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The Properties of Universities and Universities' Property:

Academic Freedom, Freedom of Expression, and Accessing Campuses

Sarah Hamill Trinity College Dublin

Abstract

The issue as to whether protests or other political demonstrations may be held on university campuses draws together interconnected issues related to freedom of expression and academic freedom. This paper offers analysis of the legal rights and obligations for post-secondary institutions in Canada and the United Kingdom. Are publicly funded universities obligated to open campus facilities to a wide range of interest groups? Must universities guard against "hate speech"? The key point is that the exercise of free expression is nuanced and that decisions should be – and often are – reached after serious consideration of the likely impacts on free expression *and* the impacts that allowing such free expression might have on others, including vulnerable individuals.

Keywords *Academic freedom; freedom of expression; hate speech; free expression policies; public and private property*

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Les propriétés des universités et le bien propre des universités :

la liberté académique, la liberté d'expression et l'accès aux campus

Sarah Hamill Trinity College Dublin

Résumé

« La question de savoir si des protestations ou d'autres manifestations politiques peuvent avoir lieu sur les campus universitaires rassemble des enjeux interdépendants liés à la liberté d'expression et à la liberté académique. Le présent document propose une analyse des droits et obligations juridiques des établissements postsecondaires au Canada et au Royaume-Uni. Les universités financées par des fonds publics sont-elles obligées d'ouvrir les installations de leurs campus à un large éventail de groupes d'intérêt? Les universités doivent-elles se prémunir contre les "discours haineux"? Ce qu'il faut retenir, c'est que l'exercice de la liberté d'expression est nuancé et que les décisions devraient être – et sont souvent – prises après un examen sérieux des impacts probables sur la liberté d'expression et des conséquences que le fait d'autoriser l'exercice de cette liberté d'expression pourrait avoir sur les autres, y compris des personnes vulnérables. »

Mots-clés *Liberté académique; liberté d'expression; discours haineux; politiques de liberté d'expression; propriété publique et privée*

> *The nation is in the midst of a fervent national debate over how universities should respond to "hate speech" on campuses (Smolla, 1990, p.195).*
>
> *Campuses today are under pressure from many quarters to compromise the noble idea of the university as an island of intellectual inquiry and robust discourse that ought to maintain some degree of separation from the commands of the sovereign, the tantalizing seductions of gigantic financial grants, and the whimsical ebbs and flows of mass politics and prejudice (Smolla, 1990, p. 216).*

Although written in 1990 and about American universities, Rodney Smolla's article and, these quotes in particular, speak to the current situation in a number of countries. Currently, universities in Canada, the USA, the UK, and elsewhere have found themselves embroiled in a situation much like Smolla described. The right to free expression is often found at the core of these situations with commentators describing the right as being weaponised (see, e.g. Read, 2018; Sultana, 2018, p. 231).

Universities' status as sites of intellectual inquiry are often used as a stick to beat them with in such disputes. How, or so the argument goes, can universities claim to defend academic freedom if they do not allow X, Y, or Z on campus?[1] There are, however, two claims here which are being run together: first, that the particular nature of universities transforms their campuses into places where anyone may exercise their expressive rights; and, second, that academic freedom and freedom of expression are identical. The sense that universities (or their students) are somehow stifling debate through their decisions is an old one. The UK saw similar allegations in the 1980s (Barendt, 1987, p. 344), which led then, as it has led in parts of Canada today, to the government requiring universities adopt policies about free expression ("The Politics"; Smith, 2019).

Such a requirement might seem strange given that many would assume the *Charter of Rights and Freedoms* applies to Canada's public universities. However, whether the *Charter* does apply is unclear (see, e.g., Henderson, 2006; Siletta, 2015; Cameron 2020), and, even if it does apply, as I have argued elsewhere (Hamill 2017), we still need to pay attention to how property law and the rights and duties flowing from it affect the claimed freedom of expression. Rather than rehash the entirety of the case law about free expression on Canadian university campuses,[2] in this piece I focus on a few key issues: the nature of university property and how, or if, it is affected by the properties we ascribe to universities *qua* universities; the interaction between free expression and academic freedom; and the competing interests – equality rights, student welfare, security concerns, free expression – at play in the debates around free speech on campus. In order to

explore the competing interests, the experiences of British universities are useful given the complex regulatory environment in which they operate. I also examine the latest in a line of Canadian cases about anti-abortion student groups seeking to protest on campus, *UAlberta Pro-Life v the University of Alberta* [*UPL*], as this case highlights many of the issues, including the role of property, in such protests. I conclude by echoing the five questions set out in my earlier discussion of this issue. These questions are:

> *does the nature of the protest fit with the normal use of the relevant university property; is there anything else, such as an ongoing exam period, which would justify placing limits on certain kinds of protests; is the expression at issue hate speech; does the expression at issue raise any safety concerns; and who is trying to access university property (Hamill, 2017, p. 186)?*

Though the focus is on groups seeking to access campus property for free expression, my discussion is relevant more broadly as it emphasises the importance of discussion, and the welfare of university members, over and above ill-thought-out, rapid responses.

Defining Universities

When it comes to defining what universities are there are two ways to answer the question. The first is to set out their actual legal status and the second is the abstract, and, perhaps, romanticised notion. Interestingly, in the Canadian case law on campus protests there is little discussion of the former description and only a handful of references, if that, to the latter. Where the legal status of universities is discussed in the case law, it typically involves a reference to the governing legislation so as to support a finding on whether or not the *Charter* applies (Hamill, 2017 pp.169, 177-178).

In terms of their legal status, all universities in the UK are formally independent and, unless they are private, they are all charities. No body or corporation can call themselves a university without the approval of the Privy Council. This is a nod to the historic origins of universities, though, as Woodhouse notes, university independence historically depended more on the institutional ability to balance the competing demands of the church, the Monarch, and the aristocracy, than anything inherent in their nature (2017, pp. 619-620).

Canadian universities are also typically charitable organisations, that is they are registered charities. This point will be bracketed for the purposes of this piece, as while there were some restrictions on charities' 'political activities' these have since been repealed.[3] The fact of charitable status was also never raised in the cases I

examined. In terms of who can call themselves a university or what a university might be in Canada, it is a status granted by governments with a key difference between colleges and universities being the nature of governance: universities are more independent than colleges (Hutchinson, 1995, p. 145; *Douglas/Kwantlen*, 1990). Indeed, university governance can vary from province to province, with some universities coming under province-wide legislation while others, such as those in Ontario, have individual, legislative charters. The other distinguishing feature of universities is that they can grant degrees.

It is also clear that universities are seen as more than their legal status. Here Smolla offers two differentiating descriptions of universities:

"For many, its [a university's] principal distinguishing characteristic is unfettered expressive freedom" and "The university is an island of equality, civility, tolerance, and respect for human dignity; a place where the contemplative and rational faculties of man should triumph over blind passion and prejudice" (1990, pp. 216-217[numbering added]).

For Smolla the second feature is the more accurate: "[t]he sense of a community of scholars, an island of reason and tolerance, is the pervasive ethos. But that ethos should be advanced with education, not coercion" (1990, p. 224). His conclusion remains persuasive today but his two features downplay the practicalities. In the context of the first, it only seems like university academics can say *anything* (Woodhouse, 2017, p. 620-621). In reality, academic freedom is both a professional standard – with norms and procedures which ought to be applied – as well as a guarantee of scholarly independence (Sultana, 2018, pp. 230-237).

Smolla's second feature might also be more of an ideal than reality. Universities may have originated as residential communities of scholars – and many still share part of this experience – but today many students, faculty, and staff commute to campus. As a 2011 Universities UK report put it, universities are more embedded in their local communities than they were historically (p.13). So too must it be noted that different members of the university community experience it differently. I certainly think of universities very differently today as a full-time academic, than I did when I was an undergraduate, or when I was a graduate student. To say nothing of how a person's experiences can be shaped by gender, race, class, and their intersections. The lofty ideals of academic freedom attributed to universities *do not* apply to everyone employed by universities, nor do they apply to anyone who simply happens to be on university campuses. "University" in the sense used by Smolla appears to be limited to particular members of the university community – those engaged in the academic endeavours of the institution. Nonetheless, it is worth reiterating that universities are communities and many campuses are

communities where people live, work, and study. These campus communities are also more or less integrated into the surrounding community (Universities UK, 2011, p.13); in fact, the campus itself may be seamlessly integrated with city streets. This facet of university life may matter in terms of allowing protests on campus.

In addition, despite the emphasis on universities as locations of intellectual inquiry, many students attend university for more practical considerations: they feel they need a degree to get a good job. These perceptions then find themselves translated into demands for 'job-ready' graduates and 'useful' degrees (Moore and Morton, 2017, pp. 591-592; Arthurs, 2014, pp. 705-708).[4] Such considerations are arguably changing the university landscape in ways which can lead to 'unproductive' or 'unpopular' departments being closed or merged. How this relates to academic freedom is beyond the scope of this piece but it is part of the background to the disputes around accessing campuses. There is a pressure for public universities, in Canada and elsewhere, to do more with less money and, perhaps, to serve demands which are not the university's own, or, at least, are not part of the original ethos of universities (Woodhouse, 2017, pp. 619-620).

Academic Freedom and Freedom of Expression

In terms of protests on campus, there is often a rhetorical linking of academic freedom and freedom of expression. Obviously, the latter is legally protected in certain contexts, the question is what legal force, if any, does academic freedom have?

In the UK, academic freedom has a statutory definition. *The Higher Education and Research Act 2017*,
c 29 s 36 stipulates that the recently created Office for Students, which has taken over the regulation of universities, has a "duty to protect academic freedom" which it then describes as the freedom of institutions to set course content, appoint academic staff, and admit students. This freedom *only* applies to academic staff and not to students nor universities (in an institutional sense) themselves (Zedner, 2018, p. 576).

Given that education is a provincial concern in Canada, there is no single statutory definition of academic freedom. Nonetheless a few examples, taken from both university documents and case law, are worth quoting at length. The University of Toronto's statement of purpose has this to say about academic freedom:

Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we

affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.

It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit (1992, p.3).

Such lofty comments find themselves echoed in case law. In 1990, the Supreme Court of Canada in *McKinney v University of Guelph*, while denying that the *Charter* applied to universities, saw La Forest J describe academic freedom as the "free and fearless search for knowledge and the propagation of ideas" (p. 282), and state that it was "essential to our [Canada's] continuance as a lively democracy" (pp. 286-287). A more recent definition can be found in the Alberta Court of Appeal case, *Pridgen v University of Calgary*:

> *Academic freedom and freedom of expression are not conceptually competing values. Freedom of expression, of course, is guaranteed to all Canadians. Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution. It has also been described as having an aspect of academic self-rule – the right of academic staff to participate in academic decisions of the university, and, more broadly, an aspect of institutional autonomy – the right of the institution to make decisions, at least with respect to academic matters, free from government interference (2012, par 114).*

Here Paperny JA asserts that there is no apparent conflict between academic freedom and freedom of expression in that both strive for the same values. Contrary to Woodhouse's definition of academic freedom (2017), however, Paperny JA seems to assert that mere opinions will be protected by academic freedom. While this may be true in certain contexts – think, for example, of criticising university administration[5] – it is less true in other contexts. Scholarly research might involve a degree of opinion but it is typically opinion which is supported by sound evidence (Sultana, 2018, pp. 230-234).

When it comes to freedom of expression, the scope of what can be protected is much broader. Freedom of expression is considered to be a key democratic right, central to a range of values both individual and collective (Moon 2000, pp. 3-8). Of

course, hand in hand with such praise and vaunted attributes, there is always the swift recognition that it is not absolute because no rights are absolute. Additionally, it has long been recognised that freedom of expression can be very conservatively understood, and that limits on free expression might actually enhance the free expression of normally silenced groups (Bakan, 1997, pp. 70-76). We do not ask whether everyone can communicate effectively and without fear; we only turn to it when one person or group seems to have been silenced.

The freedom that the right to free expression guarantees is negative: a government or governmental body cannot silence a person but it is not under any obligation to give anyone a platform. In most contexts what is protected is the *content* of the speech or expression rather than the *form* – with the exception of hate speech which is not protected (for Canada see, *Criminal Code*, RSC 1985, c C-46, s 319(1); *R v Keegstra*, [1990] 3 SCR 697).[6] The issue here is that the dividing line is not always clear because form and content can be closely related (see, e.g., Craig 2016, pp. 98-102). Flowing from the form-content divide, the location of the expression is not protected, a fact Canadian academics pointed out in the 1980s (Moon, 1988; Moon, 1988b; see also Slattery, 2010), but is worth repeating. The lack of protection for location and form can cut both ways. On the one hand it can protect certain locations, such as abortion clinics, from protestors. Yet, on the other hand, it can preclude certain locations, such as the headquarters of a particular company, from being used for free expression. As important a right as free expression is, its exercise must be balanced with other rights. In the former example, the rights of those seeking access to healthcare are protected while in the latter, it is often property rights which preclude protests.[7]

In Canada, reasonable limits on free expression are well-accepted and, based on what courts have said, effectively impose certain standards of civility (Hamill, 2014, p.162). Courts recognise that free expression can cause discomfort (*Greater Vancouver Transportation Authority*, 2009, par 77), but it ought not to cause psychological harm or at least the potential to cause psychological harm is sufficient reason against allowing some forms of expression (*Canadian Centre for Bio-Ethical Reform*, 2018, pars 21, 62). A more challenging question is whether public authorities can impose financial costs on free expression, particularly when the costs are imposed on some groups and not others. This question has yet to be squarely decided. While the Supreme Court of Canada has looked at paid forms of free expression – advertising on the side of buses – and has referred to, in passing, paying to put up posters (*Greater Vancouver Transportation Authority*, 2009; *Ramsden*, 1993, p. 1107), the implication was that the costs applied or would apply to everyone. The *UPL* case raises the question about unequal costs though does not

fully resolve the issue. The costs-question can be framed as 'who should bear the costs of free expression?' In which case, a reading of earlier case law on free expression suggests a judicial aversion to imposing costs on society (Hamill, 2014, pp.143-144). As scholars pointed out in the 1990s, the way free expression is interpreted effectively grants stronger rights to the rich (Bakan, 1997, p. 70). It may be that imposing additional costs on some instances of free expression and not others is constitutional but such costs decisions would need a clear set of reasons explaining why.

In terms of *where* a protest can be, different spaces are not equally available for free expression. In Canada it is only property owned by a public body or equivalent which is open to free expression provided that the property's normal use suggests that free expression is compatible with that use (Hamill, 2017, pp. 166-167). So, for example, public hospitals are open to all but a person could not hold a protest march in a ward. This point matters for university campuses in several ways. Even assuming that universities are sufficiently public in Canada for the *Charter* to apply, the question is whether the normal use of campuses renders them open for free expression. In terms of use, campuses are not monolithic, nor are all parts open to everyone. Student residences, for example, are clearly private; and universities often charge unaffiliated members of the public for accessing and using certain facilities such as gyms and libraries. The squares and quadrangles of university campuses *may* be more open but the legal question will turn on whether the public's access is more akin to a license than a right or, more colloquially, whether the squares are more like malls or public parks (for more see Hamill, 2017).

Describing the open squares of university campuses as more like malls than parks might seem counter-intuitive. In particular, it challenges the perception that universities are providing a public good.[8] While it is true that universities are providing a public good, university classes are not open to all.[9] The ideal of the university is a community of formally independent scholars who are to some extent self-selecting insofar as they choose who can enter their community and who has met the acceptable standards for an award of a degree. While this community may work for the public good, they are also afforded a freedom to decide how best to do that.

Just as access to degree programs is limited, some universities also claim to remove unaffiliated persons from campus whenever they are noticed (see, e.g. *Queen's University,* 1994, par 8). It should go without saying that some people are more likely to be flagged as being 'unaffiliated' than others, and there are ample stories of actual students being racially profiled by campus security.[10] This phenomenon is not limited to Canada. In the UK, King's College London recently

came under fire for suspending the student cards of certain students during a Royal visit to the university (Low, 2019). Such a move suggests that students themselves access campus under a license rather than a right. In addition, there is evidence that some Canadian universities are relying on trespass legislation to regulate who may access their campuses,[11] which further supports the argument that campuses are more akin to private property than public.

Free Expression in UK Universities

As noted earlier, many UK universities are required to have policies about free expression. Given that governments in Ontario and Alberta have now made similar moves as the UK government did in the 1980s, the UK experience is relevant for Canada. It is worth exploring how such a mandatory requirement has played out and how it interacts with other statutory duties, several of which have parallels in Canadian law. As will become clear, UK universities have competing duties and their cumulative effect is one which may chill free expression.

The starting point in the UK is section 43 of the *Education (No 2) Act 1986* which imposes a duty on university authorities to protect lawful free speech by their students and employees and visiting speakers. In effect, section 43 requires universities to draw up a code of practice on freedom of speech. It was prompted by a concern that some campus meetings had been disrupted. In particular it was controversial Conservative backbench MPs who seemed to find their attempts to address student meetings disturbed. Universities had responded by banning all controversial meetings (Barendt, 1987, p. 344). In short, the government's concern was around no-platforming.

Section 43 of the *Education (No 2) Act 1986* does not apply to Northern Ireland or Scotland. In a recent report on free speech in universities, the Parliamentary Joint Committee on Human Rights was ambivalent about the effect of section 43. The Joint Committee observed "that we found no evidence that the absence of the section 43 duty to secure free speech within the law had had either a beneficial or an adverse effect on freedom of speech in these institutions" (Joint Committee on Human Rights, 2018, p.13). The Joint Committee's report was prompted by media hyperbole around no-platforming which the Joint Committee did not think offered an accurate reflection of the situation on the ground (Joint Committee on Human Rights, 2018, pp. 8-9, 17-21).

The legal context surrounding free expression in the UK has some similarities with that seen in Canada but there are some key differences. As in Canada, hate speech is banned (Zedner, 2018, p. 575; *Criminal Code*, RSC 1985, c C-46, s 319(1); *R v Keegstra*, [1990] 3 SCR 697). So too is the right to free expression

enshrined in human rights documents, the *Charter* in Canada and the *Human Rights Act 1998* and the European Convention on Human Rights in the UK. Here there is a crucial difference in that the ECHR *does not* protect speech which "is inherently hostile toward core ECHR values" (Zedner, 2018, p. 575. But see Cannie and Voorhoof, 2011). The Canadian *Charter* has no such limits and the question of how *Charter* rights interact with each other is a work in progress (see e.g. McGill, 2016).

Yet UK universities also have other duties which are in tension with freedom of expression in an absolutist sense. As part of government efforts to combat terrorism, UK universities – along with other institutions – have an anti-terror duty known as the Prevent duty. Prevent is aimed at identifying those persons at risk of being drawn into extremism and places the onus on universities and other institutions to identify these students (Zedner, 2018, p. 547). Given the link between youth and radicalisation, universities were an obvious site of implementing Prevent (Zedner, 2018, p. 550-559). However, there is concern that the Prevent guidance provided to universities is too vague and is actually an unnecessary restriction on free speech (Zedner, 2018, p. 548; Scott-Baumann, 2017). It should be noted that Prevent is not limited to Islamic extremism but is also used to identify other forms of extremism, including right-wing extremism (Home Office, 2018, 13).

The Prevent duty has proven deeply controversial among UK academics (Greer and Bell, 2018, p. 84). One exception is provided by Greer and Bell who set out to defend Prevent and to argue that many of the claims about it are myths. They argue that chief among these myths is the existence of a duty to report. Greer and Bell say that Prevent does not "create[] a legal obligation on university staff to report students for expressing radical views" (2018, p.94). Similarly, Zedner's recent study of how the UK's counter-terrorism policies play on out on campus concludes that universities are managing to comply with the Prevent duty without "the feared adverse impacts" (2018, p.582).

In addition to Prevent, UK universities and student unions must have regard as to whether their policies promote equality and tackle discrimination (Cram and Fenwick, 2018, pp. 826, 830-833). This requirement extends to their policies with respect to speakers and speaking events. Thus gender-segregated seating would be a violation of this commitment to equality, and equality concerns were also behind the prohibition of some UK Independence Party speakers (Cram and Fenwick, 2018, p. 831). The duty to uphold equality is an important point given that, in Canada, the equality argument has been a tacit justification for banning anti-abortion student groups (*BC Civil Liberties,* 2015, pars 29, 39, 48). The argument did not receive a full hearing in *BC Civil Liberties* as it was not raised at trial, but it was implicit in the policy of the University of Victoria's Students' Society. Canadian

courts are currently grappling with how to balance competing rights claims and are accused of defaulting to administrative law arguments rather than engaging in an appropriate balancing exercise (see, e.g. Feinstein and Hamill, 2017, pp. 163, 185). In particular scholars have criticised the courts for failing to take equality arguments seriously, especially in contexts where student welfare is at issue (Feinstein and Hamill, 2017) which may be due, in part, to the way equality is conceptualised as a right (McGill, 2016). Nonetheless, it should not be controversial to point out that student welfare is a factor which educational institutions can and should consider as they make decisions about on-campus activities.

It is perhaps reassuring to know that the UK courts have, thus far, interpreted the Prevent duty narrowly (Zedner, 2018, p.584). UK courts have also refused to intervene with universities' risk assessments about particular events (Cram and Fenwick, 2018, pp. 855-856). Consequently, it is acceptable for a university to cancel an event because of fear of disorder (Cram and Fenwick, 2018, p. 827).

The Joint Committee's report also set out some instances which are not violations of free expression which are worth quoting in full:

> *Student groups are not obliged to invite a particular speaker just because that person wants to speak at the university, or to continue with an invitation if they freely decide they no longer wish to hear from a particular person. Speakers are at liberty to decline to share a platform with those they oppose. Speakers can also decline to attend events if they do not wish to comply with conditions (Joint Committee on Human Rights, 2018, pp. 22-23).*

Such comments reflect respect for the independent nature of universities and recognition that their spaces are not open to all who may wish to use them. Implicit in these comments is a recognition that speaking on campus is not a unilateral act for either the speaker or the group making the invitation. Such points are worth remembering when particular groups loudly proclaim that one or other person was invited to speak and declined. As scholars of free expression have long known, more speech is not always the solution (for empirical evidence see Glaeser and Sunstein 2014), and expression can be both damaging and silencing (Bakan, 1997, pp. 70-76; Williams 1994, pp. 1578-1580).

The complexity of the duties and obligations imposed on UK universities are often missing from the hyperbole surrounding no-platforming. While it is true that universities in England have to have a policy on free speech, they also have to be mindful of Prevent, student welfare, and equality concerns. The complex situation was summed up by the Joint Committee's question "[w]hether government policy

on free speech in universities is coherent?"[12] Their report suggested that coherence was overdue (Joint Committee on Human Rights, 2018, p.47).

Free Speech on Canadian Campuses

To date, much of the litigation about free speech on Canadian university campuses has centred on anti-abortion activists seeking to access and use campus space (for an overview see, e.g. Siletta, 2015). With the exception of cases brought by William Whatcott against universities in Alberta and Saskatchewan (*R v Whatcott* 2012; *R v Whatcott* 2002), these cases rarely involve unaffiliated individuals seeking to access university property for the purposes of communication. The litigation is thus only a snapshot of the debates surrounding free expression on campus. Nonetheless such cases have been seen across Canada. As these cases have been thoroughly explored elsewhere my focus is on the recent litigation involving the University of Alberta (*UPL* 2017, 2020). This section offers an overview of *UPL* as this case is a good illustration of the issues at stake, before briefly discussing the decision to require policies on free expression in Ontario and Alberta universities.

The facts of *UPL* are relatively straightforward and there are many similarities in the nature of the protest at issue with the earlier cases. Put briefly, in March 2015 UAlberta Pro-Life ('UPL') held an event on the Quad – a large open space near the Students' Union Building on the university's north campus ('campus'). In common with other anti-abortion groups, UPL relies on graphic imagery as part of its message (*UPL*, 2017, par 1). This event had university approval and UPL were and are a registered student group. UPL were met with a counter-protest of other "students, faculty, staff, and the general public" which attempted to block UPL's displays (*UPL*, 2017, par 1). UPL complained to the university about the counter protest and alleged a violation of the University Code of Student Behaviour (*UPL*, 2017, par 2). The university declined to proceed with the complaint. UPL sought judicial review of the decision not to proceed. They also sought judicial review of another, later decision relating to security costs. The later decision arose when, in 2016, UPL wanted to hold the event again and the university approved it, subject to UPL paying security costs, which were estimated at $17,500. UPL objected to this condition and alleged that it interfered with their right to free expression (*UPL*, 2017, par 3).

It is the latter question – the one of costs – which is arguably more important given that it raises the issue of barriers to exercising free expression. In *UPL*, the university argued that the *Charter* did not apply, while UPL argued that it did (*UPL*, 2017, par 45). At the Alberta Court of Appeal, the Court agreed that it was

appropriate to decide whether the *Charter* applied (*UPL*, 2020, pars 104, 222). However, Watson JA narrowed the *Charter* question to "whether the specific activity of the University in relation to the specific *Charter* freedom of expression *exercised by students on University campus property* is "governmental in nature""(*UPL* 2020, par. 128). That is, he did not decide whether "the University more broadly is subject to judicial *Charter* scrutiny via s 32" (ibid). Here Watson JA is referring to the threshold question of *Charter* applicability to universities. *McKinney* found the *Charter* did not apply to universities via section 32 but, in *UPL*, Watson JA carved out an exception: it applies "to the exercise of freedom of expression by students on the campuses of the University" because this is part of the "core purpose of the University" (*UPL* 2020, par. 148). Watson JA held that the University erred in its security costs decision but left space for the University to better justify such a decision in the future (*UPL* 2020, pars, 187-190).

Strikingly there was a disagreement over the question of UPL's deliberately provocative displays. Watson JA held that this was not a "compelling consideration to justify complete suppression of the event by a costs barrier" (*UPL*, 2020, par. 185). Here Crighton JA's decision, concurred in by Martin JA, argues that this was a relevant consideration (*UPL*, 2020, par. 225). The end result is that it would remain possible for the University to justify additional security costs, they just did not do so in this case.

For the purposes of this paper, the more interesting aspects of *UPL* are how the physical space of the campus appeared in the decisions. At the Court of Queen's Bench, Bokenfohr J noted that : "[a]s owner of the lands, they [the University] also have a duty to take reasonable care to ensure that individuals on its lands will be reasonably safe" (*UPL*, 2017, par 57). Whether this duty would extend to the psychological harms which can result from racist, homophobic, and transphobic abuse is an interesting question. Certainly, tort law recognises the potential for psychological harm but, to date, does not recognise a tort for racial and other discriminatory insults (for an argument in favour of such a tort see Delgado, 1982). Interestingly, the Alberta Court of Appeal recently upheld the City of Grande Prairie's refusal to allow anti-abortion adverts on buses and one of the City's reasons behind refusing was that such adverts were likely to cause psychological harm (*Canadian Centre for Bio-Ethical Reform,* 2018, pars 21-22, 62, 84, 112). This ruling should be studied with interest by Canadian universities.

The physical campus also appeared on appeal in *UPL* with Watson JA expressly comparing the University's Quad to "the groves of academe at the time of Plato" (*UPL,* 2020, par 111). His point was that the Quad would be well-suited for the exercise of expressive rights (*UPL*, 2020, par 112) and that university campuses

were well-suited more broadly to the pursuit of truth (*UPL*, 2020, par 115). Indeed, he went on to note that "the grounds of the University are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space" (*UPL*, 2020, par .148).

The University of Alberta's campus is not described private property nor as public property but other cases about university property have described campuses as a mix of public and private property (*Queen's University*, 1994, par 6). In Canada, as in other countries, some universities are campus-based, others have buildings scattered around a city's downtown, and some are a mix of both. There are often public hospitals and public transit centres in or near university campuses and closely associated with them (Hamill, 2017, p.168). The point being that when we describe how university campuses are used, we will miss the nuances if we simply say they are used for education. Education might be the central mission of universities but the education they provide is neither mandatory nor open to anyone who might wish to access it. So too for university campuses. Yet, as Watson JA notes, the purpose of the university and their spaces are linked. Suffice to say that the accessible areas of campus, like an open quad, may be available for freedom of expression but other areas may not.

Thus far, all of the litigated disputes have predated Alberta and Ontario's requirements that publicly-funded universities produce a policy on free expression. Ontario's requirement was introduced via a 'Directive' while Alberta's was achieved via a request from the Minister for Advanced Education in the province (Cameron, 2020, p.9) Both provinces pointed universities towards the Chicago Principles on Free Expression to help shape their policies (University of Chicago). Such requirements were soon criticised on the basis that the Chicago Principles are American and thus fit with the First Amendment case law, rather than the case law under the *Charter* (Moon, 2018). Yet, in Ontario all affected institutions have adopted the required policies (Cameron, 2020, p.9). Given the comments of the UK's Joint Committee, it is worth pointing out that such policies may have negligible effects. It is also worth pointing out, as Sigal Ben-Porath does, that the Chicago Principles may offer "false assurance" because they ignore the harm that "biased views" result in (2018). She urges that the principles be a starting point rather than the last word on free expression on campuses.

It seems unlikely that there will be any challenges to Alberta's and Ontario's requirement that universities and colleges adopt the Principles, and is it too early to be sure what effect, if any, the adoption of such principles may have on free expression (see also, Cameron, 2020, p. 9). It is entirely possible that the outcome will be, as it appears to have been with such policies in England, little more than a

box-ticking exercise. University resources are finite and it is doubtful that universities could afford to allow disruptive protests, even if they wanted to. *UPL* suggests, however, that Universities will need a careful justification if they ask potential protesters for security costs.

In the context of protests which are likely to be disruptive, my earlier reading of the case law suggests five questions for universities to ask themselves as they decide whether to allow the protest to take place on campus:

> *does the nature of the protest fit with the normal use of the relevant university property; is there anything else, such as an ongoing exam period, which would justify placing limits on certain kinds of protests; is the expression at issue hate speech; does the expression at issue raise any safety concerns; and who is trying to access university property (Hamill, 2017, p. 186)?*

These questions are not meant to be controversial and are based on a reading of the case law, both about protests on university campuses, and free expression in other locations. The point is that free expression should not be considered in a vacuum. The right is necessarily a social one and when it is exercised or when it is sought to be exercised on university campuses, the nature of the university itself interacts with the claimed right. Even if it is the case that universities in Canada are not bound by the *Charter,* they may have to, as universities in parts of the UK do, abide by government standards on free expression. In turn this may attract *Charter* applicability but only in respect of the mandated policy. That is Ontario and Alberta's policies will not result in the *Charter* applying to universities as a whole but only to their decisions around freedom of expression (Cameron, 2020, p.17). So too may universities voluntarily consider free expression when they make decisions about which speakers and which groups can use campus facilities, and under what conditions. Such conditions are as much about public safety as they are about the university as a property owner. Municipal councils, for example, would perform a similar exercise if a group wanted to hold a protest march or other event on city streets.

The key point is that the exercise of free expression is nuanced and that decisions should be – and often are – reached after serious consideration of the likely impacts on free expression *and* the impacts that allowing such free expression might have on others, including vulnerable individuals. Perhaps ironically, or perhaps by design, free speech absolutism silences this discussion and deliberation and thus shows itself to have little to no place with the sort of discussions which are fundamental to universities *qua* universities.

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Endnotes

[1] For a critical examination of this sort of argument see Scott, 2018.

[2] For this see Siletta, 2015; Hamill 2017

[3] See Canada Without Poverty v Canada (AG), 2018 ONSC 4147. The legislation at issue in that case has since been changed (Beeby, 2019).

[4] It should be noted that both articles cited here are ultimately sceptical of the push for job-readiness though in different ways. Moore and Morton (2017) conduct an empirical study which casts doubt on the argument that students are unprepared, while Arthurs (2014) skewers the idea that there is a one-size fits all approach to being a competent practicing lawyer.

[5] Though see Lynk 2020.

[6] For an overview see, e.g., Luke McNamara, 'Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Laws in Canada' (2005) 38 (1) UBC L Rev 1-82; Richard Moon, 'Hate Speech Regulation in Canada' (2008) 36 (1) Fla St UL Rev 79-98.

[7] See, for example, the Occupy London protest which was unable to use Paternoster Square due to it being privately owned, City of London Corporation v Samede [2012] EWHC 34 (QB) par 5

[8] This perception is under attack from other angles as well (see Woodward, 2017, p. 620).

[9] One exception to this are the various free university initiatives (see, e.g. Woodhouse, 2017, pp. 635-639).

[10] For a recent example see, e.g., Megan Gillis, et al, "'Humiliating': Black uOttawa student handcuffed in campus carding incident" ((14 June 2019) Ottawa Citizen https://ottawacitizen.com/news/local-news/humiliating-black-uottawa-student-cuffed-in-campus-carding-incident

[11] For one example of this see, e.g. R v Whatcott. 2012 ABQB 231, 538 AR 220.

[12] This question was one of the questions which the Committee asked at the launch of its inquiry into free speech on campus.
See https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/freedom-of-speech-uni-launch-17-19/