



Inclusion, harassment, and discrimination: addressing barriers to free expression at WLU

Response to the Wilfrid Laurier University
Task Force's Draft Statement on Freedom of Expression

May 13, 2018

James Kitchen, B.A., J.D.
Michael Kennedy, B.A.
John Carpay, B.A., LL.B.

Mail: #253, 7620 Elbow Drive SW, Calgary, AB • T2V 1K2
Email: info@jccf.ca • Phone: (403) 475-3622
CRA registered charity number 1717 4865 RR0001

Introduction

In March 2018, the Wilfrid Laurier University (WLU) Task Force on Freedom of Expression received the written and oral submissions of the Justice Centre for Constitutional Freedoms, and submissions from other external experts, to be considered during the Task Force's preparation of a Draft Statement in support of free speech. In April 2018, the Task Force released its Draft Statement on Freedom of Expression and invited feedback, which the Justice Centre hereby provides.

Executive Summary

In its original submission to the Task Force, the Justice Centre expounded on the central importance of freedom of expression on campus, and recommended that WLU prohibit only criminal hate speech. The Draft Statement includes some excellent content regarding the priority of free expression on a university campus, and asserts that the university should not censor speech. However, the Draft Statement fails to celebrate and protect freedom of expression as it should, and instead permits restrictions based on vague and poorly defined notions of "inclusivity" "discrimination" and "harassment." The Draft Statement further fails to address the problems of free speech on campus being silenced through physical obstruction and disruption, and being priced out of existence through the imposition of security fees on those who seek only to express their ideas peacefully on campus.

The Draft Statement unduly focuses on the concept of "inclusion" and adopts the so-called "inclusive freedom" approach to free speech on campus. "Inclusive freedom" essentially amounts to a hierarchy of protection for free speech by rejecting neutrality and permitting and justifying the unequal provision of platforms for expression. This represents a fundamental misunderstanding of the nature of free expression, which means allowing anyone and everyone to express their thoughts and opinions, regardless of the speakers' identity or status, and regardless of the contents of their views. Freedom of expression is already inclusive, unless some groups or individuals are excluded on account of the content of their expression, or other reasons. Using the content of the expression as a reason for restricting expression puts an abrupt end to "inclusive" free expression, because this approach excludes people with the "wrong" ideas and opinions. Excluding some, based on speech content, is the antithesis of free expression.

The Draft Statement asserts that WLU has a “responsibility” to restrict expression that is deemed to amount to “discrimination” and “harassment”. The Draft Statement adopts the definitions of “discrimination” and “harassment” as used by Ontario Human Rights Commission, which are vague, overly broad, and wholly inadequate in the academic context of a university. Discrimination and harassment, properly defined, are behaviours or conduct which should be prohibited on a university campus. WLU policies should state unambiguously that bans on discrimination and harassment do not apply so as to prohibit the expression of “incorrect” ideas or “unacceptable” opinions. Unless “discrimination” and “harassment” are clearly defined, such that they apply only to behaviour and not to the expression of ideas on campus, both terms will have a strong and negative impact on freedom of expression. It is imperative that any statement on freedom of expression explain clearly what kind of expression is and is not permitted. The proverbial “line in the sand” is criminal hate speech, which WLU should prohibit. All other speech should have a green light.

Canadian universities are increasingly an environment in which students are sheltered and protected from ideas and opinions which they do not agree with. The very mission and purpose of higher education is the pursuit of truth and knowledge in preparation for a valuable, meaningful and productive life in society. This is only made possible by the freedom to propose and hear new ideas, and the ability to critique and debate ideas without fear of reprisal. WLU and other Canadian universities need to move beyond merely paying mere lip service to freedom of expression, and should actually uphold it and defend it as part of the process of education.

PART I: Improper Limitations on Free Expression

1. Inclusion and “inclusive freedom”

For a statement designed to address freedom of expression on campus, the emphasis on the concept of “inclusion” is misplaced. The Draft Statement defines “inclusion” as follows:

Appreciating and using our unique differences – strengths, talents, weaknesses and frailties – in a way that shows respect for the individual and ultimately creates a dynamic multi-dimensional organization.

It is unclear how this vague and broad definition has any relevance to protecting free expression on campus. This “inclusion” does nothing to ensure that the limits on free expression are few, specific, and well-defined. In defending free expression at universities across Canada, the Justice

Centre has often seen vague, loosely-defined terminology used to justify censorship on campuses across the country. In the name of “inclusion”, many minority viewpoints and unpopular speakers have been *excluded*. For example, in 2013, the student group Brandon Students for Life was denied student group status by its student union on the grounds that the club was “not inclusive” [of pro-choice students]. If WLU students adhering to a minority viewpoint were to apply for student group status, or a venue to host an event, would these students be permitted to do so? Or would free expression be denied in the name of “inclusion”? Would a campus Liberal Party association be denied protection because its expression or its policies may be “non-inclusive” of NDP supporters? The Draft Statement is not sufficiently detailed or specific to address these conflicts, or to explain the interaction between inclusion and free expression.

The Draft Statement states that WLU embraces “inclusive freedom”, a concept developed by American professor Sigal Ben-Porath. On its face, the concept of “inclusive freedom” is redundant, because freedom of expression is supposed to apply to anybody and everybody. Free speech on campus means, or should mean, that all people are free to express their thoughts and opinions, regardless of their identity, income, or the contents of their views. Freedom of expression is already inclusive, unless some groups or individuals are excluded on account of the content of their beliefs and opinions, or other reasons. When all individuals are free to speak their mind, nobody is excluded. Individuals who feel “marginalized” or “oppressed” are also included, by virtue of enjoying the same free expression rights on campus.

“Inclusive freedom” as promoted by Sigal Ben-Porath is not merely an unhelpful attempt at virtue signalling. Rather, it is a method and justification for censorship. In her book, Ben-Porath states:

[A] commitment to democracy that encompasses individual rights and collective identities, that recognizes and grapples with power differentials and the need for equity—must be aware of the importance of free speech, **not in a neutral way but with attention to the context and effect of words.**¹ [Emphasis added]

This quote infers or implies a hierarchy of protection for free speech: ideas which recognize “equity” and “power differentials” are more deserving of protection than opinions which do not “recognize” these things. Ben-Porath confirms the existence of this hierarchy of protection by rejecting neutrality, and by implying that “the context and effect of words” should determine the

¹ <http://pennpress.typepad.com/pennpresslog/2017/08/inclusive-freedom-how-to-protect-free-speech-for-our-students.html>.

degree of protection. Ben-Porath's approach favours the content of some speech over the content of other speech. If there is no content-based hierarchy, why would the university bother paying attention to the context and effect of words, apart from ensuring that the speech is not criminal hate speech? Ben-Porath's approach permits and justifies the unequal provision of platforms for expression, based on "equity" and based on perceived and subjective quantifications of the relative "power differentials" among different students.

True free expression is always "neutral" vis-à-vis content. For the university to allow some content and prohibit other content is the antithesis of free expression. Using the content of the expression as the basis for restricting the expression puts an abrupt end to "inclusive" free expression. Content-based restrictions on expression are unacceptable, in contrast to "time, place and manner" regulation of the form.² Without providing specific examples about how "inclusive freedom" is practiced, this definition can very easily be misused and abused by future administrations to silence the expression of the "wrong" ideas.

2. Discrimination and Harassment

The Draft Statement asserts that WLU has "a responsibility to restrict illegal forms of expression", including, *inter alia*, "discrimination" and "harassment". Unless "discrimination" and "harassment" are clearly defined, such that they apply only to behaviour and not to the expression of ideas on campus, both terms will have a strong and negative impact on freedom of expression. Harassment is a pattern of conduct that seeks to bully, disturb or intimidate the targeted individual or group. Harassment goes far beyond mere criticism of someone's ideas, or even insulting someone for the ideas they adhere to. Discrimination is treating people unfairly, based on personal characteristics like race, gender, religion, etc. Like harassment, discrimination is about unacceptable behaviour and conduct, and not about censoring ideas, opinions. A proper understating of "discrimination" and "harassment" acknowledges that individuals should be protected from certain forms of unacceptable behaviour. Individuals should not be protected from ideas, opinions or beliefs that they may disagree with.

² With the obvious exceptions of criminal hate speech as defined by the *Criminal Code of Canada* and the Supreme Court of Canada.

WLU should recognize the distinction between one-on-one personal interactions, and the expression and promotion of ideas to the university community at large. For example, an anti-harassment policy could legitimately prohibit verbal abuse that is directed at a transgender individual, while also allowing for wide, free and open discussions on campus about transgenderism and related topics.

The impetus for the creation of the Task Force was the misplaced and grossly unfair accusation that a WLU graduate student and teaching assistant had “discriminated” against transgender individuals. This accusation was not based on how she had treated these people, but was based exclusively on *the content of ideas presented in a classroom*. A prohibition on “discriminatory” speech is a cold, wet and heavy blanket that severely chills expression, and any bans on “discrimination” can be equally dangerous unless targeted strictly at behaviour.

The Draft Statement relies on the Ontario Human Rights Commission (OHRC) to define “discrimination”:

Treating someone unfairly by either imposing a burden on them, or denying them a privilege, benefit or opportunity enjoyed by others, because of their race, citizenship, family status, disability, sex or other personal characteristics.

While this definition of “discrimination” appears to pose no threat to free expression, the OHRC has stated that refusing to use alternative pronouns constitutes “discrimination” based on gender identity and gender expression.³ In other words, in order to avoid being discriminatory, individuals must use the “correct” speech or risk suffering serious consequences, up to and including imprisonment for refusal to pay a fine. The Supreme Court of Canada describes compelled speech as “totalitarian and as such alien to the tradition of free nations like Canada”.⁴

Freedom of expression necessarily includes the right to express disagreement with belief systems, including various gender theories, even if those belief systems are intertwined with some individuals’ identity. It is antithetical to free speech and to the mission and purpose of a university to use “discrimination” as a justification to compel expressed agreement with a belief system. It is

³ OHRC Policy on preventing discrimination because of gender identity and gender expression, page 18.

⁴ *National Bank of Canada v. R.C.I.U.*, [1984] 1 S.C.R. 269, para. 81.

thus imperative that any future statement on freedom of expression directly address such potential conflicts by providing examples to explain clearly what kind of expression is and is not permitted.

“Harassment” is also defined by the Task Force in accordance with the OHRC:

Engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome (Section 10(1), Ontario Human Rights Code). It can involve words or actions that are known or should be known to be offensive, embarrassing, humiliating, demeaning or unwelcome. Harassment under the Ontario Human Rights Code is based on the prohibited/protected grounds.

The above definition of “harassment” conflicts with unencumbered free expression because it includes “words... that are known or should be known to be offensive, embarrassing, humiliating, demeaning or unwelcome.” Robust academic debate, and the expression of unpopular ideas on campus, cannot exist in the presence of such a broad, ambiguous chill. Inevitably, some individuals will feel offended when their ideas are refuted or challenged. The same holds true for feeling embarrassed or humiliated when one’s ideas and belief systems are mocked, disproven, or harshly criticized. Academic freedom and free speech mean nothing if they do not mean the right to fiercely oppose any idea, opinion, theory, ideology, or belief. On a campus dedicated to the pursuit of truth and open academic discourse, students will encounter unwelcome expression on a daily basis. Ideas, questions, and theories cannot be artificially and arbitrarily restricted because they are considered by the majority of students, or by a minority of students, or by the university administration, to be “offensive”.

Instead of vaguely referring to discrimination and harassment as a restriction on free expression and deferring to the Ontario Human Rights Commission, WLU should, if it is truly committed to free expression, state that it will uphold and defend free speech to the maximum extent possible in consideration of the unique importance of free expression in the academic context. Discrimination and harassment, properly defined, are behaviours or conduct which must be prohibited on a university campus. Policies must state unambiguously that bans on discrimination and harassment do not apply so as to prohibit the expression of incorrect ideas or unacceptable opinions. Properly understood, prohibitions on discrimination and harassment serve to protect freedom of expression, by banning the disruption and physical obstruction of events, conferences, displays and other expression on campus. But these terms must not be broadly or vaguely defined so as to stifle free speech and chill academic discourse.

PART 2: Measures Required to Protect Free Expression

The Draft Statement is sadly silent in regard to WLU's obligation to protect free expression from those who would silence it. As part of their legal duty to uphold the rule of law, universities also have a duty to prevent the disruption of academic and non-academic events, including student group displays, public lectures, debates, and other events.

Section 430 of the *Criminal Code* makes it an offence to obstruct, interrupt or interfere with any person in the lawful use, enjoyment or operation of property. Nonetheless, there is a growing trend on Canadian campuses to silence opposing views through the use of disruptive tactics such as:

- a. Using excessive white noise to prevent speakers from being heard;⁵
- b. Pulling fire alarms to cause audiences to evacuate and therefore not be able to hear the views expressed;⁶
- c. Obstructing visual expression so it cannot be viewed;⁷
- d. Vandalizing the property of those expressing the opposed viewpoint;⁸ and
- e. Engaging in disruptive protests that require the response of campus security and local police services.⁹

The Draft Statement fails to explain that forms of expression which disrupt others' ability to express themselves are not legitimate forms of expression. The Draft Statement fails to indicate that WLU is committed to protecting meetings, events, displays and other forms of expression from being disrupted, shouted down, blockaded or otherwise silenced.

In this regard, the University of Toronto's Code of Student Conduct provides a useful model, stating that "noise that obstructs the conduct of a meeting or forcible blocking of access to an activity constitutes disruption" and that "[no] person shall cause by action, threat or otherwise, a disturbance that the member knows obstructs any activity organized by the University of Toronto or by any of its divisions, or the right of another member or members to carry on their legitimate

⁵ <https://thevarsity.ca/2016/10/17/tensions-flare-at-rally-supporting-free-speech-dr-jordan-peterson/>; <http://www.cbc.ca/news/canada/hamilton/mcmaster-debate-with-controversial-professor-jordan-peterson-disrupted-by-activists-1.4031843>.

⁶ <https://www.thecollegefix.com/post/44307/>.

⁷ <https://www.jccf.ca/our-cases/#ualberta>.

⁸ <https://www.jccf.ca/our-cases/#uvic>.

⁹ <https://www.jccf.ca/our-cases/#ualberta>; <https://www.jccf.ca/our-cases/#uvic>; <https://thevarsity.ca/2016/10/17/tensions-flare-at-rally-supporting-free-speech-dr-jordan-peterson/>.

activities, to speak or to associate with others.”

As an indication of the impoverished understanding of free expression, many Canadian universities have responded to the increasingly popular tactic of disruption by imposing “security fees”, not on the rule-breakers who seek to silence views they disagree with, but on those who abide by the rules and seek only to express their views in a peaceful manner.¹⁰ By extorting "security fees" from those who seek only to exercise their legal rights to express their opinions and to listen to others, universities are effectively blaming the victims and encouraging the bullies. This punish-the-victim approach has only encouraged further attempts at campus vigilante censorship.

Golda Meir, a former Prime Minister of Israel, when asked by her male colleagues in cabinet to place a curfew on women to help end a series of rapes, replied: "Men are committing the rapes. Let them be put under curfew."¹¹

In 1957, U.S. President Eisenhower demonstrated his grasp of the difference between the illegal demands of a mob, and the freedom of citizens to exercise their legal rights. He ordered federal troops to escort nine black students into Little Rock Central High, in furtherance of the U.S. Supreme Court decision of *Brown v. Board of Education*. This court ruling to de-segregate American schools was highly unpopular in the American South. When school started in September 1957, Arkansas Governor Orval Faubus sided with the large, jeering and violence-threatening mob surrounding the school, which until then had been attended only by whites. Maintaining his popularity with local voters, Faubus ordered the Arkansas National Guard to keep the now-famous "Little Rock Nine" out of Central High.

Rather than pander to the mob, President Eisenhower sent federal troops to uphold the rule of law, declaring: "This challenge must be met, and with such measures as will preserve to the people as a whole their lawfully protected rights, in a climate permitting their free and fair exercise ... the troops are there pursuant to law." To the chagrin of Faubus, federal troops arrived in Little Rock on September 24. The troops protected the black students from the hostile mob, and ensured the Nine's safe entrance into Central High.¹²

¹⁰ University of Waterloo put the cost of “free” speech on its campus at \$28,500 in April 2018, <http://nationalpost.com/opinion/christie-blatchford-nothing-free-about-wilfrid-laurier-universitys-free-speech-policy>; <https://www.jccf.ca/our-cases/#ualberta>

¹¹ <https://jwa.org/encyclopedia/article/meir-golda>.

¹² <http://historymatters.gmu.edu/d/6335/>.

It is significant that President Eisenhower did not invoice the Little Rock Nine for the costs of providing security, neither before nor after the event.

What if President Eisenhower had demanded that the Little Rock Nine should pay for the costs of the federal troops? Would it have been reasonable to blame the Little Rock Nine for "provoking" the hostile mob?

The rule of law requires public authorities to uphold fundamental rights and freedoms, such as the right of the Little Rock Nine to attend Central High. If the U.S. government had demanded payment of security fees as a condition for protecting the rights of the Little Rock Nine, it would have failed in its duty to uphold fundamental rights and freedoms.

The same applies to public universities, and their obligation to uphold the rule of law on campus, by protecting individual rights and freedoms from being trampled on by a loud mob. The absence of violence does not justify the mob's behaviour when the mob obstructs, disrupts, blockades and interrupts the peaceful expression of other people on campus.

WLU's policies, and any statement on freedom of expression, must be clear regarding WLU's commitment to acting decisively to stop the disruption, obstruction, interruption and blockading of speech on campus. Whether by imposing security fees on those who wish to express unpopular views, or by way of other tactics and policies, WLU's administration should not tacitly condone mob disruption of free expression.

Sadly and unnecessarily, putting a price on expression, which is a form of censorship, has now been adopted and codified at WLU.¹³ The Draft Statement's purported commitment to free expression rings hollow. Within days of the Task Force releasing the Draft Statement, WLU administration imposed a "security fee" of over \$5,000 on the Laurier Society for Open Inquiry, simply for hosting an event where students could hear a minority viewpoint on a matter of academic interest.¹⁴ This fee was not imposed because the event itself posed any kind of risk. Rather, the fee was imposed because it was anticipated that certain individuals or groups would

¹³ Wilfrid Laurier University Policy 4.10 Booking of University Space and Facilities, which states that WLU "may assess and collect fees or costs for the use of University Space and Facilities" and that "as a condition of booking, the University may, in its sole discretion, require that additional authorized security be made available during the use of the space at the expense of the User." <https://www.wlu.ca/about/governance/assets/resources/4.10-booking-of-university-space-and-facilities.html>.

¹⁴ <http://nationalpost.com/opinion/christie-blatchford-wilfrid-laurier-professor-withdraws-from-free-speech-task-force-in-protest>.

attempt to shut down the event or silence speakers, using various methods described above, and therefore create a security risk. WLU has not explained why the security fee needs to be paid by the Laurier Society for Open Inquiry rather than by those who disrespect and trample on free expression on campus.

Requiring speakers and listeners to pay, in order to express and hear ideas, instead of requiring payment from those who disrupt, block, vandalize and drown out, results in the censorship of certain ideas and perspectives. One former member of the Task Force has argued that security fee censorship typically results in the suppression of right-wing speech because left-wing individuals and groups are far more likely and inclined to attempt to silence their opponents through actions that require a security response.¹⁵ By putting a price tag on certain types of expression, and thereby refusing to enforce the rule of law on campus, WLU and other universities are denying any stated commitment to valuing and respecting a diversity of viewpoints.

Conclusion

Positive assertions about free expression in the Draft Statement are undermined by illegitimate restrictions on expression that come under the guise of “inclusion,” “discrimination” and “harassment.” In particular, the new Booking of University Space and Facilities Policy empowers intolerant activists and mobs to price free expression out of existence.

WLU has an opportunity to re-commit to full and free expression on campus and unrestricted academic freedom, and thereby honor the purpose and mission of higher education: the pursuit of truth through uninhibited study, discourse, and teaching. That opportunity will be squandered if WLU fails to put action to words regarding free expression.

¹⁵ <https://www.therecord.com/opinion-story/8587458-luisa-d-amato-at-wlu-accusations-of-a-heckler-s-veto/>.