

Quiet Down There!

The Discourse of Academic Freedom as Defence of Hierarchy in the Aftermath of J. Michael Bailey's The Man Who Would Be Queen

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I. Introduction: Focus and Limits

For the purposes of these remarks, I will assume that Alice Dreger and J. Michael Bailey, along with David Horowitz, Lynne Cheney, and many others over the past several years, are quite sincere in their vociferous defence of what they call "academic freedom". I make this assumption not because I believe it to be the only reasonable interpretation of the relevant facts, but because their sincerity, or lack thereof, is ultimately irrelevant to the question at hand, specifically:

What is the nature of the "academic freedom" that Bailey, Dreger, et al. are so forcefully defending?

Because of the narrow question presented, there will be no detailed discussion of such interesting subjects as the scientific status of J. Michael Bailey's *The Man Who Would Be Queen* (TMWWBQ) or the underlying work by Blanchard et al. on which that book was almost exclusively based. These matters have been discussed exhaustively elsewhere by myself and others. Nor do I intend to discuss the veracity of allegations that Bailey had sexual relations with at least one of his research subjects; to the extent that this matter is discussed at all, it is for the purpose of situating Bailey's public remarks on the propriety of such conduct within the overall framework of the "academic freedom" at issue.

In examining the nature of the freedom so vigorously defended by Bailey et al., I will not make assumptions based on common usage or dictionary definitions. Instead, I will ascertain the contours of "academic freedom" à la Bailey, Dreger et al. based on the specific conduct they claim violates it. Only by taking them at their word and looking in the directions in which they point us can we truly begin to comprehend their understanding of the concept and situate this understanding within its proper historical and political context.

II. Freedom and its Defenders

"Academic Freedom": Content and Boundaries

In order to determine the contours of the academic freedom defended by Bailey, Dreger, et al., it is initially instructive to ask what conduct, in their view, falls within its scope, either as an exercise or a permissible defence of academic freedom. As strident

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defenders of academic freedom, it is reasonable to assume that they would not engage in any conduct that they themselves considered to be violative of it.

It should be noted here that we are concerned with the *minimum scope* of Bailey-Dreger academic freedom (BDAF). Given the limited data available, it would be difficult, if not impossible, to locate the outer limits of BDAF; however, based on the conduct of Bailey and Dreger themselves, and the conduct assailed by them as violative of academic freedom, we can determine what, at a bare minimum, it includes, and how, at a minimum, it can be violated.

In examining the right of academic freedom asserted by Bailey and Dreger, it is useful to start by asking who are the beneficiaries and addressees of the right, i.e., who can assert the right, and against whom.

The second prong of the question is also the simpler of the two. Bailey-Dreger academic freedom may be asserted against *anyone*. There is no limitation - as is customary in legal definitions of academic freedom - to state and quasi-state actors. Here, for example, Bailey and Dreger have asserted that their academic freedom has been violated by fellow academics, a graduate student, and persons entirely outside of the academic establishment.

At first glance, it may seem obvious who can claim the protection of Bailey-Dreger academic freedom. Based on the cases in which Bailey and Dreger have asserted that his or their academic freedom has been violated, it might appear that BDAF is a purely status-based right: a person holding an academic position may assert the right with regard to conduct of any kind, even when, as in the case of *TMWWBQ*, the asserting party expressly disavows any intention of engaging in scholarly activities.

However, this picture omits an important aspect: Bailey and Dreger assert that their academic freedom has been violated by conduct - including conduct by persons holding academic positions - that is virtually indistinguishable from the conduct they assert is protected by academic freedom when engaged in by them. Indeed, the only meaningful difference between the conduct that Bailey and Dreger consider to be protected by their version of academic freedom and the conduct they consider to be a violation of their version of academic freedom is that the protected conduct is their own, whereas the (virtually indistinguishable) violative conduct is that of their critics.

Thus, as we will see, Bailey-Dreger academic freedom accords heightened protection to their right as academics to engage in whatever conduct they wish, while prohibiting any criticism of that conduct by anyone. There is no requirement that their conduct be scholarly in nature, nor that those against whom the right is asserted be state actors.

Let us turn, then, to the most peculiar feature of Bailey-Dreger academic freedom, namely, the lack of any requirement that the underlying conduct be scholarly in nature. It should be noted that, with regard to *TMWWBQ*, there are two paths by which this

conclusion can be reached: either, as Bailey now claims, he had no intention of engaging in scientific research, but rather merely wished to create the impression that he had done so by means of the book's title ("The Science of Gender Bending and Transsexualism"), marketing materials ("based on his original research"), and numerous allusions to "our study" and the like in the book itself; or, as the book itself indicates, Bailey did in fact intend *TMWWBQ* to be a work of science, but did so poorly. Whether one chooses to credit the version offered by Bailey in his book, or the version offered in response to criticisms of the book, the conduct in question need not be scholarly or scientific; anything written by a professor will do.

Case Study I: "Sympathetic" is in the eye of the beholder

For the most part, the criticism of *TMWWBQ*, unlike the book itself, has been a fairly decorous affair, conducted at the level of fact, research, science, and ethics. Thus, there has only been one case in which the criticism can be considered to have even approached the edge of the minimum scope of the conduct protected by Bailey-Dreger academic freedom: the captions placed by Andrea James on publicly available photographs of Bailey's children.

However, before we conclude that this conduct is analogous to Bailey's, certain distinguishing factors must be taken into account. Of these, the most important distinction is the *intent*. Unlike Bailey's portrayal of transsexual women as inherently deceptive beings who transition either to enhance their masturbatory activities or to bed as many heterosexual men as possible (the latter group being "especially suited to prostitution" and "especially motivated" to commit theft), Andrea James was by no means seeking to convince her audience of the truth of her captions. To my knowledge, not even Bailey and Dreger claim that James' captions were intended as factual assertions, nor has James at any time asserted that there was a scientific or other factual basis for the content of those captions.

Rather, James' purpose was to point out to those who saw the captions how they would feel if the labels Bailey calls "sympathetic" when aimed at trans women were instead directed at their own children. Furthermore, in response to the entirely predictable outrage, James - who, whatever one may think of the method, had already proved her point - issued an apology and removed the offending pictures from her website.

This indisputably (and intentionally) offensive act, of which much has been made by Bailey & Co., stands in stark contrast to Bailey's own conduct, conduct that clearly falls within the heightened protection of Bailey-Dreger academic freedom. It is uncontroversial that the epithets Bailey directed at trans women as a group were meant to be taken as fact. Indeed, they are printed in a book that proclaims itself "the science" on the subject, a book based on Bailey's "original research".

While Bailey has not always been entirely consistent on whether the book is to be treated as a scientific work (depending on whether he wishes to claim the authority of science or duck the responsibility that comes with it), he has never suggested that

TMWWBQ was intended as a satire or parody of certain fields of science; indeed, the one matter on which he has not wavered is the fundamental scientific accuracy of his proclamation that all trans women are liars seeking to live out sexual fantasies. Any clinician or researcher who begs to differ is "squeamish" or "not scholarly enough", and, accordingly, does not even deserve to be mentioned by name.

Page after page, he asserts that his characterisations of trans women are "scientific" and "the truth", regardless of what those notoriously deceptive trans women might have you believe. Bailey has issued no apology, retraction, or qualification, and *TMWWBQ* continues to be touted as "The Science of Gender Bending and Transsexualism" and marketed as "based on his original research".

With those caveats in mind, we are left with two instances of virtually identical conduct, in one case, that of J. Michael Bailey, in the other, that of Andrea James, one of Bailey's most vocal trans critics. Alice Dreger, in her lengthy defence of Bailey, describes James' conduct as a "disgust[ing]", "unethical" "intimidation tactic", rendering James "not the sort of person who [is] good for a scholarly institution nor the sort who [is] good for trans rights." Interested readers will search in vain for such harsh terms to be used to describe what Dreger calls "Bailey's alleged treatment of transsexuals in his book" (Dreger, p. 4)².

It is important to reiterate here that the question is not whose conduct deserves what degree of condemnation. Unless one believes that trans women, as a class, deserve less dignity and respect than professors' children, that question is easily disposed of. Rather, the question is: what do these two substantially similar cases tell us about the nature of the "academic freedom" Bailey and Dreger are committed to defending? This is a particularly instructive case because Bailey's conduct is treated as a protected exercise of academic freedom, whereas James' "parody" (to use Dreger's own term) is a violation of that same freedom.

Clearly, there must be some crucial distinction that leads these two examples to fall on completely opposite ends of the spectrum of Bailey-Dreger academic freedom. Certainly, it cannot be the fact that James' conduct was not scholarly in nature and did not seek to assert or establish a matter of scientific fact. Neither James nor anyone else has claimed that her conduct was intended as an assertion of scientific fact, and Bailey has been at great pains to disavow any attempt to create a work of scholarship on his part. Nor can it be the content of James' captions or Bailey's book. If anything, if the judgment were based on content alone, James' captions - which make no factual assertions, were retracted and taken out of circulation, and were intended as a parody - would be trivial in comparison to a work that makes, as categorical, scientific fact, similar assertions about an entire class of people. Similarly, it cannot be a question of the relative "innocence" of the victim; trans women, as a class, were not "asking for" this sort of treatment any more than were Bailey's children. Nor can the crucial distinction be a matter of choice of words. If anything, James' use of slang and expletives makes it clear that the assertions are not to be

² References to "Dreger" refer to Dreger, A.D., *The Controversy Surrounding The Man Who Would Be Queen: A Case History of the Politics of Science, Identity, and Sex in the Internet Age*, Archives of Sexual Behavior, 2007.

taken seriously as a matter of fact, whereas Bailey's prose further seeks to lend the authority of science to his labels.

Yet, the one - to return to Dreger's description - is a disgusting, unethical intimidation tactic unbecoming a scholarly institution and damaging to trans rights and academic freedom, while the other is merely a permissible, protected *exercise* of academic freedom.

Having exhausted all content- and style-based possibilities, we are left with matters of status. Bailey is a tenured academic at a respected institution, who is thus accorded the privilege to define and categorise. James is a trans woman, worthy only of being the object of the definitions and categorisations bestowed upon her by the guardians of received knowledge. James' conduct upsets the order of things, whereas Bailey's *is* the order of things.

Case Study II: "Not that there's anything wrong with it."

This order of things becomes clearer as we move on to another instructive episode for our analysis of Bailey-Dreger academic freedom. In the course of the investigation by Lynn Conway et al. into *TMWWBQ* and its making, Bailey was accused by one of his research subjects, who has come to be known as "Juanita", of having had sexual relations with her. It bears repeating at this point that we are not concerned here with the accusation itself - which Bailey has, albeit equivocally, denied - but with what the Bailey-Dreger treatment of the accusations tells us about the nature of Bailey-Dreger academic freedom.

In his search for material to include in *TMWWBQ*, Bailey posed as a clinical psychologist evaluating trans women for sex-reassignment surgery (SRS) approval letters. While he was not, at any relevant time, licensed to practice as a clinical psychologist in the state of Illinois, he was able to avoid legal sanction for practicing without a license because he did not receive payment in exchange for his services, as required by the relevant Illinois statute³. In this context, he became acquainted with "Juanita", who has since accused him of having had sexual relations with her.

Bailey addresses this accusation in his *Academic McCarthyism*⁴. Because it is so instructive, his response is reproduced in its entirety below:

Sex With a "Research Subject." This charge was clearly intended to embarrass me rather than to protect a research subject. *The complainant was, after all, a prostitute.* I offer two responses.

First, there is nothing intrinsically wrong or forbidden about having sex with a research subject (and I insist that Juanita was not a research subject). Some of my colleagues have had sex with their research subjects, because it is not unusual to ask one's romantic partner to be a subject.

Even if Juanita's complaint were true, there is nothing wrong with what she claims. But her "complaint" is

3 See 225 ILCS 15 §2(6) (providing that a person only "represents himself to be a clinical psychologist" within the meaning of the Illinois Clinical Psychologist Licensing Act when he offers relevant services "for remuneration".)

4 Bailey, J.M., *Academic McCarthyism*, Northwestern Chronicle, 10/09/2005, <http://www.chron.org/tools/viewart.php?artid=1248>, last accessed on 19 June 2008.

not true. The alleged event never happened. If I ever needed to do so, I could prove this, but there is no reason why I should⁵.

Of the 125 words Bailey dedicates to "Juanita's" charge, only 30 are dedicated to actually denying that he had sexual relations with her, with an additional 10 dedicated to denying that "Juanita" was in fact a research subject. We need not tarry on this material. Ultimately, whether to credit the accusation or the denial is a credibility judgment, and Bailey has provided more than enough material for interested individuals to reach their own conclusions on his credibility.

What is, however, of interest in Bailey's response to "Juanita's" charges are his more general assertions on the propriety of the conduct of which he is accused. We begin by noting that "the complainant was, after all, a prostitute", and therefore, apparently, is forever estopped from objecting to, or claiming to have been harmed by, any sexual encounter. Having reminded readers of the complainant's all-important status, he proceeds to inform us that, even were "Juanita" a full-fledged human being with the attendant rights of sexual autonomy, it is perfectly right and proper to have sex with one's research subjects. Indeed, he informs us, he knows people who have had sex with their research subjects "because it is not unusual to ask one's romantic partner to be a subject."

Thus, for the purposes of determining what conduct is protected by Bailey-Dreger academic freedom, there is no difference between asking one's romantic partner to participate, say, in a memory study, and posing as a clinical psychologist, providing unlicensed evaluation services in that guise in order to glean intimate details about one's "patient's" sex life, and then, having established the relationship thusly, having sexual relations with one's unwitting research subject. Nor does it make any difference that one is posing as a person with the power to grant or deny access to a treatment the unwitting research subject/"patient" desperately needs. Indeed, the overall context of the relationship - of whatever sort it may have been - with "Juanita" is so irrelevant to the question of the propriety of Bailey's conduct that he does not even address it.

Nor does he address the propriety of having sex with a person with whom one has a clinical psychologist-client relationship, though it seems reasonable to take his silence on the issue as an indication that this conduct, too, is protected by Bailey-Dreger academic freedom and therefore immune from criticism⁶. And if the complainant is a sex worker, the matter is clearly not worthy of even that cursory treatment.

That is not to say that there is nothing objectionable or harmful about such matters. However, as Dreger points out in her defence of Bailey, perhaps we should keep things in perspective. The public criticism of *TMWWBQ* and Bailey's conduct in producing and marketing the book "came remarkably close to effectively destroying J. Michael Bailey's reputation and life" (Dreger, p. 52). Whether the publication of a purportedly scientific book branding all trans women as lying erotomaniacs might have had psychological, personal, legal, and professional consequences for trans women, on the other hand, is

⁵ *Id.*, (emphasis supplied)

⁶ It is, however, worthwhile to note that the Illinois legislature has been less reticent on the subject, and, in 740 ILCS 140 § 2 *et seq.*, has declared such conduct tortious, expressly extending the cause of action to "unlicensed mental health professionals" such as Bailey.

irrelevant. Under the Bailey-Dreger doctrine, consequences matter only to the extent that they harm worthy victims.

Thus, it appears that whether trans women, as a group, are entitled to the same level of dignity and respect as professors and their children is a matter of some controversy, after all.

Case Study III: Holding the line

One of the most interesting case studies in the Bailey-Dreger doctrine arose in response to the call for proposals that led to the present panel discussion. In her CFP, which was posted on the Women's Studies listserv WMST-L, Joelle Ruby Ryan gave the following accurate summary of the *TMWWBQ* controversy:

While Bailey's book *The Man Who Would be Queen* was released in 2003 to overwhelmingly negative reviews, the book caused a stir for its assertion that trans women can be split into two groupings: "homosexual transsexuals" and "autogynephilics." Trans activists and allies mobilized and took Bailey to task for his bogus claims and helped to document a compelling case against him. Many considered it an open-and-shut case until the 2007 appearance of an article by Bailey colleague and intersex researcher Alice Dreger, who published a lengthy apologia for Bailey in the *Archives of Sexual Behavior* and castigated trans women activists for their attempts at "ruining" Bailey.

In her CFP, Ryan raised a number of issues as potential topics for discussion, including the accusations of research misconduct, the propagation of "master narratives" harmful to trans women, and Bailey's advocacy of a "parental right" to test for a supposed "gay gene" *in utero* for the purpose of selective abortion (described by many, including Ryan, as "eugenics").

Dreger immediately attacked Ryan's CFP, claiming that it was "laden with factual errors and misrepresentations about the history of the Bailey controversy and [Dreger's] work⁷." Of particular interest to our discussion is that Dreger frames Ryan's CFP - though not in so many words - as a threat to (Bailey-Dreger) academic freedom:

In this work, I trace what happened to Bailey, a sex researcher who said some politically unpopular things.. What happened to Bailey was shocking and important enough that my findings were covered in the *New York Times* a few weeks ago[...] I encourage scholars in Women's Studies to read my paper because I think they are in danger of similar things happening to them, since they often say politically unpopular things⁸.

It is worth noting that Dreger did not provide any examples of the alleged factual errors or misrepresentations. Indeed, on the following day, in an exchange on the same listserv with Emi Koyama, Dreger still does not supply any specifics, though she does add an adjective. The alleged misrepresentations are now "profound⁹", though they remain unspecified. Nor do Dreger's accusations increase in specificity on the following day, though they do increase in intensity:

7 Dreger, A.D., p.e.c. on WMST-L, 19 Sept. 2007

8 *Id.*, URL omitted.

9 Dreger, A.D., p.e.c. on WMST-L, 20 Sept. 2007

I also appreciate your advising Joelle Ruby Ryan " that *she was putting herself at risk as a scholar* working within a controversial field (trans issues) by tolerating tactics that breed fear and stifle academic freedom." I would add that one is not acting like a scholar when one *repeatedly* misrepresents facts and the work of other scholars, as Ms. Ryan did in her CFP¹⁰.

A month later, little has changed. The unspecified alleged misrepresentations in Ryan's CFP have now been upgraded to "defam[ation]"¹¹. Dreger now asks: "Should I sit around and let someone say false, harmful things about me and my work, just because I'm not as oppressed as them? (Would you?)"¹²

After the unspecified accusations against Ryan have hung in the air on WMST-L for over a month, Koyama¹³ suggests that Dreger might wish to provide something in the way of actual substantiation of her repeated claims of misrepresentations, profound misrepresentations, and defamation. "No problem," Dreger responds¹⁴. Why it apparently *had* been a problem for over a month prior to Dreger's e-mail of 23 October, 2007 is, of course, beyond the scope of this work.

Ultimately, it turns out that Dreger's accusations refer to Ryan's characterisation of Dreger's 62-page defence of Bailey as "a lengthy apologia", Ryan's reference to Bailey's advocacy of what could reasonably be called "eugenics" and what is euphemistically called "reparative therapy", Ryan's statement that Bailey was accused of having sex with a research subject, and Ryan's reference to "master narratives" harmful to trans people¹⁵. The first of these "profound", "libelous" "misrepresentations" is a statement of opinion, a characterisation of Dreger's "scholarly history" with which Dreger does not agree. The "eugenics" comment is a matter of interpretation; reasonable people can differ on whether it constitutes eugenics to put the power to eliminate gay people from the gene pool in the hands of individual prospective parents. As for the "reparative therapy" reference, anyone familiar with the "Danny" narrative in Bailey's *TMWWBQ* is aware that the claim is accurate. What constitutes a harmful "master narrative", on the other hand, is another matter of opinion.

Having thus outlined her *casus belli*, Dreger announces that:

A lot of scholars (including several ethicists I saw at ASBH this past weekend) have outright begged me to move on to lawsuits, not so much for myself as to protect other scholars from similar future smear campaigns like the one I document in my article¹⁶.

That Dreger's list of "profound", "libelous" "misrepresentations" does not include a single item that would give rise to a cause of action for libel or defamation is a matter for a symposium on *New York Times v. Sullivan*¹⁷ and its progeny. Nor need we tarry on the

10 Dreger, A.D., p.e.c. on WMST-L, 21 Sept. 2007 (emphasis supplied)

11 Dreger, A.D., p.e.c. on WMST-L, 19 Oct. 2007

12 Dreger, A.D., p.e.c. on WMST-L, 22 Oct. 2007

13 Koyama, E., p.e.c. on WMST-L, 22 Oct. 2007

14 Dreger, A.D., p.e.c. on WMST-L, 23 Oct. 2007

15 *Id.*

16 *Id.*

17 376 U.S. 254 (1964) (in order to state a claim for defamation, a public figure must show that allegedly defamatory statements are false and published knowingly, or with reckless disregard for the truth).

question of whether Dreger was aware of the rudiments of libel and defamation law when she made this threat, or whether she simply hoped that Ryan would not be. Instead, we are concerned here with what constitutes a permissible defence of Bailey-Dreger academic freedom, and this episode is quite instructive in that regard.

At this point, it is worth reiterating that we are dealing with a quintessentially scholarly activity: a call for submissions for an academic panel discussion. From Dreger's response to Ryan's CFP, however, it is clear that this scholarly activity - unlike *TMWWBQ* or Dreger's apologia - is well outside of the protection of Bailey-Dreger academic freedom. Indeed, not only is it not protected by the Bailey-Dreger doctrine, it is, in itself, a violation of it.

From Dreger's response, it appears that there are few limits - if any - to the means to which a beneficiary of Bailey-Dreger academic freedom may resort. Surprisingly, even threats of potentially devastating defamation litigation - the ultimate in state-supplied coercive mechanisms - may be employed in order to bring miscreants to heel. Even short of employing the coercive measures of the state, it is permissible to defend one's Bailey-Dreger academic freedom by issuing vague, unspecified accusations, and allowing them to hang in the air for extended periods, in order to undermine the reputation and credibility of a violator of Bailey-Dreger academic freedom.

Here, again, we see the Bailey-Dreger doctrine's interesting treatment of consequences. The consequences of a violation of Bailey-Dreger academic freedom for its beneficiaries are all-important, more important than the substance of the protected activity or the nature of the violation. The consequences that the exercise of Bailey-Dreger academic freedom might bring for others, on the other hand, are irrelevancies, trivial matters not worthy of any serious time or attention.

If, for example, someone takes *TMWWBQ* and its production seriously enough to research its making and publicly critique its content, the validity of their critique is of no consequence; the only matter of importance is the damage that such attention might cause to Bailey's reputation. The logic is akin to that of Justice Antonin Scalia's order enjoining further vote counting in Florida on the grounds that, if the count revealed that Bush had lost, this would cause irreparable harm to his legitimacy as President.

If, on the other hand, Dreger decides to damage a graduate student's career with vague, unspecified (and ultimately false) accusations in order to forestall an academic discussion that is violative of Bailey-Dreger academic freedom, the consequences for the graduate student are no concern of ours. She was asking for it.

From these case studies, it is clear that Bailey-Dreger academic freedom is fundamentally status-based. Unscholarly conduct may be protected, and scholarly conduct unprotected, based on the status of the person engaging in that conduct. However, it is clear that the relevant status is not a position within the academic establishment. While the two known beneficiaries of Bailey-Dreger academic freedom both hold faculty positions at a leading university, Lynn Conway and Deirdre McCloskey,

both respected academics at other institutions, clearly do not merit the protection of the Bailey-Dreger doctrine.

What, then, is the key status attribute that distinguishes those who benefit from the virtually absolute right of Bailey-Dreger academic freedom from those who are subject to the corresponding duty to applaud or remain silent? It would be cynical to suggest that the only beneficiaries of the doctrine of Bailey-Dreger academic freedom are Bailey and Dreger, and no evidence suggests that the doctrine would never apply to anyone other than themselves. Thus, the necessary status attribute must be something more than merely belonging to the academic establishment.

Judging from the case studies above, it would appear that the key criterion is not *membership* in the academic hierarchy, but one's attitude toward hierarchy itself. This is the one clear distinguishing characteristic between the conduct of Bailey and Dreger and that of Conway et al. Bailey and Dreger, above all, defend the hierarchical position of "experts", their right to define and categorise the lower orders, without regard to the lived experiences or insights that the latter might provide. By demanding to be heard on the question of "who and what are trans women," and even daring to contradict a J. Michael Bailey, Conway et al. challenged one of the most entrenched hierarchies in our society: the right of Thorstein Veblen's "substantial people" to define the discourse on any given subject. It is not the butterfly's place to lecture the entomologist; it may feel pain whilst being pinned to a corkboard, but it had best keep that to itself.