an argument for how these criteria analogise to norm-breaching expression.

1 Participation

A deliberative democracy should be inclusive. Public deliberation 'should include all members of the relevant political community'.[148] Smith notes a tension between whether deliberation must include all who are *governed* by the relevant democratic institutions or whether, as Iris Marion Young argues, it must include all those *affected* by the decisions.[149] The latter is impractical, for instance, in domestic deliberation over foreign affairs, where it would be impossible to include all those affected by decisions. Smith proposes a compromise that deliberative democracy must include all those *governed* by a democratic institution and account for the *interests* of all those affected by decisions in the course of deliberation.[150] For example, deliberation in Country A about a matter of foreign affairs affecting Country B must account for the interests of the inhabitants of Country B.

The inclusivity principle yields the first justification for disobedience. Where deliberation has excluded people who are governed or has failed to account for the affected interests of those outside the deliberative community, a moral justification for disobedience arises.[151] This category of failure extends from clear cases of disenfranchisement to more oblique value judgements about consideration of interests.

What would a non-inclusive debate be in a scholarly context? If discriminatory deliberation marginalised the views of certain peoples, this would be non-inclusive. In the *Anderson* case, his presentation contended that media coverage of the Israel–Palestine conflict systematically discarded Palestinian interests.[152] This might justify some departure from conventional academic expression as Anderson appears to consider that the Palestinian interest is neglected in deliberations. In effect, he contends that deliberation has failed to be inclusive.

The case for norm-breaching expression will be weaker in defending the scholarly consensus or political mainstream. This intuition has a synergy with a traditional rationale for academic freedom as providing the means to test and

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Computational Linguistics, 2022) 192 <https://doi.org/10.18653/v1/2022.woah-1.18>.

148 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 356 (emphasis omitted).

149 Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000) 23.

150 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 357.

151 Ibid 364–5.

152 *Anderson* (n 16) 40–1 [85] (Kennett J).

challenge 'received wisdom'.[153] It is not apparent that a scholar can defend a consensus while critiquing the deliberative process that has privileged that view.

Consider the following example of a participation failure. In 2020, security studies scholars Alison Howell and Melanie Richter-Montpetit published an article with the provocative title 'Is Securitization Theory Racist?'.[154] They conclude that the dominant 'Copenhagen School' of security studies is 'structured … by civilizationism, methodological whiteness, and antiblack racism'.[155]

This publication is closer to the core of academic norms than many examples discussed in this article. However, it was deliberately inflammatory and some scholars implied the title was reckless and insulting.[156] A deliberative lens however suggests that if, as Howell and Richter-Montpetit contend, security studies is shaped by 'methodological and normative whiteness' and non-white perspectives are systematically excluded,[157] norm-breaching expression is likely justifiable to challenge this exclusion.

The deliberative systems prediction was apparently validated. The publication led to a cathartic outpouring over race in security studies in leading journals.[158] It seems it took a provocative and arguably 'uncollegial' article title to spur renewed deliberation.

2 Distortion

Democratic deliberation is characterised by persuasion, not coercion.[159] Smith concedes that absolute political equality is likely unachievable and favours a 'fair opportunity to influence democratic deliberation', or as a negative freedom, deliberation free from coercion.[160] If there are dominant political actors who coerce or intimidate other political actors, Smith argues this 'frustrates the sense in which decisions are made on the basis of reasons'.[161]

The distortion principle justifies civil disobedience when 'powerful groups are able to manipulate or bias the course and outcome of public deliberation to promote their own interests'.[162] Coercive influences disparage reason-giving and abrogate public deliberation. For example, a political donor threatening to

153 *Statute XII: Academic Staff and the Visitatorial Board*, University of Oxford (at 15 February 2017) s 1(1); *Education and Training Act 2020* (NZ) s 267(4)(a).

154 Alison Howell and Melanie Richter-Montpetit, 'Is Securitization Theory Racist? Civilizationism, Methodological Whiteness, and Antiblack Thought in the Copenhagen School' (2020) 51(1) *Security Dialogue* 3 <https://doi.org/10.1177/0967010619862921>.

155 Ibid 16.

156 Lene Hansen, 'Are "Core" Feminist Critiques of Securitization Theory Racist? A Reply to Alison Howell and Melanie Richter-Montpetit' (2020) 51(4) *Security Dialogue* 378, 379–80 <https://doi.org/10.1177/0967010620907198>.

157 Howell and Richter-Montpetit (n 154) 11.

158 See, eg, Mark B Salter et al, 'Race and Racism in Critical Security Studies' (2021) 52(Suppl 1) *Security Dialogue* 3 <https://doi.org/10.1177/09670106211038787>.

159 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 359.

160 Ibid.

161 Ibid.

162 Ibid 365.

withdraw donations to a politician unless they oppose a policy is not engaged in reason-giving.

Applied to norm-breaching expression, the scholar will be morally justified to use this speech form if they reasonably conclude deliberation is distorted. Examples that might readily found such a conclusion could be managerial pressure, philanthropic influences,[163] university–private sector partnerships,[164] foreign interference[165] and social interests.[166]

Consider the following example of a distortion failure. In December 2020, University of Mississippi Professor of History Garrett Felber was dismissed.[167] Felber's research focuses on racialised incarceration in the United States. Two months earlier, the University had blocked a USD42,000 grant Felber had been awarded for a program called 'Study and Struggle' which promoted a 'political education project on mass incarceration and immigrant detention'.[168] In the preceding year, journalists had revealed the efforts the University had undertaken to appease explicitly racist donors.[169] Soon after the grant was blocked, Felber tweeted that the University 'prioritizes racist donors over all else' and that 'this antiracist program threatens racist donor money'.[170] His dismissal followed soon after.

Felber's comments plausibly did contravene scholarly norms through invective directed towards donors, particularly in United States higher education context where philanthropy has an integrated role.[171] Regardless, norm-breaching expression is justified by his earnest and reasonable view that the management of the University was driven by a policy of appeasing the views of a conservative donor class. Financial power distorts the deliberative process, in this case, apparently restraining deliberation to political ends. The deliberative systems hypothesis was validated as Felber's choice to speak out spurred civil society interest and caused considerable scrutiny over the University's processes.[172]

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163 Evans and Stone (n 3) 141–3.

164 Ibid 143–6.

165 Ibid 129–34.

166 See, eg, Barendt (n 33) 297–314.

167 Christian Middleton, 'UM Fires History Professor Who Criticizes "Powerful, Racist Donors" and "Carceral State"', *Mississippi Free Press* (online, 15 December 2020) <https://www.mississippifreepress.org/um-fires-history-professor-who-criticizes-powerful-racist-donors-and-carceral-state/>.

168 Ibid.

169 Ashton Pittman, '"The Fabric is Torn in Oxford": UM Officials Decried Racism Publicly, Coddled it Privately', *Mississippi Free Press* (online, 2 August 2020) <https://www.mississippifreepress.org/the-fabric-is-torn-in-oxford-um-officials-decried-racism-publicly-coddled-it-privately/>.

170 Middleton (n 167).

171 See generally Andrew G Bonnell, 'Corporate Power and Academic Freedom' (2021) 63(1) *Australian Universities' Review* 19.

172 Henry Reichman, 'Faculty, We Have Met the Enemy, and It Is Us', *The Chronicle of Higher Education* (online, 9 August 2021) <https://www.chronicle.com/article/faculty-we-have-met-the-enemy-and-it-is-us>; John K Wilson, 'Open Letter to University of Mississippi Chancellor Boyce in Support of Garrett Felber', *Academe Blog* (Blog Post, 16 December 2020) <https://academeblog.org/2020/12/16/open-letter-to-university-of-mississippi-chancellor-boyce-in-support-of-garrett-felber/>.

3 Information

Democratic deliberation should incorporate relevant information and data into the process of deliberation.[173] Smith describes this principle as capturing the 'intuition … that a full defence of democratic deliberation will include some reference to the epistemic quality of deliberation'.[174] Deliberation is legitimising because it produces reasonable decisions, and reasonable decisions rest on assessment of accurate information and data. Smith argues that in conditions of wide circulation of information, deliberation will usually yield more informed outcomes.[175]

When deliberation is uninformed or misinformed, a justification for civil disobedience might arise. Smith is more hesitant about this justification; taken to extremes, it justifies technocratic rule which is distinctly opposed to deliberative principles. However, he emphasises deliberation being '*sufficiently* informed'.[176] For example, where deep-seated assumptions frustrate the consideration of information and opinions that support a different view, disobedience might be justifiable. This resolves to a concern for 'open-mindedness', where unwillingness to consider alternative information and views frustrates the reason-giving force of deliberation.[177]

Analogised to norm-breaching expression, this criterion may apply when the scholar holds an opinion that runs contrary to a substantial scholarly or popular consensus. If their perspective or new information was simply ignored rather than excluded (participation) or suppressed (coercion), this represents closed-mindedness that could justify norm-breaching expression. Equally, this justification will arise where a scholar discloses information of substantial public interest that would not gain commensurate interest if communicated through conventional channels.

Consider the following example of an information failure. In 2019, Murdoch University physicist Gerd Schröder-Turk gave public comments on an episode of the Australian Broadcasting Corporation's *Four Corners* where he alleged that the University was neglecting the welfare of international students by admitting students who did not meet the University's English language standards.[178] Critique of university governance is a recognised, albeit persecuted, exercise of academic freedom.

Murdoch University attempted to remove Schröder-Turk from his membership of the University Senate and sued for damages. Schröder-Turk's conduct was norm-breaching in that he departed from internal disclosure processes.[179] Schröder-Turk had earlier written to the Chancellor, but his concerns had not been addressed.[180] His

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173 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 359–60.

174 Ibid 360.

175 Ibid 361.

176 Ibid 368 (emphasis added).

177 Levy and Orr (n 133) 22.

178 Christopher Knaus, 'Murdoch University Sues Whistleblower after Comments on International Students', *The Guardian* (online, 11 October 2019) <https://www.theguardian.com/australia-news/2019/oct/11/murdoch-university-sues-whistleblower-after-comments-on-international-students>.

179 *Public Interest Disclosure Act 2003* (WA) s 5(3).

180 Elise Worthington, Sharon O'Neill and Naomi Selvaratnam, 'When Large Numbers of Students Started Failing, Alarm Bells Started Ringing for Academics', *ABC News* (online, 6 May 2019) <https://www.abc.net.au/news/2019-05-06/uni-academics-risk-jobs-to-speak-about-international-students/11082640>.

conduct is justifiable because he drew concerns about the University's recruitment practices into the 'spotlight'. If Schröder-Turk felt internal controls and oversight had failed, breaching professional norms and procedures appears to be justifiable.

D Conclusion

A deliberative systems frame embeds academic freedom in its social and political context. When deliberative conditions satisfy certain criteria, norm-breaching can be seen as a democratic necessity rather than an indiscretion. However, this analysis leaves undisturbed the question of how far the disobedient scholar can go, and at what cost to others. In the next Part, I ask what negative consequences of norm-breaching can be tolerated.

IV THE HARM OBJECTION

The moral and legal question facing university administrators and, eventually, courts as they parse disputes over norm-breaching expression is 'at what cost should we permit norm-breaching expression?' Further, do claims of harm arising from norm-breaching expression override the legal and moral arguments I have made? In Part II, I presented a doctrinal argument that norm-breaching expression is a protected exercise of academic freedom. In Part III, I presented a normative argument that justified norm-breaching expression as a protected exercise of academic freedom that contests failures in the deliberative system. In this Part, I synthesise these doctrinal and normative arguments to address a key objection in public debate and scholarly debate. That objection is the broad concept of harm.

Addressing this objection also addresses the counterargument contemplated by John Rawls that 'encouraging everyone to decide for himself' when disobedience is justified might 'invite anarchy' in a 'nearly just' democracy.[181] Addressing the harm objection concedes that norm-breaching expression is subject to limits.

I argue in this Part that administrators must take an approach I term 'systemic balancing' to considering the harms of norm-breaching expression. Systemic balancing tethers the weighing of interests between scholar and the individual claiming harm to a higher value of deliberation because academic freedom has systemic importance. This approach refuses to accept zero-sum framing between freedom and harm. Sanctions can be justified through systemic balancing but are treated with caution. I will demonstrate that the FMC permits a systemic balancing approach and apply this method to the *Ridd* facts to yield an arguably superior outcome.

A Harm Claims

As norms are breached, the occasion arises for claims of harm to be made. Similar to the *Ridd* case, scholars subjected to invective scholarly criticisms may complain of distress or embarrassment. The Federal Court found Anderson's superimposition

181 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 373, quoting John Rawls, *A Theory of Justice* (Oxford University Press, 1972) 389.

of Nazi symbolism on the flag of Israel to be 'deeply offensive and insensitive to Jewish people'.[182] The lecturer who swears while expressing a contentious point or the researcher who publishes an article ridiculing a colleague's work are all vulnerable to such claims from their students or colleagues, however trivial or profound. Sometimes these harm claims describe harm actually experienced. In other cases, including *Anderson*, decision-makers rely on assumptions about what would be likely to harm particular classes of people.[183]

There is lengthy theoretical and empirical literature that debates harm claims.[184] Theories of stochastic terror posit that hateful language or misinformation can inspire unpredictable acts of political violence.[185] Moreover, for almost half a century, there has been a prolific view that hateful words may represent an actual harm comparable to physical injury. This was powerfully set out in Richard Delgado's seminal article 'Words that Wound', where he argued that the harms of racial hate are of a tangible type that a tort action could recognise.[186] It suffices to say, the 'sticks and stones' aphorism attracts less sympathy today.

Harm claims and norm-breaching expression, admittedly, are not always coupled. Some harm claims arise from conventional academic expression, for instance, a student distressed by instruction on confronting topics. Similarly, not all norm-breaching expressions produce harm claims. For instance, the lecturer who swears in the course of their lecture only to humorous effect may cause no harm. However, I think it matters little to exclude these cases from the analysis.

B Systemic Balancing

In this section I will show why conceptual balancing – a 'zero-sum form of reasoning about political values'[187] – is deficient in reasoning through the harm objection and that systemic balancing should be preferred. There is a temptation when faced with seemingly conflicting interests to place them on scales and to favour the weightier concern. However, weighing the interest of the scholar in free expression against the interest of an individual in their wellbeing obscures the systemic implications of the question. A systemic insight reminds us that the scholar and harmed person cohabit in the same deliberative environment and have shared interests. Even a person alleging harm has an interest in healthy deliberation.

The scales metaphor that characterises conceptual balancing does not accommodate shared interests. A vibrant culture of academic freedom including

182 *National Tertiary Education Industry Union v University of Sydney* (2021) 309 IR 159, 227 [268] (Jagot and Rangiah JJ).

183 Ibid.

184 See, eg, Andrea Millwood Hargrave and Sonia Livingstone, *Harm and Offence in Media Content: A Review of the Evidence* (Intellect Books, 2nd ed, 2009).

185 James Angove, 'Stochastic Terrorism: Critical Reflections on an Emerging Concept' (2024) 17(1) *Critical Studies on Terrorism* 21, 22–3 <https://doi.org/10.1080/17539153.2024.2305742>.

186 Richard Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling' (1982) 17(1) *Harvard Civil Rights-Civil Liberties Law Review* 133. See also from a feminist perspective: Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993) <https://doi.org/10.2307/j.ctvjk2xs7>.

187 Levy and Orr (n 133) 13, 60–4.

norm-breaching expression may improve democracy more broadly. The interests of the person making the harm claim are not wholly divisible from the positive externality of academic freedom. They cohabit in the same political space. Even when a student complains of harm arising from comments made by their lecturer, the student also has some interest in the protection of that scholar; the student benefits from the epistemic functions of a deliberative democracy.

The deliberative literature on civil disobedience has generally failed to provide a satisfactory answer to this problem. Young acknowledges that the extent of '[m]orally acceptable [civil disobedience] tactics are much disputed' but decides to avoid 'enter[ing] these debates'.[188] She leaves open the question of how far activists can go in breaking norms and law. Fung favours proportionality analysis: 'the choice of means should be scaled according to the extent to which political adversaries and opponents reject the procedural norms of deliberation'.[189] Fung's approach has more substance than Young's, but remains difficult to apply to a complaint of harm and could, in a case of immense deliberative failures, justify profoundly harmful norm-breaching expression.

I respond to the deficiencies of conceptual balancing by supplying a concept I call 'systemic balancing' where the analysis of the dispute foregrounds the deliberative and systemic implications of any decision.[190] Where conceptual balancing sees the disruptive scholar and harmed person as irredeemably opposed with rivalrous interests (illustrated in Table 1), systemic balancing identifies shared interests arising from a shared deliberative system (illustrated in Table 2).

How does a systemic balancing approach operate? We first recognise that there are values to be 'balanced' that are shared between the conflicting parties. I have already explained that the interest in a free academic community is shared. However, the safety of participants is also shared as we recognise that deliberation cannot take place in conditions of coercion. We may acknowledge non-systemic interests, such as feelings of discomfort, however not when they are incompatible with deliberative values. A systemic balancing analysis might consider whether sanctioning the norm-breaching scholar would improve the quality of deliberation and whether the harm claimed is of a type that represents a coercion or exclusion from participation in deliberation. Many of the interests that conceptual balancing would regard as partisan interests are incorporated into systemic analysis. For instance, the interests of the harmed person in avoiding discrimination represent a systemic interest in non-coercion.

Systemic balancing requires discounting interests incompatible with deliberative values. A university administrator might feel apprehension about public criticism should a disciplinary decision fall one way or another. Fear of scrutiny cannot square with the higher value of deliberation – indeed, it is counterposed. A concern of philanthropic reprisal in response to a decision is similarly incapable of recognition; it is coercive.

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188 Iris Marion Young, 'Activist Challenges to Deliberative Democracy' (2001) 29(5) *Political Theory* 670, 673–4 <https://doi.org/10.1177/0090591701029005004>.

189 Fung (n 141) 403.

190 Inspired by 'accommodative balancing' in Levy and Orr (n 133) 58–61, 108.

Table 1: Balancing under 'Conceptual Balancing'

Norm-breaching scholar's interests	Harmed person's interests
Academic freedom	Personal dignity / psychosocial interests
Advancement of teaching and knowledge	Collective interests (dignity of identity group)
Academic and personal reputation	Prevention of future harm
Pecuniary interest in on-going employment	Desire for harm to be recognised through sanction

Table 2: Balancing under 'Systemic Balancing'

Norm-breaching scholar's interests	Systemic interests	Harmed person's interests
Academic and personal reputation Pecuniary interest in ongoing employment	Health of the deliberative system (including safety of participants and conditions for ongoing deliberation)	Desire for harm to be recognised through sanction

There will undoubtedly be cases of norm-breaching expression where the systemic balance favours sanctions. Incitement of violence, criminal implications aside, jeopardises the deliberative system by introducing an extreme form of coercion. The systemic interests favour sanction. Similarly, abusive language towards marginalised students in a class may create a further deliberative failure. However, there may be cases where the earnest feelings of the person claiming harm cannot be validated by sanction. A scholar's expression may cause outrage but to punish it would chill deliberation more broadly.

Consider the following example. In 2022, Erika López Prater was teaching her class on global art history at Hamline University in the United States.[191] Aware of sensitivities in depictions of religious figures, she warned in the class syllabus that images of holy figures, including the Prophet Muhammad would be shown. Before showing an image of the Prophet, she warned students again in case students with concerns wished to leave. After she showed the 14th century painting to the class, some Muslim students complained. The display of the image was, they argued, an attack on their faith. Other Muslim scholars later defended Prater. The University sided with the complainants and terminated Prater's employment, saying that the Muslim students' interests should have 'superseded academic freedom'.[192]

Conceptual balancing compares Prater's interest in her reputation and career with the students' claimed faith-based interests. A systemic balancing approach acknowledges deeper interests. Certainly, there is a potential chilling effect on the teaching of religious art. More than that, surely Muslim students, a religious

191 Vimal Patel, 'A Lecturer Showed a Painting of the Prophet Muhammad. She Lost Her Job.', *The New York Times* (online, 20 June 2023) <https://www.nytimes.com/2023/01/08/us/hamline-university-islam-prophet-muhammad.html>.

192 Ibid.

minority, themselves have an interest in the maintenance of pluralistic expressive conditions. Few need expressive freedoms as much as a marginalised religious minority. A conceptual balancing approach is insensible to the democratic consequences of academic freedom while a systemic balancing approach brings a richer perspective.

C Applying the FMC

The FMC permits, if not prefers, a systemic balancing approach to determining claims of harm. The FMC provides that scholars enjoy academic freedom subject only to restrictions imposed by law and the 'reasonable and proportionate regulation necessary' to discharge a discrete set of purposes, most relevantly, the university's 'duty to foster the wellbeing of students and staff' ('wellbeing duty').[193] This is best seen as a presumption in favour of the freedom of the scholar, rebuttable by a contrary duty in university policy that is reasonable and proportionate in service of the wellbeing duty. The wellbeing duty is given an open definition in the FMC. It:

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects; and
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.[194]

I draw attention to three characteristics of this definition. First, the named categories map to criteria for successful deliberation. Second, the objective construction favours systemic balancing. Third, the final excluded category gestures towards a systemic taxonomy of harm claims.

The objective to prevent 'unfair disadvantage or unfair adverse discrimination' based on protected characteristics points to the deliberative criterion that successful deliberation 'should include all members of the relevant political community'.[195] Discrimination inhibits participation. '[T]hreatening and intimidating behaviour' and humiliation or intimidation is coercive conduct that undermines the deliberative value of a 'fair opportunity to influence democratic deliberation'.[196] The FMC recognises deliberative harms as legitimate objects of prohibitive regulation.

193 French (n 15) 297.
194 Ibid.
195 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 356 (emphasis omitted).
196 Ibid 359.

The humiliation and intimidation criteria appear more concerned with deliberation at a systemic level than a bilateral level. The clause recognises objective conduct rather than subjective claims about conduct. Regulation made under this head of the definition can only prohibit lawful speech to the extent that 'a *reasonable person* would regard [the speech], in the circumstances, as *likely* to' humiliate or intimidate the other person and that the speech is '*intended*' to intimidate and/or humiliate.[197] If the FMC were concerned with subjective experiences of harm as an equal or greater interest to systemic interests in deliberation, this criterion would use subjective terms: lawful speech that causes another person to feel humiliated or intimidated. The objective framing prevents 'egg shell skull' reasoning that a person who is unusually (or unreasonably) vulnerable to intimidation or humiliation could validate a greater encroachment on the freedom of the scholar.[198] The reasonable person test is invariably a gesture towards some sense of 'ordinariness or normalcy', the sensibilities of citizens in aggregate.[199] The FMC seeks to avoid the scholar self-censoring because they do not know how vulnerable their audience is. This is a concern for the systemic value of deliberation.

Similarly, the excluded category of 'feeling offended or shocked or insulted' by another person's lawful speech points to the FMC's objective instincts. Offence, shock and insult are named, I think, because they defy objective application and have uncertain systemic impacts. Why not construct the final clause like the penultimate, referencing some concept of a reasonable person and intent? Although offence, shock and insult are not words entirely unknown to the law,[200] it is possible that French doubted the ability of the non-judicial decision-makers to make the fine-grained distinction between what would offend/shock/insult a reasonable person (an objective test) and what did, it is claimed, offend/shock/insult an actual person (a subjective test). Perhaps humiliation and intimidation, being more extreme, are easier to apply in objective terms. Even if this speculation is wrong, I think the clause may manifest the legacy of the intellectual tradition to which I have referred through this article, that universities have a disruptive function. Negative subjective feelings that issue from scholarly disruption cannot justify restrictions or else the prosocial function of the disruptive scholar is lost.

D Revisiting *Ridd*

In this section I will revisit the *Ridd* case to examine how it could be determined today under the FMC with a systemic balancing approach. I reduce the facts of *Ridd* to eliminate the subsequent breaches of confidentiality. I assume that the relevant enterprise agreement clauses and academic freedom policy mimic the FMC text, the emerging trend I identified in Part II.

197 French (n 15) 297 (emphasis added).

198 *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501, 536–7 (McHugh JA).

199 Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14(4) *Lewis and Clark Law Review* 1233, 1236.

200 See, eg, *Racial Discrimination Act 1975* (Cth) s 18C(1)(a).

Following Ridd's comments to the media, JCU claimed he had failed to act in a 'collegial way' and he was directed that future comments must be made 'in a collegial manner that upholds the University and individuals [sic] respect'.[201] The University further claimed that his criticism was not made 'in the collegial and academic spirit of the search for knowledge, understanding and truth' and was not 'respectful and courteous'.[202] These are claims of harm to the University and its staff through disrespect and a lack of collegiality.

Does a systemic balancing analysis under the FMC identify a countervailing interest rebutting academic freedom? University policies that may penalise such speech operate only if it is an interest capable of recognition under a head of the wellbeing duty. Otherwise, the university policies are inoperative as the FMC policy prevails to the extent of the inconsistency.

We start by identifying the systemic interests in balance: deliberation and the conditions that enable deliberation. There are also personal interests: the reputations, comfort and livelihood of Ridd and the people he criticised. The University's claims stopped short of an implausible claim that Ridd's comments were threatening, intimidating or discriminatory, and rightly so. The question reduces to whether Ridd's comments were humiliating. Understanding the description of humiliation in the FMC text as an objective test, with a concern for deliberation conditions, we ask whether there was deliberative exclusion or coercion. Sharp, scholarly critiques do not foreclose a 'fair opportunity to influence democratic deliberation'.[203] Moreover, mutual critique is essential to scholars fulfilling their democratic function of testing truth claims. Applying a deliberative lens, his comments cannot be 'humiliation'. Moreover, a sanction against Ridd plausibly has a systemic chilling effect on academic expression, weighing further against sanctions.

The FMC's wellbeing duty invites the decision-maker to consider whether any person claiming to be humiliated by Ridd's comments is 'humiliated' or 'offended'. The answer is surely that they are offended. Given that no head of the wellbeing duty applies, the FMC would invalidate the JCU Code of Conduct to the extent of the inconsistency.

E Conclusion

The harm objection is powerful and must not be dismissed out of hand. However, claims of harm equally must not be treated as perfunctory caveats to academic freedom. In the emerging 'FMC world', Ridd's comments would be protected exercises of academic freedom. This conclusion is compatible with disdain for his methods and scepticism towards his substantive views. A systemic balancing approach means we do not have to pick sides. Interests are shared because we cohabit in a political community.

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201 James Cook University, 'Chronology', Submission in *Ridd v James Cook University*, B12/2021, 15 April 2021, 3.

202 *Ridd* (n 1) 525 [50] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

203 Smith, 'Democracy, Deliberation and Disobedience' (n 140) 359.

V CONCLUSION

The controversies that universities face seem indomitable. I side with Joan Wallach Scott's observation that the scholarly vocation of 'knowledge production … critical of prevailing norms' will invariably '[incur] the wrath of partisans of those norms, who seek to defend their integrity and their truth'.[204] Academic freedom is the principle that governs these conflicts and the positive argument in favour of freedom.

However, the norm-breaching expression case is particular. It challenges conventional theories of academic freedom because flouting norms exposes the differences in how scholars think about their social role. Few would deny that scholars have a role to bring new information and perspectives before society. However, admitting a role for norm-breaching expression admits something more confronting: that information and ideas might only have limited independent locomotion. The norm-breaching scholar recognises that their ideas may need to be put out into the world with a push.

As a theoretical insight, this is a recognition that deliberation is not a perpetual motion machine. Deliberation can stall and be obstructed. Jürgen Habermas's 'forceless force' of the better argument appears enfeebled in an environment of friction.[205] A systems approach permits a deliberative lens to survive the frictions of democracy-at-scale. It furnishes us with a moral justification for the equal and opposite force that is required to sustain deliberation at the systemic level.

The harm objection looms over these conversations. This article moves beyond dealing with this objection as a perfunctory caveat to academic freedom. Without a principled method to engage with harm claims, these claims may corrode academic freedom. I have presented a method to integrate recognition of harm claims into the general justification for academic freedom.

This article is as much as anything an attempt to defend universities and the principles that govern them. These institutions – lauded and denounced, sheltered then pilloried – are part of the infrastructure of our democracy. With this perspective, the norm-breaching scholar might just be doing their civic duty.

204 Joan Wallach Scott, 'Academic Freedom and the Politics of the University' (2024) 153(3) *Daedalus* 149, 150 <https://doi.org/10.1162/daed_a_02095>.

205 Habermas, *Between Facts and Norms* (n 117) 24.