

Free Speech and Censorship on Campus

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Contents

Introduction	5
Free speech on campus	7
What should the law around free speech be?	9
Students as snowflakes	17
Prevent	21
Conclusion	27
Endnotes	29

Introduction

In October 1966, Stokely Carmichael – Chair of the Student Non-Violent Coordinating Committee and a leader of the American civil rights movement – gave a speech on the campus of the University of California at Berkeley. The University faced enormous pressure to cancel his speech from (among others) Ronald Reagan, then the Governor of California. In his speech, Carmichael reminded his audience that the struggle for free speech on campus amounted to a struggle over ‘whether or not black people will have the right to use the words they want to use without white people giving their sanction.’¹

Fast forward 50 years. In February 2017, Milo Yiannopolous – a right-wing provocateur – was scheduled to give a speech at Berkeley. Again, the University resisted calls from prominent voices to cancel the event. On the day Yiannopolous’s speech was to take place, violence spun off from large counter-protest. People hurled metal police barricades through the plate-glass window of Berkeley’s student centre. Someone set fire to a media outlet’s lighting rig. A masked protester pepper-sprayed a fellow student protester while she was being interviewed by a local television news crew. Amid the chaos, police removed Yiannopolous from campus.² The event’s cancellation triggered national media outrage and protests against Berkeley, including a tweet from President Trump threatening to cut off the University’s federal funding, which has received around 200,000 likes.³



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Milo Yiannopolous does not deserve to be spoken about in the same breath as Stokely Carmichael. Their speech is not of equivalent value. But you have to know both of these stories to think clearly about free speech on campus.

Free speech on campus

Who decides who gets to speak on university campuses? Before answering that question, it is worth reminding ourselves why this is a free speech issue. After all, there is no right to speak at a university.

I have no right to walk into a university and commandeer the podium. I am sometimes invited – it is a great privilege. But I have no legal or moral claim on any university to invite me. My hosts are free to impose reasonable conditions on my speech – for example, that I stick to my allotted time limit, and do not stray off topic. I have no right to demand that anyone in particular share the stage with me, nor do I have any right to hold the stage alone, although I could refuse an invitation to speak alongside any person with whom I do not want to associate or debate. I also have no right to demand that the university stifle any protest against my speech, as long as that protest does not threaten my safety or interfere with my own ability to speak.

These may seem like obvious, even banal, points and yet from time to time controversy arises from misunderstanding these basic limits of free speech. For example, when particular academics or student groups refuse to share a stage with another invited speaker, that is not a violation of anyone's free speech. Someone may wish to tell that to recent Ministers for Universities, including Jo Johnson and Sam Gyimah. When students organise peaceful demonstrations protesting about campus speakers, that is not a violation of anyone's free speech. Someone may want to tell that to Germaine Greer. Far from

being violations of anyone's rights, both those things are the exercise of legally-protected free speech.

But when any institution, including a students' union, exercises a university's power to veto a speaker's invitation or censor a speech that someone else on campus has arranged to hear, or when any group of people are left free to directly disrupt someone's act of speech, that is a free speech problem. Article 10 of the European Convention on Human Rights protects the right to freedom of speech and includes a right to receive and impart information, including the right to say things that offend the listener. The Education Act (1986) places on universities a legal duty to secure freedom of speech for their students and for visiting speakers. Unless an event is going to result in a breach of the law – and, in the UK, that includes laws against hate speech – universities and their agents cannot and should not interfere with the efforts of members of the university community to facilitate any speech or exchange of ideas.

What should the law around free speech be?

The argument is sometimes made that universities should prevent speech that degrades the equal dignity of particular groups of people. As the critical legal scholar Mari Matsuda argued, the notion of 'free speech' begs the question, 'free for whom?'⁴

The choice to allow offensive speech is a choice to burden the offended listener. Often it is traditional victims of discrimination – a class of people who already have diminished access to power, including the power to have their voices heard – who bear the heaviest burden. When we ask women, black people, gay people, transgender people or migrants to recognise the free speech rights of those who would call them inferior or question their right to exist, we ask them to forgo a potential tool of resistance to their own subjugation. It is a lot to ask.

Although we are thinking about what the law should be here, it is worth noting that the law as it is does provide some support for this view. We have established that universities have a legal duty under the Education Act (1986) to facilitate free speech, but they also have, under the Equalities Act (2010), what is known as the 'public sector equality duty' to:

- 'eliminate discrimination, harassment, victimisation';
- 'advance equality of opportunity'; and
- 'foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'⁵

One might argue that the duty includes an obligation to prevent speech that offends or degrades people of a relevant protected characteristic. I do not envy anyone with the difficult job of balancing these conflicting legal obligations.

Shifting back from the descriptive to the normative, my point is this: free speech advocates are wrong to deny that speech can cause harm. They are wrong to suggest the 'marketplace of ideas' is a level playing field where everyone participates freely and good ideas will always triumph over bad.

'The answer to bad speech is more speech' is simply not a satisfactory response. It is a shallow excuse that fails to acknowledge that not everyone has equal access to speech, and not everyone will be heard.

Nevertheless, I think compromising principles of free speech on campus would be an enormous mistake, primarily for two reasons.

First, shutting down speech rarely silences the relevant message and often makes it stronger. For example, amid the turbulence of the Vietnam War and the civil rights movement, many American universities, including the University of California at Berkeley, began aggressively enforcing regulations limiting on-campus political activism for 'outside political causes'. In the 1964/65 academic year – the year before Stokely Carmichael's speech – thousands of students responded by engaging in the largest mass act of civil disobedience ever seen on a university campus, illegally but peacefully occupying a campus building. After a two-day stand-off, police raided the building, arresting hundreds of students. The crackdown spurred outrage. Celebrities flocked to the campus. The folk

singer Joan Baez famously performed. Arrested students became new celebrities, most notably Mario Savio, whose famous speech about the need to ‘put your bodies upon the gears and upon the wheels, upon the levers, upon all the apparatus’ of the great dehumanising machinery of power has inspired generations of activists ever since.⁶ The University had no choice but to back down, and the Free Speech Movement, as the students called themselves, grew into a powerful nationwide anti-war movement that eventually helped to end the Vietnam War.

Turning to a more recent and less inspiring example, after the dramatic cancellation of his speech last year, Milo Yiannopolous vowed to return to Berkeley in triumphant fashion in September 2017. He called his event ‘Free Speech Week’, deliberately co-opting the mantle of the Berkeley Free Speech Movement – even promising to issue a prize called the Mario Savio Award, a proposal Savio’s surviving son called ‘some kind of sick joke’.⁷ This time, the University was better prepared, spending around a million dollars in security in order to enable Yiannopolous’s event to go forward without violence. This may have been a great disappointment to Mr Yiannopolous, who seemed poised to place Berkeley once again in the role of the enemy of free speech. The chaos surrounding Free Speech Week – including conflicts about whether announced speakers had actually been invited, and apparent failures by the student organisers to make basic logistical arrangements – contributed to a sense that its organisers had been preparing more for a battle with the university than for an actual event.⁸ Eventually, Yiannopolous folded, cancelling the event. He has been struggling to make headlines ever since.

To take an example closer to home, look at the story of Tommy Robinson, the avatar of a man named Stephen Yaxley-Lennon, founder of the English Defence League, whose public profile skyrocketed after he was charged with contempt for intentionally violating reporting restrictions on a criminal trial. He succeeded in hoodwinking a large segment of the public into believing he was being prosecuted for exercising his right to free speech.

If there is one lesson to take from examples like these, it is that attempts to silence speech often inject oxygen into a movement and increases its power. Sadly, in recent times, the fascist right has been extremely effective in exploiting that dynamic.

A second, and by far the most important, reason to question equality-based arguments for limiting free speech on campus is that they almost always prove counterproductive to the cause of equality. The tools we give universities to limit speech in the name of equality will be used to undermine equality. A university is an institution of power and a bureaucracy. Any rule administered by a bureaucracy that allows censoring of speech creates the risk of the arbitrary exercise of power. All of us – students, professors and the people you would seek to invite on campus to speak – become censorable. While universities are grounded in a noble mission to educate, they also have institutional corporate interests in preserving their brand, their revenue streams and their relationships with political authorities. That tension creates a significant risk of censorship of provocative people on the left at least as much as on the far right, including radical voices within traditionally marginalised communities.

This dynamic is not merely hypothetical. I have already noted the story of Stokely Carmichael, and referenced the fact that, in the 1970s, the idea of a values-based attack on campus speech belonged to the political right. Ronald Reagan campaigned successfully throughout that decade on a promise to crack down on student dissidents and close campuses to anti-war, pro-civil rights and left-wing speakers. 'Free speech does not require furnishing a podium for the speaker', he said. 'I don't think you should lend these people the prestige of our university campuses for the presentation of their views', he continued.⁹ One wonders whether those who articulate similar notions today realise whose original work they are sampling.

Or take university hate speech codes, which have been standard practice at universities in the UK and in America since at least the 1990s. These codes emerged from the demands of women and other minority students to address issues of discrimination and exclusion on campus. But they are often used against the very people they were designed to protect. In less than two years, under the University of Michigan's speech code (at the University I attended as an undergraduate), more than 20 white students accused black students of racist speech. Had such codes been in place in 1966, Carmichael's Berkeley speech would have violated them.

The idea that progressive causes are vulnerable to campus censorship is not a mere historical artefact. In 2017, a Princeton professor named Keeanga-Yamahtta Taylor was forced to cancel a series of campus speeches after receiving death threats for criticising Donald Trump and – unlike Milo Yiannopolous – apparently not receiving sufficient assurances of her safety. The President of another American university

apologised for allowing a black student to read a poem critical of police violence at commencement, and called it a 'mistake' while promising greater oversight of programme content at the next year's ceremony.

Or how about an example closer to home? I read with some concern a report that the Chancellor of Oxford, Chris Patten, criticised students involved in a campaign to remove a statue of Cecil Rhodes and suggested that they should abandon their cause or 'think about being educated elsewhere.'¹⁰ Ironically, Patten appears to have cloaked his implicit threat in the mantle of free speech, accusing students of trying to stifle debate by turning away from historical fact. That is ridiculous. The students were not trying to stifle a debate; they were trying to start one. They were rewarded with condemnation and something that smelled a little too much like a threat of punishment.

Evidence of the critical value of free speech protections for vulnerable, disempowered and discriminated-against communities is omnipresent for those of us who practise free speech law. The Milo Yiannopolouses and Tommy Robinsons seize the headlines, but those of us working on the ground know that the real victims of free speech violations are, most often, not far-right lunatics with public relations consultants. They are, rather, those who do not have power. They include:

- the victims of domestic violence, whose abusive former partners use defamation claims to silence them when they publicly call out their abusers;
- the black teenagers who have an injunction slapped

on them prohibiting them from making music videos because the police draw a link between their style of music and violent crime; and

- the citizens exercising the time-honoured tradition of civil disobedience, who are threatened with extra-long jail sentences because they refuse a judge's command to renounce their environmentalist views.

All three are real examples from Liberty's recent free speech work.

Our commitment to equality should not push us to limit free speech. Rather, it requires us to question the acceptability of rules that allow the gatekeepers of power to decide who has access to speaking platforms and on what terms. It is not possible to write rules to protect ourselves from racists, fascists and transphobes that cannot be turned back and used against the next generation of activists for equality and justice.

This is not an assertion that free speech is a higher value than equality. If it were possible to achieve equality by sacrificing our right to say certain things, that would well worth doing. But we will not eradicate racism, misogyny, transphobia or any other evil by prohibiting or criminalising speech.

Students as snowflakes

Asking people who are already disempowered to accept others' right to speak in ways that perpetuate that disempowerment is asking them to put down a tool of resistance. Coming to peace with that is difficult. It remains, for me, an uneasy peace. But university communities are – on the whole – handling this difficult and important problem rather well.

People talk about a crisis of free speech on campus, fretting about 'snowflakes' and 'safe spaces' and 'no-platforming' and other unhelpful rhetorical devices. But the evidence shows that there is no crisis of free speech on campuses. In 2017, Parliament's Joint Committee on Human Rights took extensive evidence on this issue from individual students, student organisations, academics, university administrators and civil society groups (and also commissioned research from HEPI on institutions' existing free speech policies). In its March 2018 report, the Committee concluded:

*The extent to which students restrict free speech at universities should not be exaggerated. Where it happens, it is a serious problem and it is wrong. But it is not a pervasive problem.*¹¹

Polling consistently shows student attitudes towards free speech are fairly supportive, or at least in line with the general population, undercutting the notion that free speech has a generational problem. When a group of 1,004 students and a group of the general public (1,636 British adults) were questioned by YouGov on whether they would want to disinvite speakers with certain controversial views from their

real or imagined universities, there was 'no evidence that students are more likely than the general public to want to ban speakers whose views they find offensive'.¹²

In HEPI's earlier poll, conducted via YouthSight, 83% of students reported feeling free, in the main, 'to express [their] opinions and political views openly and without any restriction.' Most students agree with statements like 'the best way to fight prejudice is to debate it rather than ban it' – not all, but the distribution is not meaningfully different from the general population, and it seems to me there's nothing wrong with having a little uncertainty about that sort of categorical statement. Only a small percentage of students – around 14% – express any support for the notion that student unions should ban speakers that 'may cause offence to some students.'¹³

This is not to deny there are free speech violations on campus. But universities have always been a battleground for ideas about the balance between free speech and equality. Almost 50 years ago, the intellectual Herbert Marcuse argued that free speech had become a form of oppression and criticised the notion of a free marketplace of ideas as absurd. With Marcuse as an influence, and in direct response to the rise of fascist movements like the National Front, the National Union of Students adopted its first 'no-platform policy' in 1974 vowing to ban any speaker 'holding racist or fascist views.'¹⁴ Even then, there was disagreement over whether it should be limited to groups who expressly advocated violence and incitement or whether it should cover all those with more generally racist or far-right views, and whether it might not be more productive to expose the latter to debate. We have

been here before, and we will always be here, grappling in good faith with these genuinely difficult issues.

Likewise, contemporary left-wing critiques of free speech as neglecting the implications for equality did not spring fully formed from some 21st-century wokeness. In the 1980s, psychological studies of trauma and critical feminist and racial studies scholars began to explore the concept that words alone can cause harm, a concept that fed the growth of campus hate speech codes in British and American universities throughout the early 1990s, which at their inception generated heated debates about what kind and how much speech a campus should tolerate, and what the consequences should be for those whose speech harms other students.

So when Spiked.com or Donald Trump or Fox News engage in handwringing about a 'campus free speech crisis', suggesting academic freedom and the human capacity for critical thinking face extinction from a unique modern threat, when they insult the contemporary generation of university students as 'snowflakes' who cannot endure intellectual challenge, don't stand for it. That is an ignorant, ahistorical analysis. It is fake news.

Prevent

There is a substantial irony in the Government spuriously accusing today's students of threatening free speech when, in fact, the true threat to free speech on campus is the Government's own policies. Indeed, it is an almost Trumpian manoeuvre to distract from a series of Government policies that deliberately set out to stifle debate and disempower the voices of people on campuses who may challenge Government orthodoxy.

Through the so-called Prevent strategy, the Government imposes obligations on universities and members of university communities that either directly interfere with speech or have the foreseeable and actual effect of chilling the exercise of free expression.

Section 26(1) of the Counter-Terrorism and Security Act 2015 imposes on universities a duty to 'have due regard to the need to prevent people from being drawn into terrorism.'¹⁵ Statutory guidance on this duty requires universities to check that speakers are not likely to express 'extremist' views and, if they may express such views, to either take steps to limit the speech or, if they cannot limit the speech to manage the risk, force the cancellation of the event.¹⁶

What are 'extremist' views? No one can really say for sure. The Home Office defines extremism as the 'vocal or active opposition to our fundamental values, including the rule of law, individual liberty, and the mutual respect and tolerance for those of different faiths and beliefs.'¹⁷ By that definition, I would have expected to see Katie Hopkins referred to Prevent

long ago. This definition of extremism, as Harriet Harman MP has noted, could classify as extremist her feminist-grounded criticism of those who use religion to justify discrimination against women and LGBT people.¹⁸

This is not a coherent or workable definition of extremism, especially not for the purpose of judging whether we think someone is on the road to terrorist violence. Perhaps it is not surprising, then, that the Government itself gets confused about what the definition is. Although I have discussed the definition from the Home Office's website, at other times the Government has defined extremism as activity 'which creates an environment for radicalising individuals and could lead them on a pathway towards terrorism.'¹⁹ Other times they say, 'extremism is wider than terrorism. It is hate crime and the other harms that can be caused to society by the promotion of ideology that leads to harm.'²⁰

It should go without saying that incoherent attacks on speech and thought are dangerous to individual rights and to society. Section 2(8)(c) of the Higher Education and Research Act (2017) confirms:

*the freedom within the law of academic staff at English higher education providers — (i) to question and test received wisdom, and (ii) to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.*²¹

It is harder to imagine a clearer example of 'received wisdom' than 'our fundamental values'. Is questioning those values the

mark of a good professor or of an extremist? I recently debated the UK's fundamental value of Parliamentary sovereignty with a legal academic, where I argued it should be limited. Am I an extremist?

Of course not, and I know there is little reason to believe that I will ever find myself caught up in the Prevent programme. But that is because I have white privilege. There is every reason to believe that black and minority ethnic students and academics, as well as those of Muslim faith, will be caught up in the Prevent programme, and even more reason to know that their exercise of the right to freedom of speech, conscience and association has been compromised.

A recent research study based on a national survey of more than 2,000 students at UK universities and qualitative research at six universities showed that many Muslim students modify their behaviour as a result of Prevent by self-censoring or disengaging from campus life and their studies for fear of being stigmatised, labelled an extremist or subjected to discrimination. The study also shows that Prevent produced wariness among Muslim and non-Muslim students about participating in research on religion, freedom of speech and campus life.²²

The Director of SOAS, Baroness Amos, has told Parliament:

*There is a sense on our campus and among a lot of our students that they are operating in an environment where they feel under particular scrutiny, where, as students who may be Muslim or come from ethnic minorities or have a particular political view, they are under additional scrutiny as a result of that.*²³

Patrick Kilduff, the president of Edinburgh University Students' Association, told the same parliamentary enquiry a question-and-answer session with a Syrian refugee had been cancelled due to concerns about a potential negative effect on the organisers thanks to the Prevent rules. He said: 'The real threats [to free speech] are coming from Government legislation like Prevent.'²⁴ Helen Mountfield QC has told Parliament Prevent encourages universities to have an 'overanxious approach to stopping speech for fear that it might be an indicator of a view' that runs foul of Prevent.²⁵

In 2017, in *Salman Butt v Secretary of State for the Home Department*, the courts narrowed the scope of the Prevent guidance, interpreting the Prevent Duty as applying only to speech which actually creates 'a risk that others will be drawn into terrorism.'²⁶ That is a good result. But patterns of regulatory and community behaviour under Prevent have already bedded in. The Government, as far as I know, has done nothing to update the Prevent guidance let alone anything to undo the misunderstanding and fear that its prior vague approach sewed into the fabric of campus life.

Under pressure from the House of Lords, and following years of lobbying from human rights groups and various Parliamentary committees, the Government has agreed to conduct an independent review of Prevent. At the time of writing, the terms of this review have yet to be announced. Many observers – including Liberty – have raised concerns that the Government sees this more as a public-relations exercise than an opportunity to assess fully the costs and benefits of Prevent.

If it is a genuine independent inquiry, then we have before us an excellent chance to remedy a real threat to free speech and equality on campus. The desire to interrupt the process of radicalisation is a laudable one, but we cannot let that desire override the very liberties and values that many of today's terrorists seek to threaten.

Conclusion

Let me end with a quote from the historian and journalist Jill Lepore. She has summarised the continuing challenge and the continuing role of universities in protecting free speech thus:

All speech is not equal. Some things are true; some things are not. Figuring out how to tell the difference is the work of the university, which rests on a commitment to freedom of inquiry, an unflinching search for truth, and the fearless unmasking of error. But the university has obligations, too, to freedom of speech, whose premise, however idealized, is that, in a battle between truth and error, truth, in an open field, will always win. If the commitment to these difficult freedoms has sometimes flagged—and it has—it has just as often been renewed. Free speech is not a week or a place. It is a long and strenuous argument, as maddening as the past and as painful as the truth.²⁷

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There are few issues in higher education as controversial as free speech.

In this report, Corey Stoughton, the Advocacy Director of the human rights organisation Liberty, looks at the issue through history, international experience and recent legal changes.

She notes that asking disempowered people to accept a total right to free speech is expecting them to put down a tool of resistance. She also claims the biggest threat to free speech on campus actually comes from the Government's Prevent programme.

The paper ends with a clarion call in favour of free speech. Compromising the principles of free speech on campus is a mistake because it often makes the relevant message stronger and tends to prove counterproductive to the cause of equality.

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