ACROSS BORDERS: What Academia Can, and Should Do in a Changing Environment of Open Expression

Lucas Oesterreich
Honors Political Science
McMaster University

Morgan Birck
English and Philosophy
Georgetown University

Introduction

On October 29th of 2014 - coincidentally the fiftieth anniversary of its famous Free Speech Movement of the Cold War - UC Berkeley's administration overturned an undergraduate organization's decision to rescind Bill Maher's invitation to speak at their December commencement. A large portion of the student population had protested that Maher's commentary on Islam was offensive and urged the university to reconsider its invitation on the grounds that his comments qualified as hate speech. However, the administration took a strong stance against this position by citing the university's respect and support for his right to express his opinions and their refusal to "shy away from hosting speakers who some deem provocative"[1].

UC Berkeley's decision to allow Maher to speak was somewhat of a rare occurrence in a growing trend of students protesting candidates for commencement speeches based on ideological characteristics. The Foundation for Individual Rights in Education (FIRE) is a watchdog for student rights in post-secondary education, and their recent studies found that the rate of these kinds of protests have doubled in the past decade[2]. This could indicate a number of developments in Academic behaviour, including that political issues in North America are becoming steadily more polarized, or academic perceptions of the ramifications of free speech are changing. Similar instances of highly publicized requests for the university to either protect or limit free expression have become a central element of public commentary in both Canada and the United States. For instance, Brandeis University acquiesced to the student protest of Ayaan Hirsi Ali as a commencement speaker. Similarly, Secretary of State Condoleezza Rice and Attorney General Eric Holder rescinded their invitations to speak at Rutgers University and the Oklahoma Police Academy respectively, as well as the Chair of the IMF Christine Lagarde at Smith College[3,4].

---

[1] Public Affairs, UC Berkeley, "Campus statement on commencement speaker" (2014), URL: http://newscenter.berkeley.edu/2014/10/29/campus-statement-on-commencement-speaker/

[2] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[3] Kathleen McCartney, "Announcement Regarding the 2014 Commencement Speaker", (2014), Speeches and Writings Archive of the Smith College. URL:

This is not an exclusively American phenomenon, but one that concerns the broader academic environment. A report by John Carpay and Michael M. Kennedy for the Justice Centre for Constitutional Freedoms indicated that 301,810 Canadian students attended Universities with poor administrative 'actions and practices' related to free speech, and a further 440,030 studied at Universities with poor policies or actions by student unions[5]. Similar policies and their subsequent implications for the student body have in some instances become the centre of media attention, notably after the Dalhousie School of Dentistry suspended students for misogynistic comments on Facebook. This incident sparked a national debate about what the scope of a University's powers are with regards to private speech and how federal laws fit into University policy. Two years prior to the Dalhousie event, feminist activists blocked the entry of paid attendees to a controversial lecture by Warren Farrell at the University of Toronto, even pulling the fire alarm to shut down the event when the police intervened. Just recently, the Canadian Centre for Bio-Ethical Reform held an open debate on abortion at McMaster University, but the debate was unable to commence when pro-life protestors entered and yelled prepared speeches over speakers of both sides[6]. It echoed a previous disruption at the University of Waterloo, where a man infamously dressed in a costume depicting the female genital shouted down a Conservative MP.

These instances evidently vary in type, from the kinds of commencement speaker protests mentioned earlier to more forceful obstructions with varying degrees of legal questionability. In both cases, the people limiting or protecting free speech employ many different methods and embody ostensibly different strata of legal responsibility. This is one factor that creates a need for an effective model for dealing with expression issues. The variance of the kinds of parties involved is a significant factor as well, as it includes student political groups, student union groups, professors, university administration, the courts, and governments. Universities have different policies for handling disruptions, some which differ for the student legislature and the official administration. The legislative landscape likewise varies greatly amongst North American jurisdictions, and the common law has differing precedents, which form an unclear landscape for both students and

http://www.smith.edu/president/speeches-writings/commencement2014

[4] Kristina Sguelglia, "Condoleezza Rice declines to speak at Rutgers after student protests", (2014), CNN, URL: http://www.cnn.com/2014/05/04/us/condoleeza-rice-rutgers-protests/

[5] John Carpay and Michael Kennedy, "The 2013 Campus Freedom Index", (2013), Justice Centre for Constitutional Freedoms, URL: http://www.jccf.ca/wp-content/uploads/2013/01/2013CampusFreedomIndex.pdf

[6] Patrick Kim, "Pro-life session ambushed", The Silhouette (2014), URL: http://www.thesil.ca/pro-life-session-ambushed

university administrators to navigate, in order to secure individual protections and to maintain civil liberties. These vast differences in limits, actors, and policies regarding free speech make it difficult to determine exactly what infringes on the freedom of speech in universities. However, freedom of speech, guaranteed by both Canadian and American constitutions, is at least in theory protected to the full extent of the law. As a result of this broader legal goal, there should also exist an effective, corresponding policy model that offers clarification for students, student unions, University administrations, and governments to navigate these complicated and sometimes differing spaces of legal protection.

In order to develop such a model- one that both adequately protects the free speech rights of the aforementioned parties, and prevents the propagation of dangerous or extreme hate speech- considerations must be given to the various factors and structural realities that affect the legal discussion of free speech in Academia. These factors include an analysis of the role of the university as a public or private academic institution, the degrees of harm and proximate harm that can potentially result from a speech act, a clear explanation of the ambiguity in the existing legal framework, and an exploration of the multi-lateral policy directions that can be taken by the many parties involved in academic free speech. The uncertainty left in the wake of instances similar to the ones listed above leave political and legal theorists a myriad of questions that this paper will explore in depth. In particular, what moral or institutional obligations do universities have to protect or limit free speech? Do constitutional or statutory protections of free expression apply to universities as well as governments? What obligations do students or student unions have to ensure an environment open to expression? How should academics respond to a changing environment of student perceptions towards appropriate content?

Free speech, germane in the world outside of universities, continues to be especially relevant in the face of changing student perceptions and university behaviour. In light of the recent attacks on the Charlie Hebdo magazine offices in Paris, the issue of free of expression and the right to free speech without the fear of violence has exploded in social and print media, and is a centrally relevant topic of social discourse. “Je suis Charlie” has been an internationally vocal response, decrying the extreme violence against those who were practicing their right of freedom of expression. However, free speech on university campuses is not held to the same standards of free speech in the media and the rest of the democratic world.

Whether or not extremely controversial content should be published in a satirical cartoon publication is an interesting and important topic of free speech that is rooted in the context of the public’s relationship with open dialogue, but this paper primarily concerns the greater standard of tolerance inferred upon the context of universities who symbolically represent a “marketplace

of ideas". Universities have a greater responsibility than other institutions to maintain this bias-free environment, which includes allowing for unpopular or controversial ideas to be debated in a safe, open academic forum. Opportunities such as these allow students and teachers to approach issues from opposing political, religious, ethical, and legal views. This in turn provides students with the means to become well informed, educated members of society. As a result, it is imperative that free speech on campuses should be kept as open and as minimally restricted as possible. The methods with which this goal can be accomplished will depend upon a number of legal, legislative, and normative considerations that these authors explore. Based on these factors, the most balanced and feasible method seems to be for universities and student unions to enact policies that attempt to maintain an environment conducive to open, even controversial discussion that maximizes the opportunity for dissent and debate. In particular, policies similar to the University of Toronto's Policy on the Disruption of Meetings- which infer a greater standard of responsibility upon all the groups involved in an academic setting to maintain this environment- should be introduced or more effectively enforced in Universities where they already are. Universities should create policies that both protect their students from hate speech and speech that incites violence, while also making freedom of speech a priority on campuses.

The Role of Universities in Protecting/Limiting Free Speech

Though the exact manner in which universities protect or limit speech varies throughout history and location, it is generally accepted that universities have a distinct and important role in the exchange of ideas. They have played important roles in public discourse and the sciences by maintaining an environment of inquiry- an attitude that has allowed some of the greatest discoveries in scientific history to develop and dissent to flourish in times of democratic uncertainty. Dr. Stephen Toope, the President of the University of British Columbia, has offered the following conception of that role: "the role of the university is to encourage tough questioning, and clear expressions of disagreement, but not the "silencing" of alternative views. Universities are sites for the contestation of values, not places where everyone has to agree. That means that speakers we don't like, or even respect, should be allowed to put forward their views...[which can] then be challenged and argued over."[7]

Maintaining this environment of open knowledge is valuable for its applications to the education of the individual, as well as the betterment of society as a whole through its contributions to the economy, to technological advancement, and the attainment of a broader goal of social

[7] John Carpay and Michael Kennedy, "The 2013 Campus Freedom Index", (2013), Justice Centre for Constitutional Freedoms, URL: http://www.jccf.ca/wp-content/uploads/2013/01/2013CampusFreedomIndex.pdf

justice. Harvard President Drew Faust notes that the "[p]revailing discourse, familiar since at least the 1990s, emphasizes the university's place as a paramount player in a global system increasingly driven by knowledge, information and ideas...[k]nowledge is replacing other resources as the main driver of economic growth, and education has increasingly become the foundation for individual prosperity and social mobility."[8]

However, universities have an equally strong responsibility to guard themselves against becoming a hotbed for hate speech and ideas that openly encourage proximate violence against an identifiable group. Opinions that move past extremity into forceful action are not conducive to this open, academic environment, and serve to hurt rather than encourage intellectualism. Still, universities should exercise caution when determining what constitutes dangerous speech, as an overreach of this determination can result in unfair limitations, and yet an under-reaching of this determination can result in the proliferation of hate speech. This is a challenge posed by the nature of ideas and opinions, and a necessary balance that offers no clear answers on where to draw the line. Offensive content scales with our own perceptions and cultures, and misjudgments in either direction can easily cause harm. It is of the utmost importance that universities recognize this delicate balance and exercise caution in their deliberations.

We, the authors, recognize that there is no clear method of attributing harm to speech, and that the proximate harm that can result from a speech act varies with the context and type of speech used. Many of the instances in which this will be an issue will ultimately depend upon the individual case, and methods used to determine whether or not a specific action- whether on the universities' part or on the part of a students'- should mirror the legal framework for proximate cause used in common practice. A step-by-step walkthrough for proximate cause will not be the subject of this paper, but rather how universities and students can benefit from responsive policies designed to ensure that academic environments remain welcoming to a diverse set of ideas and debates.

The Bi-Lateral Legal Reality

Free speech and expression are constitutionally protected laws in both the United States and Canada, but there is ambiguity surrounding how these protections apply to universities, which has led to challenges before the courts and within the administrative frameworks of North American Universities. The biggest ambiguity concerns whether universities are public or private institutions. Private universities that receive zero public assistance do exist; in fact, roughly a fifth of American post-secondary students attend such places. Public universities receive direct funding from the government, and often rely on continued government services. The

[8] Drew Faust, "The Role of the University in a Changing World", Speech to the Royal Irish Academy, Office of the President (2010) http://www.harvard.edu/president/speech/2010/role-university-changing-world

concern for constitutional applicability thus relates to whether a university's obligations to meet government standards increases with the amount of public resources that the university receives. Where we should draw the line, in terms of how much protections a student is entitled to relative to the dependency of that institution on public funding, if any at all, is currently unclear.

The United States

In the United States, free speech is divided between public and private universities. Public universities have no free speech rights of their own, as the legal protocol states that "at a state university, the principles are, or at least should be, clear: A state university is, legally, an arm of the government and is constrained by the First Amendment"[9]. The university itself thus has no rights, but it must protect the rights of its constituents and constituent groups, namely the students and professors, as well as their organizations. Though the public university may not endorse the views of its students, student groups, guest speakers, and even faculty, it is not legally allowed to censor their views, even ones with which university officials disagree[10]. In the landmark 1957 case Sweezy v. New Hampshire, Paul Sweezy, a visiting lecturer at the University of New Hampshire, refused to answer questions from the attorney general of New Hampshire regarding his lecture and the Progressive Party, citing his First Amendment right to freedom of academic pursuit. Chief Justice Earl Warren led the majority opinion, stating, "The essentiality of freedom in the community of American universities is almost self-evident…Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die."[11]

As Michael Stokes Paulsen, a distinguished university chair and professor at the University of St. Thomas School of law, notes, the principles as stated by Chief Justice Warren should be clear, but in practice these principles are not always upheld. Many campuses have introduced speech codes, which limit speech beyond the legal limits of such speech as slander, harassment, libel, and fighting words. These speech codes are often aimed at limiting expressions that display prejudice against a certain group of students, whether it is racial, ethnic, religious, or some other form of

[9] Michael Stokes Paulsen, "Freedom of Speech at a Private Religious University", University of St. Thomas Journal of Law and Public Policy, Vol. II, No. 1, p. 104-108 http://www.stthomas.edu/media/schooloflaw/pdf/jlpp/volume2no1/PaulsenFinal.pdf

[10] Michael Stokes Paulsen, "Freedom of Speech at a Private Religious University", University of St. Thomas Journal of Law and Public Policy, Vol. II, No. 1, p. 104-108 http://www.stthomas.edu/media/schooloflaw/pdf/jlpp/volume2no1/PaulsenFinal.pdf

[11] Kermit L. Hall, "Free speech on public college campuses overview", First Amendment Center, Friday, (2002), URL: http://www.firstamendmentcenter.org/free-speech-on-public-college-campuses

discrimination[12]. The Supreme Court has not issued a direct ruling on speech codes at public universities, but many U.S. district courts have struck down speech codes. For example, in Doe v. University of Michigan (1989), the U.S. District Court for the Eastern District of Michigan struck down a speech code at the University of Michigan, citing that the speech codes prohibiting hate speech were too broad and thus violated the First Amendment. Similarly, the U.S. District Court for the Eastern District of Wisconsin struck down a University of Wisconsin policy that called for student discipline for racist or discriminatory comments, epithets, or other expressive behavior directed at other students[13]. Similar to Michigan's case, the Court held that the policy was too broad and thus unconstitutional[14]. In September 2004, U.S. District Court Judge Sam Cummings struck down the free speech zone policy at Texas Tech University. Cummings pointed out that the speech code banning "insults", "ridicule", and "personal attacks", as well as a university policy requiring even casual free expression to get prior permission, was "imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University"[15]. Judge Cummings also required the "free speech zone" policy at Texas Tech, allowing free speech for students in park areas, on sidewalks, on streets, or in other common areas[16]. Cases like these, and the many more brought to court each year, demonstrate the legal push towards proliferating freedom of speech on campuses. Setting precedent, which establishes concrete concern for protecting free speech is a step in the right direction for demonstrating to Universities what their obligations and limitations are.

Yet despite the number of cases struck down by federal courts each year, free speech continues to be limited on public university campuses. 55% of the U.S.'s four hundred and thirty-seven public and private schools received "red-light" designations for policies that the Foundation for Individual Rights in Education says, "clearly and substantially prohibit protected speech"[17]. This is especially

[12] John Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich 1989)
Decided Sept 22, 1989
http://www.bc.edu/bc_org/avp/cas/comm/free_speech/doe.html

[13] The UWM Post, Inc. v. Board of Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991), Decided Oct. 11, 1991, URL: http://www.mit.edu/activities/safe/legal/uwm-post-v-u-of-wisconsin

[14] The UWM Post, Inc. v. Board of Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991), Decided Oct. 11, 1991, URL: http://www.mit.edu/activities/safe/legal/uwm-post-v-u-of-wisconsin

[15] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[16] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[17] Foundation for Individual Rights in Education, "Spotlight on Speech Codes

problematic for public universities, which should be bound by the First Amendment, but whose responsibilities do not coincide with the direction of the courts. Despite this, the situation does seem to be improving: 54.1% of public schools received a red light rating for the year 2014, compared to seventy nine percent in 2008[18]. This decline is drastic and a good sign for the future of expression on University campuses, but individual cases consistently arise that demonstrate that this change in trend is insufficient to rectify the broader issue.

For example, despite the trend away from poor policies related to free speech nationally, Norfolk State University's Code of Student Conduct prohibited "profanity by any student on property owned or controlled by the University, or at functions sponsored or supervised by the University". "Profanity" is also a violation of the Student Code of Conduct at the University of West Alabama. These policies run contrary to the decision in Cohen v. California, 403 U.S. 15 (1971), which established that profanity, though vulgar, is still considered protected speech[19]. Additionally, in Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973), the Supreme Court ruled that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'"[20]. Norfolk State and West Alabama's policies clearly violate both of these Supreme Court rulings, though no action has yet been taken against them.

Private post-secondary education presents a far more troubling scenario for students. The protection of the First Amendment does not generally apply to private colleges in the United States. Unlike public universities, private schools are not considered an arm of the government, and are therefore entitled to their own free speech rights. There is also the concern that "although acceptance of federal funding does confer some obligations upon private colleges…compliance with the First Amendment is not one of them"[21]. Most private universities do promise freedom of speech and academic freedom for many of the reasons

2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[18] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[19] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[20] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

[21] Foundation for Individual Rights in Education, "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses", Annual Report (2015), URL: http://www.thefire.org/spotlight-speech-codes-2015/

explained earlier, concerning the importance of free speech on campuses. Yet even though some level of free speech is guaranteed, private universities schools still reserve the right to limit speech more than public universities, and students who wish to attend these universities must accept these restrictions in exchange for membership to the university community.

Canada

In Canada, the average university's tuition fees constitute a mere twenty percent of total revenue, while federal and provincial transfers account for over fifty percent [22]. Taxpayers pay approximately $20,000 of education cost per student per year, whereas private payments by these students amount to a $5000 tuition bill[23]. Under the Canadian jurisdiction, most universities exhibit characteristics of both public and private institutions, though their applicability to Charter scrutiny does not scale with the ratio of public characteristics to private characteristics. Intuitively, it seems that the university's public obligation to respect statutory and constitutional protections should likewise increase or decrease according to this ratio. However, the legal reality is that the Canadian Judiciary takes a whole different set of considerations into mind when determining whether a student is entitled to these protections or not. Generally speaking, the Courts under the constitutional clause that protects private actors from unreasonable government action do not consider Universities 'government'. Still, there exists a framework for the Courts to apply constitutional protections as if they were governments if they are acting out the policy directions of government- a framework which makes Charter scrutiny a provincial affair as the result of the constitutional division of powers.

Any constitutional argument in favour of limiting universities' actions regarding free speech must come from the applicability of the fundamental freedoms to Universities under s. 32 of the Charter, which binds the protections found in it to the actions of the legislature and government of each province. Considering the amount of public funding that universities in Canada receive, the court has addressed applications requesting judicial review over the wording of s. 32. In particular, these requests are for a reading that would regard universities as a part of the 'government' of each province, and therefore obligated to respect Charter protections. Though the case centrally concerned a mandatory age of retirement, the decision in McKinney v. University of Guelph (1990) clarified the meaning of s. 32 in light of the aforementioned arguments. Writing for the majority of the Supreme Court, the Right Honourable Justice La Forest wrote:

[22] Statistics Canada, "University and college revenue, by province and territory", (2009) http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/educ47a-eng.htm

[23] Josh Dehaas, "Think your tuition bill is too high? Check the government's", Maclean's magazine, (2011), URL: http://www.macleans.ca/education/uniandcollege/think-your-tuition-bill-is-too-high-check-out-the-governments/

> The universities are legally autonomous. They are not organs of government even though their scope of action is limited either by regulation or because of their dependence on government funds. Each has its own governing body, manages its own affairs, allocates its funds and pursues its own goals within the legislated limitations of its incorporation. Each is its own master with respect to the employment of professors. The government has no legal power to control them[24].

He further clarified that this decision could be more broadly applied to any institution that was a creature of statute, a designation which does not attract Charter scrutiny in the eyes of the Courts.

This decision established a strong precedent for the administrative freedom of universities to enact policies as if they were entirely private institutions, regardless of how much public funding they receive. However, as would later become extremely important in a very recent case before the Courts, the Supreme Court decision in McKinney v. Guelph did not comprehensively decide that universities could never be found to a part of the government for the purposes established by s. 32. Though this case dealt specifically with the University's decision to impose a mandatory retirement age contrary to the will of a professor who sought Judicial review, it established a precedent that, regardless of the content of the University's decision, it could still be held to a limited degree of Charter scrutiny if it met the legal criteria for 'acting out' government policy. Justice La Forest notes in para. 42:

> [T]here may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities[25].

This has important implications for University policies on other Charter protections, namely freedom of expression.

This was used in a subsequent decision in 1997 by the RH.J. La Forest in Eldridge v. British Columbia (Attorney General), which found that the Charter did apply to a private identity, a hospital in this particular case. It was found that the private entity in question "carrie[d] out government policy", concluding that the Charter can be applied to private

[24] Supreme Court of Canada, "Mckinney v. University of Guelph", S.C.R. (1990), http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/687/index.do

[25] Supreme Court of Canada, "Mckinney v. University of Guelph", S.C.R. (1990), http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/687/index.do

entities when their actions are "inherently governmental" or for a "specific government policy or program."[26] This case, quite similar to the case discussed before, did not directly concern free speech, but it would have immense ramifications for it in recent decisions. This is salient to our discussion of preserving free speech in Academia because the accountability of University action to the Charter is enforceable under certain qualifications.

This decision has already been useful for students who felt that their right to freedom of expression was unduly infringed upon by the actions of a university. In 2010, Keith and Steven Prigden were suspended by the administrative staff of the University of Calgary for violation of the universities non-academic misconduct code. Feeling that their Charter rights to expression were violated by the university's decision, the Prigdens sought judicial review for their suspensions. The Supreme Court of Canada used the above precedent in Eldridge to overturn the decision of the university and ordered remedial action in favour of the students. It also found that the university had violated their fundamental rights, and could be held accountable according to their mandate given by the Alberta P.S.L. Act. This Act demonstrates a wider scope of responsibility set upon universities to obey the Charter rights and freedoms of students, but it can only be enforced when there is a statutory framework in that province, which can be demonstrably contrasted to the actions of the university. It is a framework that changes with the jurisdiction. If an event takes place in a certain jurisdiction it will produce different outcomes based on the particularities of the statutory structure of that province[27]. The decision in Prigden applied because there was a contradiction found between the University's actions and the goals set out in the specific post-secondary education legislation in Alberta, and that legal framework was effective in addressing the problems outlined in this paper, but only for that jurisdiction. The respective post-secondary education set out in the Post-Secondary Education Choice and Excellence Act in Ontario, in contrast, does not include the same provisions that the P.S.L. Act does, and whether or not comparable protections to the precedent established by Prigden can be saved under other provincial legislation on post-secondary education is not guaranteed[28]. The only way for an explicit answer to form under the common law system is for a similar case to be tried in every province, and for each judiciary to

[26] Supreme Court of Canada, "Eldridge v. British Columbia (Attorney General), S.C.R. (1997), URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do

[27] Supreme Court of Canada, "Eldridge v. British Columbia (Attorney General), S.C.R. (1997), URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do

[28] Government of Ontario, "Post-secondary Education Choice and Excellence Act, (2000), Ontario e-laws, URL: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00p36_e.htm

evaluate how- if at all- the corresponding post-secondary education legislation fits in with the particular case. This is a process which could take decades to materialize, and offers no guarantee of protection to anybody (except for students in Alberta) until it does. Even worse, it is a process which could produce different legal results for students in different provinces, and is therefore a drastically ineffective method for instigating meaningful change for the majority of Canadian University students.

Evaluating Constructive Policies

Considering the legal realities of free speech protections in both Canada and the United States, the model that we can construct for both students and administrations to follow is unfortunately a messy series of steps and cautions. As a result, it may lead to different conclusions by different jurisdictions, based on different precedents and the specific facts of the case. This is especially true in Canada, as protections are warranted in specific instances where universities are acting as private institutions which carry out government programs. Difficulty arises when we seek to apply the precedent set in Prigden elsewhere, as the specific application of the P.S.L. Act is a provincial decision limited to the jurisdiction of Alberta. This legislation does not exist in the other provinces, and therefore has serious implications for students, student unions, and University administrations.

Luckily, the decision to treat universities similarly to governments when they carry out governmental aims is a decision that holds true for every jurisdiction. The difficulty lies in the fact that this form of legislation varies between provincial jurisdictions. As the role of education is a provincial responsibility as set out in the division of powers section of the Constitution, courts will have to weigh the relevant legislation against the actions of a university's administration for a finding similar to the one in Prigden. These will have different characteristics based on the educational structure of that province. As such, judicial review of any decision to apply University policy to Charter scrutiny will require an individual analysis of how to fit the specific case with the statutory framework behind the post-secondary education system of that province. This is different from the application of the Charter because it attempts to enforce a federal law according to provincial legislative specificity.

Students looking for a legal solution to any perceived breach of their speech rights have an even more ambiguous framework to work with in the United States, where remedial action in private universities is simply out of the question, and where even public universities have policies against certain types of expression that stand contrary to Supreme Court rulings concerning what legally requires protection. In theory, public universities in the United States should be absolutely bound to the First Amendment, and all students, student groups, and faculty should have the right to freedom of expression. The nature of these policies - and therefore the range of protections that students are afforded - varies from university to

university based on their individual policies. As a result, any action to protect students from either the university itself, or from oppressive actions by other students, should begin first with a demand for open academic environments to be reflected in administrative or union-based university policy.

It is evident that in order to maintain their freedom of expression, students should push back against university policies and student groups which severely limit their academic freedom, but universities should recognize the benefits in mirroring this kind of attitude. Universities which openly protect controversial opinions and maintain an academic forum conducive to free expression can avoid the risks of potential litigation by students. When institutions understand their responsibilities clearly, they should act in a way that is consistent with them. When they do not, the case for remedial action on behalf of those affected is all the more clear. While the ambiguities presented by the legal frameworks of either American or Canadian jurisdictions have the potential to harm students, it is also a powerful reminder to institutions that decisions to unduly infringe on fundamental rights may not avoid a lengthy and expensive process of judicial review, as well as an immense amount of negative publicity. It is a legal reality that should provide incentives to both students and administrations to take free speech laws seriously, though the financial assets available to universities may make them more patient with regard to the legal route.

Considering both academia's goal to educate society and of the legal obstacles that face both students and institutions, a satisfactory solution will come from an attempt to strengthen the protection of civil liberties through litigation. The outcomes for students would be varied and expensive, and would present no comprehensive model of federal-level protection. Further, litigation would be the slowest solution available. As a secondary consideration, an approach that consolidates the strength of the expression protections against a university's freedom to enact its own policy would not apply student groups disrupting an open academic environment. This challenges the ability of controversial topics to be discussed on university campuses. There is also a glaring issue with this approach in regards to the legal problem of amending the statutory framework: it would be an extremely complicated bilateral process involving at least one Federal bill, and in Canada's case it would be impossible under the current division of powers. It is extremely unlikely that an amendment to the Constitution would be made to allow for educational policy to become under Federal jurisdiction. Despite that this would make for an ideal way for the legislature to simplify the applicability of Eldridge to University policies, it is legally unfeasible and would have far-reaching consequences for the structure of education in Canada.

Instead, both students and universities should recognize the value in policies that protect free expression on campus, and should push to enact administrative and student union

policies that mirror these attitudes. Such policies would involve provisions that reinforce laws against dangerous hate speech, while including published steps to be taken by either the student body or the university during controversial discussions. This could potentially allow the university to take action against students who disrupt meetings illegally, or perhaps allow them to hire security for certain events. It should allow student groups to protest and engage with the controversial ideas of visitors, and continue to welcome said ideas. It should also ensure that events involving minority viewpoints are not forced off-campus by the will of the majority.

This kind of speech policy has been effective in practice, achieving goals of both protecting minority and controversial speeches while also protecting against extreme hate speech. The University of Toronto provides one such model that students, student unions, and universities should look towards when developing policies of their own. Namely, their 'Policy on the Disruption of Meetings' bluntly states that: "[e]very member of the University is obligated to uphold freedom of speech and the freedom of individuals and groups from physical intimidation and harassment. The administration of the University has a particular responsibility to require from members and visitors a standard of conduct which does not conflict with these basic rights."[29]

We chose the University of Toronto policy as an exemplary model of university policy for several reasons. First, it enshrines the notion that the university is obligated as an institution of ideas to uphold the freedom of individuals from harassment or intimidation, and to protect their freedom to express their ideas freely. Secondly, it also proposes a framework for dealing with contentious speakers and events, one that mirrors both the university's obligations and the obligations of students to uphold this environment as well. Thirdly, it is standalone legislation that goes into explicit details about the specific topic of controversial events/speech/meetings, as opposed to policies that exist in other Universities like McMaster, which simply address disruptions with one or two lines that are slapped onto broader, partly related legislation. It does this via a six-step walkthrough available for the benefit of both the administration and students involved, beginning with an identification of those involved and the request to desist, and leading up to more serious remedies if the situation cannot be resolved. The latter includes contacting the authorities and administering academic punishments if the university cannot adequately protect the rights of their students due to actions by other students or student groups[30].

---

[29] Governing Council of the University of Toronto, "Policy on the Disruption of Meetings", (1992). URL: http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/ppjan281992.pdf

[30] Governing Council of the University of Toronto, "Policy on the Disruption of Meetings", (1992). URL: http://www.governingcouncil.utoronto.ca/Ass

This is an effective policy because it uses the opportunity presented by the legal obstacles to unequivocally declare its support for the rights of students. By doing so, the university bolsters its own reputation while avoiding the myriad of legal issues that come with enforcing its role in permitting dissenting views. It is a multi-lateral policy approach that involves both student organizations and administrative ones, and applies responsibility and obligations to each in meaningful ways that minimize the opportunity for one group to steamroll another out of the discussion. Universities are obligated by it to provide sufficient insurances of safety for those who wish to organize or attend controversial events, and the events themselves. Students are likewise obligated to maintain a level of respect for ideas or speakers that they disagree with, and- given their role as members of the University community- are required to tolerate a diverse range of ideas in order for their membership to that community to continue. Since it avoids the strenuous and complicated route of litigation, this policy manages to provide both Canadian and American universities with an ideal goal. It can certainly be applied to any institution that is generally given special privileges to enact their own policies, regardless of which side of the border their jurisdiction happens to be. And most importantly, it holds everyone involved to a higher standard of intellectual discourse – one that reflects the special role and higher standard for dissent that universities have in society.

However, legislating policy is only half of the solution, and controversies at U of T surrounding free speech demonstrate that even exemplary policies will not maintain desirable academic environments without a strong commitment to enforcing them. Universities and students must be willing to be dedicated to these policies, and to act in a way that acknowledges their effective force. Without this commitment, policies are nothing more than words on paper, and will remain this way until academic attitudes grow serious about protecting free expression on University campuses.

Conclusion

A growing challenge is presented by changing student perceptions and institutional behaviours toward free expression in an open academic environment. The track record of both educational institutions and student groups seems to have worsened in recent years, and action is required in order to ensure that it does not endanger the universities' special place in society as the encouragement of a marketplace of ideas. It is not only imperative that attitudes change within a national sphere, but across borders and for universities that inhabit a broader, international academic environment. This is an issue that affects people of every ideological affiliation, and it is important to determine some form of meaningful policy. The challenges that free expression face present obstacles that go beyond partisanship; it is

ets/Governing+Council+Digital+Assets/Polici es/PDF/ppjan281992.pdf

fundamentally not a right-wing or a left-wing idea. This is perhaps best illustrated by the reality of the situation facing the educational context of both authors – who are from McMaster and Georgetown University respectively – which frames the issues around the same ideological movement in different contextual realities that exemplify a similar problem.

Georgetown currently has a "red-light" rating under FIRE's standards for the Student Code of Conduct policy on incivility which states that students may be punished for "engaging in behavior, either through language or actions, which disrespects another individual including but not limited to: a fellow Georgetown student; a University Official or law enforcement officer" [31]. In fact, Georgetown is ranked among the top ten worst colleges for free speech[32]. One issue contributing to this rating is 'H*yas for Choice', a pro-choice group not recognized by the Catholic, private, and firmly pro-life university. Two incidents in January 2014 and September 2014 prompted FIRE to criticize Georgetown's policies and whether they uphold their values of free speech[33]. In January, the 'H*yas for Choice' group was forced to relocate after handing out condoms outside of a pro-life conference on campus. In September, members of the group had set up a table with information and the club's agenda outside the front gates of the university, a location previously approved for their organization. A Georgetown Department of Public Safety officer removed the group, although it was later allowed to return. While FIRE recognizes that private universities may limit speech, Georgetown explicitly claims that all members of their community have the right to freedom of speech and expression, with no disclaimer specific to Catholic values. Because of this discrepancy, FIRE has given Georgetown an incredibly low rating on its annual report[34]. This particular issue was about a pro-choice group fighting for its right to speak freely about the reasons it believed abortions should be made available to women, but actions on the part of the university were unreasonably infringing on the discussion to take place in an environment conducive to debate rather than ideological favouritism. This case is one example of harmful actions or policies taken by the university. But it is only one expression of the larger problem surrounding how various parties can act toward another party,

---

[31] Foundation for Individual Rights in Education, "Spotlight: Georgetown University", Speech Code Rating (2015), URL: http://www.thefire.org/schools/georgetown-university/

[32] Foundation for Individual Rights in Education, "Spotlight: Georgetown University", Speech Code Rating (2015), URL: http://www.thefire.org/schools/georgetown-university/

[33] Toby Hung, "Campus Reflects on Speech", (2015), The Hoya, URL: http://www.thehoya.com/campus-reflects-on-speech/

[34] Toby Hung, "Campus Reflects on Speech", (2015), The Hoya, URL: http://www.thehoya.com/campus-reflects-on-speech/

and evokes the same kind of necessity for strong policies designed to mitigate infringements that take place in any direction.

A different expression of the same problem appears at McMaster, but as evidenced abroad by recent events at Waterloo and U of T, pro-choice groups attempted to directly oppress free discussion, rather than behaving in a manner that was a reasonable demonstration of their desire for discourse – we are here referring to the decision of student activists at McMaster to effectively shut down the campus debate on abortion. Air horns and pre-written speeches may have been the means of oppression in this context, as opposed to the more official demeanour of an administrative decision, but the mens rea remains consistent as the central focus of remedial policies. Instances like these demonstrate that harmful behaviour which creates restrictive environments can come from either end of the political spectrum, and either end of the institutional power balance. The issue at hand is not based on the content of the arguments, whether they are 'for' or 'against' a particular controversial topic, but based on that party's ability to maintain an open discussion about the issue, without infringing upon another party's ability to respectfully defend their ideas.

This is a phenomenon that has significant ramifications regardless of the borders that politically separate its different incarnations, since universities as a broader institution of learning occupy the same role in Canada and the United States. Regardless of the legal framework under which they operate, universities can have the same approach to their shared role as institutions of higher learning if both administrators and students push for a more effective body of policies to maintain an open academic environment. It is a challenge that changes with the specificities of the institution at hand, and the culture in which it is rooted, but the core conceptual basis for a principled approach to academia is universal. This has significant value for the economic benefits that arise from the existence of an intellectually diverse institution in society. It also has great importance for the ability of students and universities to interact meaningfully with the law, and for the broader goal of social justice – from Georgetown to McMaster, and beyond.

Bibliography

Carpay, John and Kennedy, Michael. "The 2013 Campus Freedom Index." *Justice Centre for Constitutional Freedoms*, 2013. http://www.jccf.ca/wp-content/uploads/2013/01/2013CampusFreedomIndex.pdf

Dehaas, Josh. "Think your tuition bill is too high? Check the government's." *Maclean's Magazine*, 2011. http://www.macleans.ca/education/uniandcollege/think-your-tuition-bill-is-too-high-check-out-the-governments/

Faust, Drew. "The Role of the University in a Changing World." *Speech to the Royal Irish Academy, Office of the President,* 2010. http://www.harvard.edu/president/speech/2010/role-university-changing-world

Foundation for Individual Rights in Education."Victory for Free Speech at Texas Tech." *Press Release*, 2004. http://www.thefire.org/victory-for-free-speech-at-texas-tech/

Foundation for Individual Rights in Education. "Spotlight: Georgetown University." *Speech Code Rating*, 2015. http://www.thefire.org/schools/georgetown-university/

Foundation for Individual Rights in Education. "Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation's Campuses." *Annual Report*, 2015. http://www.thefire.org/spotlight-speech-codes-2015/

Governing Council of the University of Toronto, "Policy on the Disruption of Meetings." 1992. http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/ppjan281992.pdf

Government of Ontario, "Post-secondary Education Choice and Excellence Act." *Ontario e-laws*, 2000. http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00p36_e.htm

Hall, Kermit L. "Free speech on public college campuses overview." *First Amendment Center*, 2002. http://www.firstamendmentcenter.org/free-speech-on-public-college-campuses

Hung, Toby. "Campus Reflects on Speech." *The Hoya*, 2015. http://www.thehoya.com/campus-reflects-on-speech/

John Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich 1989) Decided Sept 22, 1989. http://www.bc.edu/bc_org/avp/cas/comm/free_speech/doe.html

Kim, Patrick. "Pro-life session ambushed." *The Silhouette*, 2014. http://www.thesil.ca/pro-life-session-ambushed

McCartney, Kathleen. "Announcement Regarding the 2014 Commencement Speaker." *Speeches and Writings Archive of the Smith College*, 2014. http://www.smith.edu/president/speeches-writings/commencement2014

Paulsen, Michael Stokes. "Freedom of Speech at a Private Religious University." University of *St. Thomas Journal of Law and Public Policy* 2, no.1 (2009):104-108 http://www.stthomas.edu/media/schooloflaw/pdf/jlpp/volume2no1/PaulsenFinal.pdf

Public Affairs, UC Berkeley, "Campus statement on commencement speaker." 2014. http://newscenter.berkeley.edu/2014/10/29/campus-statement-on-commencement-speaker/

Sguelglia, Kristina. "Condoleezza Rice declines to speak at Rutgers after student protests." *CNN*, 2014. http://www.cnn.com/2014/05/04/us/condoleeza-rice-rutgers-protests/

Supreme Court of Canada, "Eldridge v. British Columbia (Attorney General), S.C.R. 1997. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do

Supreme Court of Canada. "Mckinney v. University of Guelph", S.C.R. 1990. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/687/index.do

Statistics Canada, "University and College Revenue, by Province and Territory." 2009. http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/educ47a-eng.htm

The UWM Post, Inc. v. Board of Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991), Decided Oct. 11, 1991. http://www.mit.edu/activities/safe/legal/uwm-post-v-u-of-wisconsin