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The Republic of Dissent: A Constitutional Theory of Academic Freedom

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ABSTRACT

This article conceptualizes academic freedom as a form of social contract, grounded in what is termed *the republic of dissent*. This concept rests on two pillars: a republican tradition of resisting the accumulation and centralization of power, and a classical liberal emphasis on protecting the ability to think and dissent freely. The republic of dissent model helps clarify the relationship between freedom of expression and academic freedom, which are often conflated as a matter of constitutional usage. While universities contain free speech zones, this article argues that the university, as an institution, is more accurately understood as a decentralized system designed to allow academic competition while preserving dissent. From this perspective, not all versions of freedom of expression will necessarily be compatible with academic freedom. Classical liberal versions—which treat expression as a paramount community value and require institutional content-neutrality—are consistent with the republic of dissent. In contrast, balancing models that give equal weight to competing values and rely on officials to conduct content-based scrutiny to prevent social harm are likely incompatible with academic freedom.

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RÉSUMÉ

Cet article conceptualise la liberté académique comme une forme de contrat social, fondé sur ce que l'on appelle *la république de la dissidence*. Ce concept repose sur deux piliers : une tradition républicaine de résistance à l'accumulation et à la centralisation du pouvoir, et une approche libérale classique mettant l'accent sur la protection de la capacité à penser et à diverger librement. Le modèle de la république de la dissidence permet de clarifier la relation entre la liberté d'expression et la liberté académique, qui sont souvent confondues dans l'usage constitutionnel. Bien que les universités contiennent des zones de libre expression, cet article soutient que l'université, en tant qu'établissement, est plus justement comprise comme un système décentralisé conçu pour permettre la rivalité académique tout en préservant la dissidence. De ce point de vue, toutes les versions de la liberté d'expression ne sont pas nécessairement compatibles avec la liberté académique. Les versions libérales classiques, qui considèrent l'expression comme une valeur communautaire primordiale et qui exigent une neutralité institutionnelle en matière de contenu, sont compatibles avec la république de la dissidence. En revanche, les modèles de pondération, qui accordent un poids égal à des valeurs concurrentes et qui confient aux fonctionnaires le soin d'évaluer le contenu pour prévenir d'éventuels préjudices sociaux, semblent difficilement compatibles avec la liberté académique.

The owl of Minerva takes its flight only when the shades of night are gathering.[1]

- G.W.F. Hegel

INTRODUCTION

An eminent constitutional law scholar once described academic freedom as "primarily a value used by scholars to defend the autonomy of the scholarly enterprise" from outsiders and "external control" because "rarely do scholars need to defend this autonomy from each other."[2] The first proposition—on the external defence of academic freedom—appears correct as a historical matter. But the second part—on scholarly harmony—has not aged terribly well. While students get most of the blame in the so-called campus culture wars,[3] scholars have increasingly taken part in calls for other scholars to be silenced, sanctioned or fired.[4] There have also been intense debates amongst scholars about the adoption of proposed equity and diversity attestations[5] and social justice missions for

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1 GWF Hegel, *The Philosophy of Right*, translated by SW Dyde (Kitchener: Batoche Books, 2001) at 20.

2 Robert Post, "Why Bother with Academic Freedom?" (2013) 9:1 FIU L Rev 9 at 12 [Post, "Why Bother?"].

3 Greg Lukianoff & Jonathan Haidt, "The Coddling of the American Mind", *The Atlantic* (September 2015), online: <theatlantic.com> [perma.cc/AD7Y-FTCJ]; Jim Ryan & Ian Baucom, "Can We Talk?", *Inside Higher Ed* (27 March 2022), online: <insidehighered.com> [perma.cc/V7WC-K7PM]; Emma Camp, "I Came to College Campus Eager to Debate. I Found Self-Censorship Instead", *The New York Times* (7 March 2022), online: <nytimes.com> [perma.cc/Z9MC-G3HM]; Oyin Adedoyin, "Do Students Self-Censor? Here's What the Data Tell Us", *The Chronicle of Higher Education* (7 March 2022), online: <chronicle.com> [perma.cc/GK2R-PFXX].

4 Alexander C Kafka, "Academic Freedom Is on the Ropes", *The Chronicle of Higher Education* (27 May 2021), online: <chronicle.com> [perma.cc/V6S5-PTZF]. For example, David Cole notes in relation to an academic's controversial tweets that "[d]ismissing Shapiro would have been loudly applauded by most of the Georgetown law community" (see "Georgetown Law Did the Right Thing on Ilya Shapiro", *Washington Post* (4 June 2022), online: <washingtonpost.com> [perma.cc/WK3M-9B9Z]).

5 Brian Leiter, "The Legal Problem with Diversity Statements", *The Chronicle of Higher Education* (13 March 2020), online: <chronicle.com> [perma.cc/Z6EE-KMFU].

academic disciplines.[6] There is also a growing trend of university investigations into offensive expression, which both scholars and students have been subjected to.[7] While many of the most notorious instances in the campus culture wars have occurred in the United States, the trend has spread elsewhere, including the United Kingdom[8] and Canada.[9] Given

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6 Jonathan Haidt, "When Truth and Social Justice Collide, Choose Truth", *The Chronicle of Higher Education* (23 September 2023), online: <chronicle.com> [perma.cc/KKJ5-HBAT].

7 See e.g. Suzanne Nossel, "Academic Freedom's Proxy Wars", *The Chronicle of Higher Education* (27 June 2022), online: <chronicle.com> [perma.cc/5ANK-4N77]; Alex Morley, "FIRE Warns University of Illinois Chicago Over Investigation Into Law Professor's Exam Question", *FIRE* (22 January 2021), online: <thefire.org> [perma.cc/6GXV-GK8F]; Andrew Koppelman, "Georgetown Law, Truth and Orthodoxy", *Inside Higher Ed* (14 March 2022), online: <insidehighered.com> [perma.cc/3S36-MEWL]; Jonathan Chait, "Georgetown Abandons Its Free-Speech Policy Over Ilya Shapiro: Dumb Tweets For Me, But Not For Thee", *New York Magazine* (6 June 2022), online: <nymag.com> [perma.cc/WD9L-MFED]; Jordan Howell, "Georgetown Law Provokes Backlash by Suspending Lecturer Over Tweets", *FIRE* (1 February 2022), online: <thefire.org> [perma.cc/BPL3-ZP8R]; David Frum, "Georgetown's Cowardice on Free Speech", *The Atlantic* (20 May 2022), online: <theatlantic.com> [perma.cc/GX3R-RRLZ]; Jane Bradley, "Academic Under Investigation for 'Offensive Tweets' Is Cleared", *The Scotsman* (3 June 2021), online: <scotsman.com> [perma.cc/4RTR-HA8N]; Hannah Brown, "Edinburgh University Lecturer Falsely Called a Racist and 'Rape Apologist' Returns to Campus", *Edinburgh News* (23 September 2021), online: <edinburghnews.scotsman.com> [perma.cc/65U9-KEMA]; Josh Moody, "Land Acknowledgments Spur Controversies", *Inside Higher Ed* (22 February 2022), online: <insidehighered.com> [perma.cc/3HX5-DAD7]; Wyatt Myskow, "This Professor Was Investigated for an 'Offensive' Land Acknowledgment. Now He's Suing." *The Chronicle of Higher Education* (13 July 2022), online: <chronicle.com> [perma.cc/3SUY-KHK9]; Tom Gordon, "Abertay University Student Lisa Keogh Cleared After Being Investigated for Saying Women Have Vaginas", *The Herald* (9 June 2021), online: <heraldscotland.com> [perma.cc/68NF-VSQB]; Aaron Sibarium, "A Yale Law Student Sent a Lighthearted Email Inviting Classmates to His 'Trap House:' The School Is Now Calling Him To Account", *The Washington Free Beacon* (13 October 2021), online: <freebeacon.com> [perma.cc/79P9-5H3K]; Aaron Terr, "How Yale Law School Pressured a Law Student to Apologize for a Constitution Day 'Trap House' Invitation", *FIRE* (14 October 2021), online: <thefire.org> [perma.cc/W82U-SHUF].

8 "Academic Freedom in British Universities Is Under Threat", *The Economist* (13 October 2021), online: <economist.com> [perma.cc/S83S-6Z5S]; Bradley, *supra* note 7; Gordon, *supra* note 7.

9 In Canada, the campus culture wars first raged over calls to cancel controversial speakers such as Jordan Peterson (see Colleen Flaherty, "'Hijacking a Fundamental Right'", *Inside Higher Ed* (20 March 2017), online: <insidehighered.com> [perma.cc/VZ6H-

that academic freedom increasingly faces challenges on all fronts, from both sides of the political spectrum, and from outside and inside the university,[10] it may be time to regain some clarity on starting principles.

Academic freedom is often conceived of as either a model set of principles for how institutions ought to be governed or as a set of rules for protecting the autonomy of institutions and individuals.[11] I will devote my attention to the latter. Academic freedom is a notoriously nebulous concept, often given to lofty and grandiose pronouncements on its essential service to democratic society.[12] Unsurprisingly, legal protections of academic freedom are often nebulous as well, especially when grounded in the freedom of expression.[13] Without a guiding principle, the doctrine of academic freedom, as it was memorably put, "floats in the law, picking up decisions as a hull does barnacles."[14] As Stanley Fish succinctly concluded, academic freedom "is rhetorically strong but legally weak."[15] My object is to provide a clear, minimal account of academic freedom and its relationship to freedom of expression; academic freedom

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SCCT]). Controversies over visiting speakers led one university, the University of British Columbia, to engage in a process aimed at redrafting its policies on freedom of expression (see Craig Takeuchi, "UBC Announces Changes to Event Booking Process in Response to Concerns About Hate Speech", *The Georgia Straight*, (9 July 2020), online: <straight.com> [perma.cc/9SNX-ZAQZ]; Alex Nguyen, "'Balancing Act': What Is the Limit of Freedom of Expression at UBC?", *The Ubyssey* (5 December 2017), online: <ubyssey.ca> [perma.cc/75D2-2MQA]). More recently, a speaker, Frances Widdowson, was cancelled from giving an invited lecture at the University of Lethbridge because of her controversial views (see Jaclyn Kucey, "University of Lethbridge Cancels Controversial Frances Widdowson Lecture", *Global News* (30 January 2023), online: <globalnews.ca> [perma.cc/8NZH-8ZBN]).

10 Kafka, *supra* note 4.

11 Walter P Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America" (1988) 66:7 Tex L Rev 1265 [Metzger, "Profession and Constitution"]; Robert Post, "Academic Freedom and the Constitution" in Akeel Bilgrami & Jonathan R Cole, eds, *Who's Afraid of Academic Freedom?* (New York: Columbia University Press, 2015) 123 at 123 [Post, "Academic Freedom"].

12 For a critique of such grandiosity, see Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (Chicago: University of Chicago Press, 2014) at 1–4.

13 Post observes that "the doctrine of academic freedom stands in a state of shocking disarray and incoherence" (see "Profession and Constitution", *supra* note 11 at 123).

14 J Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment'" (1989) 99:2 Yale LJ 251 at 253.

15 *Supra* note 12 at x.

"without romance," to borrow a phrase.[16] My object is not to reconcile academic freedom with existing doctrines of constitutional law. I do not propose to strip away any barnacles, nor tell any tall tales on the feats of academic freedom. Instead, my aim is to define the systemic demands of academic freedom as a form of quasi-social contract, which establishes a set of formal and informal norms governing expression within a university community.

Why institutions and governments contract into academic freedom is a complicated matter of enlightened self-interest. My concern is with the obligations that are created when this contract is entered into.[17] I will attempt to map out how academic freedom informs the university social contract and define how and when it attracts freedom of expression-*like* protections. When institutions, and the governments that support them, contract with the public and individuals on the basis that the institution supports academic freedom, they assume a basic framework for expression and content regulation for academic life on campus.[18] I propose that the social contract of academic freedom contains two essential elements: (1) the decentralization of authority over content and academic decision-making and (2) the insulation of dissent from sanction. The former is a republican impulse that resists the centralization of power, while the latter is a classical liberal priority of anti-censorship. Within the two core university operations of teaching and research, professional authority blends with the sheltering of dissent, in what I term the *republic of dissent*.

The classroom has been famously described by the United States Supreme Court as "peculiarly 'the marketplace of ideas.'"[19] Many have

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16 Daniel A Farber, "Free Speech Without Romance: Public Choice and the First Amendment" (1991) 105:2 Harv L Rev 554.

17 On the protection of freedom of expression on private campuses as a matter contract, see Erica R Salkin & Colin Messke, "Opting In: Free Expression Statements at Private Universities and Colleges in the US" (2021) 55:1 First Amendment Studies 1.

18 University campuses are often complex communities that contain many different stakeholder groups and venues for communication, including workplaces, sports facilities, dining halls, and residences. I do not suggest that the social contract proposed here covers the entirety of campus life, but merely expression in three core zones of academic life: the classroom, the open lecture, and academic scholarship.

19 *Keyishian v Board of Regents*, 385 US 589 at 603 (1967) [*Keyishian*]; see *Rosenberger v Rector and Visitors of the University of Virginia*, 515 US 819 at 831 (1995) [*Rosenberger*]; *Healy v James*, 408 US 169 at 180 (1972). See also *Dambrot v Central*

criticized this equation of academic freedom with the marketplace metaphor.[20] It is suggested that the theory of the republic of dissent helps to reconcile the marketplace metaphor with academic freedom, and education in general. The university's core functions of teaching and research are by no means zones of freedom of expression; but neither are they merely zones of professional autonomy, as some prominent accounts would have it.[21] There is something uniquely aligned with the anti-censorship spirit of classical liberalism within these zones of teaching and research—and these are, it is argued, a product of the republican nature of academic freedom. Academic freedom can be conceived as a system of checks and balances: scholars must meet disciplinary competencies, and it is, in turn, the autonomy of academic disciplines that protects the autonomy of individual scholars from their university. The university, however, must also protect scholars from not only outside interference, but also from their own disciplines, as well as internal threats from colleagues and students. And so, while the nature of the university and its housing of academic disciplines requires content discrimination, it must also house the marketplace of ideas and ensure that individuals are not punished for their beliefs or their dissent. The republic of dissent is an attempt to rationalize how these two traditions are housed under one institutional roof.

Part I of this paper offers that academic freedom is a social contract for the university that can best be conceived of as a republic of dissent. The primary pillar of academic freedom is a contractual chain of autonomy, which flows from the state to academic institutions, to disciplines, and ultimately to individuals. This chain of autonomy is a republican division of power over intellectual governance for the university. The chain of autonomy also provides the space for dissent amongst the academy's membership, which is classical liberal in spirit by ensuring the freedom to

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Michigan University, 55 F (3d) 1177 (6th Cir 1995) ("the purpose of the free-speech clause ... is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions" at 1188).

20 Post, "Academic Freedom", *supra* note 11 at 123–24. For an endorsement of Post's view, see Fish, *supra* note 12 at 45; Byrne, *supra* note 14 ("[d]emocratic values exist in tension with academic freedom because they insist that the university ... be measured by standards other than professional competence" at 282).

21 Fish promotes a deflationary, "it's just a job," version of academic freedom (see *supra* note 12).

think and consider any idea, even if it is not always equivalent to an individual expressive right. A major component of Part I is refuting other academic accounts that have rejected the connection between academic freedom and the marketplace of ideas.

Part II considers the incompatibility of academic freedom with other liberal models of regulating expression, namely a model of balancing expression against other social values. A recent example of a Canadian university redrafting its campus social contract on expression is used to demonstrate the incompatibility of the balancing model with academic freedom. Campus speech disputes are not simply intellectual disputes; they are also jurisdictional disputes. When university community members call on university leaders to cancel academic speakers they disagree with, they are not simply taking sides in a particular expressive or intellectual dispute, they are asking officials to assume an authority over content that, under academic freedom, is not theirs to control. The essence of the republic of dissent is not an individual's freedom to speak; it is preventing the powerful or the majority from dictating the search for truth.

I. THE REPUBLIC OF DISSENT

A. Academic Freedom and Autonomy

Academic freedom is, first and foremost, a principle of autonomy. Academic freedom is meant to protect the autonomy of the scholarly enterprise from interference.[22] Historically, this interference usually came from outside the university. In its original Prussian form, academic freedom was a special grant of autonomy to the scholarly community,[23] insulating it from the regular government chain of command.[24] In this early version, scholars were treated as an esteemed class of civil servants who

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22 Post, "Why Bother?", *supra* note 2 at 9.

23 Metzger, "Profession and Constitution", *supra* note 11 at 1269.

24 Walter P Metzger, "The German Contribution to the American Theory of Academic Freedom" (1955) 41:2 Bull Am Assoc U Professors 214 at 217–18 [Metzger, "The German Contribution"]; Metzger, "Profession and Constitution", *supra* note 11 at 1269.

were provided with a special degree of independence.[25] In the German or Humboldtian tradition of *akademische freiheit* (academic freedom), *Wissenschaft*—roughly the scholarly and systematic pursuit of knowledge for its own sake, independent of concern for practical application[26]—provided the university with its institutional purpose, while academic freedom provided the means for pursuing it. Under the Humboldtian model, academic freedom was divided into two main components: scholars were provided with the *Lehrfreiheit* ("teaching freedom"),[27] while students were to be given *Lernfreiheit* ("learning freedom").[28] Notably, the scholarly *Lehrfreiheit* was broadly construed to include research and publication as well, laying the foundation for the modern form of academic freedom.

The modern outlines of academic freedom began to take shape when the nascent American Association of University Professors (AAUP), in its famed *General Report of the Committee on Academic Freedom and Academic Tenure* (1915 Report),[29] adapted the German tradition of *Lehrfreiheit* to fit American democracy.[30] One notable alteration in the American adoption was the jettisoning of *Lernfreiheit*—to leave academic freedom as the province of scholars alone[31]—which was likely due to the practical realities of administering residential colleges.[32] The 1915 Declaration also

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25 Metzger, "The German Contribution", *supra* note 24 ("[t]he German universities were state institutions, but the combination of governmental restraint, limited professorial co-option, elected administrators and cultural isolation gave them the appearance, and a good deal of the reality, of self-governing academic bodies" at 217).

26 Leo L Rockwell, "Academic Freedom—German Origin and American Development" (1950) 36:2 Bull Am Assoc U Professors 225 at 227; Metzger, "The German Contribution", *supra* note 24 at 215–16.

27 Rockwell, *supra* note 26 at 228; Metzger, "Profession and Constitution", *supra* note 11 at 1269.

28 Rockwell, *supra* note 26 at 228.

29 American Association of University Professors, "General Report of the Committee on Academic Freedom and Academic Tenure: Presented at the Annual Meetings of the Association: December 31, 1915" (1915) 1:1 Bull Am Assoc U Professors 15 [AAUP, "General Report"].

30 Metzger, "The German Contribution", *supra* note 24 at 223.

31 *Ibid* ("[o]ne alteration was tantamount to an amputation: on the opening page of its report, the members of the Seligman committee announced that they would dispense with the principle of Lernfreiheit" at 271).

32 Metzger, "Profession and Constitution", *supra* note 11 at 1270, 1272.

marks the beginning of the era of providing external justification for academic freedom in democratic terms, pitched to the surrounding populace, and especially to politically appointed university leaders and trustees.[33] In the Prussian original, the enlightened self-interest of the bargain for academic freedom between state and scholars was rather straightforward: it was part of the reforms undertaken to modernize a civil service that had proved itself rigid and unresponsive in the country's crushing defeat by Napoleon's armies.[34] In the American context, the bargain was not so simple, as scholars confronted a complex web of vulnerabilities, as Walter Metzger explained:

> Nowhere in the western world was lay authority brought so deeply into the academy ... higher education was not monopolized by the state but was shared by a multitude of public and private bodies. Professors were not privileged members of a civil service but employees of the governing boards of numerous discrete enterprises. Administrators were not the chosen instruments of the faculty, but the deputies of the governing board that employed the faculty. An academic administration was not composed of a ceremonial figure called a rector, ... but rather of a potentate called a president, to whom governing boards delegated much discretionary power and who had a variously sized but ever-growing bureaucracy largely under his direct command.[35]

University stakeholders, especially trustees and political appointees, had to be convinced that the scholarly profession was a form of public trust, a calling in the service of the common good and to democratic society. To this end, the 1915 Declaration repeatedly referenced how academic freedom served democracy: by producing research to assist in legislating a complex democratic society, and by fulfilling the general university function of helping "make public opinion more self-critical and more

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33 Metzger, "The German Contribution", *supra* note 24 ("[t]hus, American theorists, unable to appeal with practical effect to the law-makers or the courts, appealed to a more nebulous authority - the will of the people as a whole" at 224).

34 See e.g. Metzger, "The German Contribution", *supra* note 24 ("[t]he University of Berlin, dedicated to academic freedom, was a phoenix that had arisen from the ashes of military defeat" at 218).

35 Metzger, "Profession and Constitution", *supra* note 11 at 1276.

circumspect, to check the more hasty and unconsidered impulses of popular feeling, [and] to train the democracy to the habit of looking before and after."[36] The democratic justification holds that academic freedom is crucial to fostering a citizenry capable of deliberation and performing the civic functions required of an enduring democratic society. As John Dewey, who was notably the head of the AAUP during its formative years, once declared: "Since freedom of mind and freedom of expression are the root of all freedom, to deny freedom in education is a crime against democracy."[37]

The 1915 Declaration also marked the joining of the German tradition of academic freedom with the classical liberal tradition of freedom of expression, or more to the point, freedom of thought. As Walter Metzer observed, the drafters of the 1915 Report drew "on Mill and Dewey more than on Fichte and Humboldt" when they "evolved a functional rather than idealistic rationale for freedom of teaching and research."[38] Liberal protections of expression and anti-censorship norms have since become intertwined with the modern university, but freedom of expression in education is a means to an end, not an end in itself. As the 1940 AAUP Statement stressed: "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition."[39]

B. Academic Freedom, Dissent, and the Marketplace of Ideas

Defining the common good as a process, and not a conclusion or fixed conception of a single public virtue, yields this classical liberal outline for academic freedom: (1) the common good is best secured by free inquiry and the unfettered exchange of ideas; (2) free inquiry requires that individuals must be free to consider for themselves any problem that

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36 AAUP, "General Report", *supra* note 29 at 32.

37 Louis Fischer, "Academic Freedom and John Dewey" (1977) 60:8 High School J 379 at 384.

38 Metzger, "Profession and Constitution", *supra* note 11 at 1274.

39 American Association of University Professors, "1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments" (last accessed 18 March 2024) at 14, online (pdf): <aaup.org> [perma.cc/44KS-JSL4] [AAUP, "1940 Statement of Principles"].

arises, with all available knowledge and opinion; and therefore (3) neither institutions, nor other community members, may silence expression because they disagree with its content. This liberal tradition was more recently embodied in the well-known "Chicago Principles," or the "University of Chicago Statement" on expression,[40] which is arguably the gold standard articulation of freedom of expression in higher education. The Chicago statement affirms that:

> Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn.[41]

The Chicago Statement also affirms that:

> [I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. ... Although the University greatly values civility, ... concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.[42]

The university further acknowledges, "a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."[43] This entails that the university must safeguard against the attempt of some community members to silence others through the exercise of expression or conduct, as with some form of "heckler's veto."[44] Ultimately, the Chicago Statement affirms that the consideration of ideas and the evaluation

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40 University of Chicago, *Report of the Committee on Freedom of Expression* (Chicago: University of Chicago, 2015), online (pdf): <provost.uchicago.edu> [perma.cc/ET8W-EUYX].

41 *Ibid* at 2.

42 *Ibid.*

43 *Ibid* at 3.

44 *Ibid* ("[a]lthough members of the University community are free to criticize and contest the views expressed on campus ... they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe" at 2–3).

of claims to the truth rests with individuals, not the institution.[45] This statement echoes Justice Brandeis's famous concurring opinion in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[46] In this way, each university community member is an independent evaluator of truth, and speaker of their own version of the truth, though never a censor.

The unfettered contest of ideas, championed earlier by Milton in his *Areopagitica*[47] and by Mill in *On Liberty*[48], was eventually embraced by Justice Holmes in his much-celebrated dissent in *Abrams v. United States*, which gave life to the marketplace metaphor:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[49]

An eloquent echo of the marketplace of ideas is found in the 1915 Report:

> [I]n a democracy there is political freedom, but there is likely to be a tyranny of public opinion. ... An inviolable refuge from such tyranny should be found in the university. It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may

45 *Ibid* ("[i]t is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose" at 2).

46 *Whitney v California*, 274 US 357 at 377 (1927), Brandeis J, concurring.

47 John Milton, *Areopagitica*, ed by John W Hales (Oxford: Clarendon Press, 1894).

48 John Stuart Mill, *On Liberty*, ed by Elizabeth Rapaport (Indianapolis: Hackett Publishing, 1978).

49 *Abrams v United States*, 250 US 616 at 630 (1919), Holmes J, dissenting.

> become a part of the accepted intellectual food of the nation or of the world.[50]

In the years since *Abrams*, the United States Supreme Court has frequently embraced Holmes's metaphor and declared that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[51] The marketplace of ideas provides an eloquent metaphor for the relationship between democratic government and freedom of expression. As Fish observed:

> In a democracy government does not have a proprietary purchase on truth and can neither monopolize the conversation nor dictate its course. The state is only one voice among many and it must allow all voices in the marketplace where, in the fullness of time, the truth will emerge.[52]

The Supreme Court has further indicated that "the classroom is peculiarly the 'marketplace of ideas,'" and that "the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[53] Though the marketplace may be a fitting metaphor for speech in a democracy, it does not make for a seamless fit for academic freedom nor higher education in general.

Under the marketplace of ideas, the government's regulation of expression is only permissible so long as it meets the "requirement of viewpoint neutrality,"[54] in which courts give "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[55] The apparent problem with equating the marketplace of ideas with the university is that the basic functions of the university, namely the pursuit of knowledge through research and teaching, requires content discrimination. Fish, for one, has rejected the marketplace of ideas, as well as any democratic or First Amendment justifications of academic freedom: "If what you are after is knowledge that

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50 AAUP, "General Report", *supra* note 29 at 32.

51 *Red Lion Broadcasting Co, Inc v FCC*, 395 US 367 at 390 (1969).

52 Fish, *supra* note 12 at 45.

53 See *Keyishian*, *supra* note 19 at 603; *Rosenberger*, *supra* note 19 at 831.

54 *Rosenberger*, *supra* note 19 at 834.

55 *Turner Broacasting System, Inc v FCC*, 512 US 622 at 642 (1994).

is reliable and authoritative, those in the business of fashioning it must be credentialed and held to professional standards. Exclusion of voices is necessary."[56] In this way, Fish follows upon J. Peter Byrne, who argued that "[d]emocratic values exist in tension with academic freedom because they insist that the university ... be measured by standards other than academic competence."[57] Similarly, Robert Post observed that "the production of expert knowledge ... depends on the continuous exercise of peer judgment to distinguish meritorious from specious opinions. Expert knowledge requires exactly what First Amendment doctrine prohibits."[58] I certainly agree, in so far as to expert knowledge and the evaluation of academic competence. But I think these accounts are missing something. Academic freedom is more than competencies and expert knowledge, though it certainly includes these; it also encompasses, or subsidizes, dissent amongst experts. Perhaps "the knowledge industry—the academy—cannot be understood as a subset of democracy and the First Amendment,"[59] as Fish suggests, but I think it certainly is a subset of the marketplace of ideas.

Arguably the most comprehensive rejection of the connection between academic freedom and freedom of expression, and the marketplace of ideas in particular, has been provided by Post. As Post has argued:

> But if, as the theory of the marketplace of ideas holds, "the First Amendment recognizes no such thing as a 'false' idea," then it cannot sustain, or even tolerate, the disciplinary practices necessary to sustain the truth claims to which the ideal of expert knowledge aspires.[60]

Yet, Post seems to be conflating the First Amendment with the marketplace of ideas. For example, he suggests that the "egalitarian premises built into the foundations of First Amendment doctrine undermine the disciplinary authority necessary for the maintenance of expert

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56 Fish, *supra* note 12 at 45.

57 Byrne, *supra* note 14 at 282.

58 Robert C Post, *Democracy, Expertise and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012) at 9 [Post, *Democracy, Expertise and Academic Freedom*].

59 Fish, *supra* note 12 at 45.

60 Post, "Academic Freedom", *supra* note 11 at 127.

knowledge,"[61] and that "[d]emocratic legitimation requires that the speech of all persons be treated with toleration and equality."[62] This is no doubt an accurate reading of the First Amendment (which is not my concern here), but it seems some distance from the classical liberal roots of the marketplace as an ideal of anti-censorship. Consider Post's example of the academic journal:

> [D]isciplines commonly use professional journals to serve as gatekeepers for the recognition and distribution of knowledge. Journals could not perform this function if they were required to operate according to the theory of the marketplace of ideas. If disciplinary journals were forced by constitutional doctrine to accept all manuscripts on a first-come, first-served basis, or if they were constitutionally prohibited from engaging in the content discrimination required to distinguish good from poor submissions, they could no longer serve as disciplinary gatekeepers for the recognition and distribution of knowledge.[63]

This example reads curiously on two counts. First, why would the marketplace of ideas ever apply to an academic journal, unless it was faced with government censorship or was a vehicle for it? I suppose Post's use of this example is meant to convey the ludicrous results that would occur if individual scholars were granted an equal say or equal space within academic venues. Though would the same argument not apply to many areas of public life? No culture, information, or knowledge-based institution could persist without the ability for editorial content discrimination. The second question, which flows from the first, is why the marketplace of ideas would ever dictate an equal opportunity for all authors and their submissions? The marketplace of ideas, in my reading, is never suggestive of an entitlement to have our ideas adopted. Freedom of expression is an entitlement to give voice to thought and opinion, not an entitlement that those thoughts and opinions should be published, reproduced, or favoured by others. Whether *The New Yorker* once again rejects my cartoons or *The Lancet* rejects my article on the medicinal wonders

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61 *Ibid* at 129.

62 *Ibid* at 130.

63 *Ibid* at 127.

of leeches, no theory of freedom of expression, including the marketplace of ideas, gives me an entitlement to publication or a receptive audience.

According to Post, the marketplace of ideas is inherently fused and interchangeable with the First Amendment's egalitarian concern for the equal individual right to expression. Notice Post's progression here:

> The marketplace of ideas expresses the egalitarian principle that persons cannot be regulated based upon the content of their ideas. We have interpreted the First Amendment to mean that every person has an equal right to speak as he or she thinks right.[64]

The first sentence resembles the marketplace of ideas, or at least my reading of it, though I would instead put it as: "Ideas cannot be silenced by regulation, and therefore persons cannot be sanctioned or discriminated against based on the ideas they hold or give voice to." Additionally, as I will explore further below, the marketplace of ideas is hardly egalitarian—if anything, it is anti-majoritarian in nature. Though Post is not alone in making the switch from ideas to persons and their voices—recall how Fish summarized the marketplace, in which "the state is only one voice among many and it must *allow all voices* in the marketplace."[65] In any event, it is the connection of the first sentence with the second, or Post's equivalence between the marketplace of ideas with an egalitarian First Amendment, that is the real issue in regard to academic freedom. To see that it is a true conflation, and not simply two sentences following in order, consider another version of Post's journal example: "If a marketplace of ideas model were to be imposed upon *Nature* or the *American Economic Review* or *The Lancet*, we would very rapidly lose track of whatever expertise we possess about the nature of the world."[66] Or, consider this example, which is more germane to the present consideration of academic freedom:

> Universities cannot fulfill their social function unless they are authorized to evaluate scholarly speech based upon its content and professional quality. No doubt if the New York Times were to editorialize that the moon is made of green cheese, the First

64 Post, *Democracy, Expertise and Academic Freedom*, *supra* note 58 at xi.

65 Fish, *supra* note 12 at 45 [emphasis added].

66 Post, *Democracy, Expertise and Academic Freedom*, supra note 58 at xii.

> Amendment, deploying the concept of the marketplace of ideas, would prohibit government from imposing any sanction. Yet no astronomy department could survive if it were constitutionally prohibited from denying tenure to young scholars who were similarly convinced.[67]

Again, the concern alluded to with this reference to the marketplace of ideas involves the disastrous consequences if the junior scholar were able to claim an equal entitlement for all ideas. The problem is not only that Post appears to be using the marketplace of ideas as synonymous with the equality of speakers and their speech under the First Amendment, but that there is a division of powers within academics that tends to be glossed over. From this perspective, the department may well have violated the scholar's academic freedom, if the decision was made by the department unilaterally or without an adequate academic and disciplinary[68] basis. The young scholar example helps demonstrate a second problem of conflation that can occur when the university, the discipline, and the scholar are fused into some grand collective effort for the common good. For example, consider Post's point on university decision-making:

> Only competent faculty can advance knowledge. Universities assess competence by using the standards of the scholarly profession. And they assess the competence of faculty all the time: whenever they hire, promote, tenure, or award grants to professors. Universities invoke the doubled structure of academic freedom whenever they honor the need for critical freedom while simultaneously making the judgments of quality required to advance knowledge.[69]

I have to quibble with this statement as well. I do not think that universities, under a system of academic freedom, get to be primary decision-makers on each of those calls. On the first and last, hiring and the provision of honours, yes; but not as to tenure and promotion—those should be primarily disciplinary decisions, guided by other external scholars, not

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67 Post, "Academic Freedom", *supra* note 11 at 128.

68 I use "disciplinary" as in a field of academic expertise, not an exercise in behaviour modification.

69 Post, "Academic Freedom", *supra* note 11 at 126.

the university and its departments. I am by no means suggesting that Post contemplates an arbitrary and unitary vision of the academic profession—far from it. As Post himself observes:

> If a professor sues a university for a violation of academic freedom for its refusal to award him tenure, the right question for a court to decide is neither the individual rights of the professor nor the institutional prerogatives of the university. It is instead whether the tenure decision is made on the basis of the proper disciplinary standards.[70]

But this acknowledgment means that the prerogatives of the university are constrained, and my point is that these are constrained in different ways in different contexts. The university does not have a blanket ability to assess competence "all the time."[71] The checks and balances demanded by academic freedom mean that university authority is much more variable than Post seems to suggest. And more importantly, Post's account misses the anti-censorship component of academic freedom, which counts against the very discipline that infuses his account with all of its scholarly authority. Not only is the university checked in its authority over disciplines, but so too must the academic discipline be checked vis-à-vis the individual scholar. Post seems to hew to the view of academics as a priestly class administering wisdom to society, following Justice Frankfurter in his famed concurrence in *Wieman v. Updegraff*:

> To regard teachers ... as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.[72]

And while Post's account undoubtedly has rhetorical appeal in terms of external justification, it is missing the important ingredient of dissent—

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70 *Ibid* at 133.

71 *Ibid* at 126.

72 *Wieman v Updegraff*, 344 US 183 at 196–98 (1952), Frankfurter J, concurring. This passage was endorsed and cited by Post (see "Academic Freedom", *supra* note 11 at 138–39). Fish offers a strong critique of this view as inherently elitist (see *supra* note 12 at 47).

that there must also be protection for heretics and the unorthodox amongst the priesthood.

C. *Autonomy and the Academic Republic*

Academic freedom makes demands upon any society that purports to offer it, and in this regard can be thought of as a form of social contract. The social contract of academic freedom consists of two pillars: a republican division of powers and the freedom to dissent. By *republican*, I refer to a classical tradition stretching back through Machiavelli—English republicans such as Milton, Harrington, Sidney and Blackstone—as well as Montesquieu and many Americans of the founding era, such as Jefferson, Madison, and Adams.[73] Although republicanism has many variants and differing attributes of emphasis (as with the civic virtue of political participation) *republican* as used here refers to the avoidance of the accumulation and centralization of power, which may facilitate dominance and exercise of arbitrary power. I use republican in a simple fashion to signify a rule-based system designed to resist a monopoly on decision-making authority, to ensure that individuals within the system are provided with sufficient independence to pursue their own version of the good life, and to question and contest the decisions of those in positions of power. The republic of dissent is Jeffersonian,[74] or in the spirit of subsidiarity,[75] in the sense of being adverse to the centralization of power.

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73 Frank Lovett, "Republicanism" in Edward N Zalta & Uri Nodelman, eds, *Stanford Encyclopedia of Philosophy* (Stanford: Stanford University, 2022), online: <plato.stanford.edu> [permca.cc/3LLQ-K6H5]. For more modern revivals of the republican tradition, see e.g. Quentin Skinner, "Machiavelli on the Maintenance of Liberty" (1983) 18:2 Politics 3 at 3; Quentin Skinner, "Freedom as the Absence of Arbitrary Power" in Cécile Laborde & John Maynor, eds, *Republicanism and Political Theory* (Malden: Blackwell, 2008) 83 at 85; Philip Pettit, "The Freedom of the City: A Republican Ideal" in Alan P Hamlin & Philip Pettit, eds, *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell, 1989) 141 at 158; Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012) at 7.

74 This affiliation primarily reflects Jefferson's political preference for republican style, as opposed to Hamilton's more federal and centralized vision; but secondarily, Jefferson's contribution to modern post-secondary education through his founding role with the University of Virginia.

75 Subsidiarity is a principle that suggests that decisions ought to be made at the lowest or least centralized level possible. See e.g. Steven G Calabresi & Lucy D Bickford,

The social contract of academic freedom begins with the grant of autonomy to universities by governments, which occurs, often implicitly, when those in power agree to not interfere with the intellectual life of the university. Universities, in turn, provide autonomy to both disciplines and the scholars within those disciplines. In the original Prussian version of academic freedom, autonomy was also granted to students. Under the concept of *Lernfreiheit*, as previously mentioned, students had the privilege to study what, and when, they saw fit. This autonomy of students did not survive the development of the modern residential university and was summarily jettisoned in the 1915 Declaration.[76] Yet, students, of course, retain intellectual autonomy, as Post notes.[77] This is an important component in the anti-censorship, individual liberty pillar of academic freedom discussed below.

The key grant of autonomy, or division of power, occurs when universities agree to house independent disciplines. A university is not bound to house a biology department, and a school of fine arts should not be bound to offer courses in biology. Though once an institution does commit to hosting a biology department, under the terms of academic freedom, the university surrenders content authority over biology to biologists. Neither the government nor university officials get to dictate the terms of what constitutes biology, or what may or may not be taught, researched, or published within the field. What is most unique about the university is this division of powers with academic disciplines, which places substantial aspects of assessment outside of the institution itself. For instance, decisive qualification points in the career of a scholar, as with promotion and the award of tenure, are usually based on a peer review process external to the university and its departments. Ultimate decision-making as to tenure and promotion, of course, resides with university officials and internal committees, but it is difficult to imagine this process proceeding without a decisive foundation in external peer review, whether this is found in each individual journal or book publication, or with the referee reports on a candidate's tenure dossier. Unlike other

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"Federalism and Subsidiarity: Perspectives from US Constitutional Law" (2014) 55 NOMOS 123 at 125.

76 AAUP, "General Report", *supra* note 29 at 20. For a consideration of the likely motivations for this deletion, see Metzger, "Profession and Constitution", *supra* note 11 at 1270, 1272.

77 Post, "Academic Freedom", *supra* note 11 at 126.

private or public institutions, a university makes its major evaluations of its academic staff contingent upon the assessment of independent academic expertise. Indeed, it is the independence of academics that ensures that their expertise may be relied upon by the public, and so it is fitting that this independence of expertise is reflected in a university's assessment of whether individuals qualify for the scholarly guild.

Universities and disciplines then further delegate authority over content delivery. The university cannot dictate what constitutes biology, and neither can an individual instructor. The instructor must deliver to students the recognizable competencies of a given field. Though within the realm of the classroom neither the university nor the discipline should be able to set any rigid structure for how biology is to be taught or delivered. Academic freedom proceeds via a chain of autonomy: governments to universities, universities to disciplines, and from universities to individual scholars. The university is thus constrained in many important ways as to the operation of the academic project, or the professional pursuit of knowledge as it were, but the university necessarily (and governments for that matter) retains important decision-making powers. Universities and governments must be able to discriminate amongst disciplines and individuals in many regards. Governments are free to discriminate over funding, determining whether to support a school of fine arts or biology, for example. Similarly, university leaders are able to discriminate in the level of funding, or where scarce resources are to flow between respective departments. And significantly, universities must be able to discriminate over who gains admittance to its ranks. Although it is not my focus here, I do recognize that academic freedom is also conceived of as a principle of institutional governance, as was alluded to earlier.[78] In this regard, it could be said faculty members ought to be involved in many of the important decisions as to resource allocation and membership. I will constrain myself to considering a model of the university where scholars' involvement in university decision-making is often better described as either unwelcome or a matter of delegation, as when a university delegates authority for hiring decisions to a department or unit. If the university

78 See e.g. Larry G Gerber, "'Inextricably Linked': Shared Governance and Academic Freedom" *Academe* 87:3 (May–June 2001) at 22. See also Fish, *supra* note 12 at 42–44.

administration retains a veto on the decision, then its authority has not been surrendered, and there has been no division of powers.

No matter who exercises decision-making authority on behalf of the university—whether faculty or administrators—the discretion to make academic distinctions regarding funding and membership is not subject to challenge under the principles of academic freedom. If I am an aspiring biologist, I have no claim to the protection of academic freedom for my declined application as a student or as an academic candidate, regardless of who made the decision on behalf of the university.[79] The division of powers under academic freedom operates only once I am a member of the institution, and subject to its academic social contract. Academic freedom, therefore, can forestall my involuntary exit from the institution, but not provide a right of entry. In short, academic freedom operates against tenure and promotion committees, not admissions or hiring committees. Just as academic freedom does not cover decisions of academic management, as with discrimination as to which students qualify for admittance to a program, neither will freedom of expression. Certainly, if the university discriminates in an illegitimate manner, which is certainly a thorny topic,[80] this should be open to legal or constitutional challenge—though not as a matter of freedom of expression nor academic freedom. Freedom of expression is not a positive right that guarantees our equal opportunity of admittance to any and every institution of higher education.[81] So then how, and when, does freedom of expression operate and follow academic freedom on campus?

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79 For example, the Alberta Court of Appeal, in the context of considering the potential application of the Canadian *Charter* to protect the freedom of expression of students on campus, found that the issue of admissions was explicitly not protected under freedom of expression. The Court determined that such a "case is directed to academic management and to student qualification for college entry and not to freedom of expression" (see *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 143 [*UAlberta*]).

80 For example, affirmative action and race and ethnicity-based preferences in university admissions decisions (see *Students for Fair Admissions, Inc v President and Fellows of Harvard College*, 600 US 181 (2023)).

81 A state can certainly be committed to a universal entitlement to post-secondary education, which is commendable, but I would not frame that as flowing from the freedom of expression—at least not in its classical liberal tradition as a negative liberty.

D. A Republic of Dissent

Universities are bastions of freedom of expression that are everywhere covered in the regulation and discrimination of expression. In order to function as an institution of education, universities must evaluate the expression of its members. Academic expression must by its very nature produce unequal outcomes. Freedom of expression is an inherent right that should be open to all individuals equally, while academic freedom is a professional privilege that only some possess by virtue of their education and professional qualifications. So how is it possible to square universities and academic freedom with the freedom of expression? I think examining the university through the lens of decentralized authority reveals that the marketplace of ideas is an animating principle of the university social contract.

The marketplace of ideas is essentially an ideal of anti-censorship. The government is not to be a tool for the majority or those in power to dictate the contest of ideas and declare winners and losers in the search for truth or moral supremacy. Individuals are but a means to the end in the search for truth. The reason that we should not sanction dissenters, however vehemently we may disagree with them, is twofold: First, it would disincentivize future dissenters to witness the social cost of expressing unpopular ideas; second, the dissenting author may well be the only one willing to champion or give voice to the dissenting idea. A sanction in the university context can cover a wide range of penalties or imposed costs, ranging from the most serious as with termination of employment or student expulsion, to impositions that may be time consuming and stressful, but which do not result in formal discipline. No doubt institutional investigations or hearings may produce anxiety or embarrassment for respondents even when they do not result in any formal institutional sanction.

As a constitutional or regulatory matter, the marketplace of ideas demands content neutrality on the part of the government, so that expression may only be regulated based on practical concerns of time, place, and manner restrictions, not on the substance of the expressed content. In the metaphor of the university as a social contract, let us place the university administration in the role of government and consider the various ways that the marketplace of ideas is detectable.

The most apparent location of the marketplace of ideas on campus is the quad, or the central university square. The quad has evolved into a quintessential place of freedom of expression, where community members come to protest, debate, and advocate. It is in a sense a modern place for the pamphleteer. Here, the university must be content neutral and regulate only on a time, place, and manner basis. Although the university quad may be a quintessential marketplace of ideas, it is not necessarily academic in nature. The protest of a foreign war does not change in meaning by changing the location from the city square or legislature steps to the university quad. It is perhaps a mark of the special place of the university within society that in the collective imagination it has become an ideal site for debate and open exchange. For example, when the Alberta Court of Appeal—for the first time in Canada—provided constitutional protection to student expression in the quad,[82] the court drew on a long tradition within western civilization, including not only the words of Thomas Jefferson on the founding of "our new University,"[83] but also the Roman poet Horace who described "the groves of Academe" in the time of Plato.[84]

The university marketplace of ideas also connects with academic freedom when expression moves off campus, in the form of so-called extramural expression. A modern feature of academic freedom, in the American updating of the German original, is the protection of the expression of academics or scholars undertaken in their personal capacity. The drafters of the 1915 Report were acutely aware that extramural expression was likely to be the target of censorship or retribution from politically motivated university board members or trustees, but the committee members were conflicted as whether to take the step of extending the protection of academic freedom to include expression that was beyond the scope of a scholar's expertise.[85] Why, after all, should a scholar be exempt from consequences that other citizens would face for expression that is voluntarily undertaken in a capacity outside of the workplace and outside of a scholar's professional expertise? The committee, largely at the instigation of the leading member, Arthur Lovejoy, was finally swayed to embrace

82 *UAlberta*, *supra* note 79 at 112.

83 *Ibid* at para 115.

84 *Ibid* at para 111.

85 Metzger, "Profession and Constitution", *supra* note 11 at 1274–75.

the more expansive view of academic freedom that included extramural expression.[86] As Walter Metzger details:

> In his peripatetic investigations, Lovejoy had discovered that American professors were especially likely to become an endangered species when they took stands on mooted issues outside their fields. Indeed, he had discovered that professors were more likely to pay for outspokenness when they criticized campus officials than when they challenged anyone else. His report on mass faculty dismissals and resignations from the University of Utah was an eye-opening documentary on how the most devastating storms could be aroused by the academy's teapot controversies.[87]

Moreover, it could also be said that an advantage of a broad, though not unlimited,[88] immunity for expression is pragmatic in that it may be difficult, especially in some disciplines, to define boundaries between academic expression and personal political expression. When constitutional law professors publicly criticize Supreme Court decisions, are they speaking professionally or in their personal capacity as citizens? Perhaps both.

The campus quad and extramural expression are both zones of the marketplace of ideas, but they are only indirectly related to academics, if at all. To be clear, although the campus quad and extramural expression resemble the marketplace of ideas, I do not think that these fall under the proposed theory of a republic of dissent, for these are lacking in the republican, or jurisdictional, component of the republic of dissent. The republic of dissent is instead identifiable in areas where there is both an element ensuring for the possibility of dissent and a balance of powers that limits centralized authority. The republic of dissent is argued to characterize areas that are at the core of the university's mission in the pursuit and dissemination of knowledge, namely: (i) the classroom, (ii) the open lecture, and (iii) academic performance. Unlike the campus quad or social

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86 *Ibid* at 1275.

87 *Ibid.*

88 Academic freedom should provide no protection for expression that is otherwise unlawful, as with libel or copyright infringement, or which violates basic workplace norms, as with harassment or intimidation of a coworker.

media, these three zones are unique to a university and are manifestations of the republic of dissent. I will deal with each of these three in turn.

1. The Classroom

The classroom is an anti-censorship zone—prohibiting the sanction of an individual for their beliefs or ideas held. Freedom of expression is inapplicable to academic performance and its evaluation, nor does it provide an unfettered liberty to speak. Of the three zones covered here, the classroom is arguably the least given to freedom of expression. Most obviously, the university and its department heads are able to dictate what will be taught and when. Academic freedom provides no defence to an instructor's aversion to teaching contract law on Friday afternoons, and freedom of expression does not displace the basic requirements of an employment contract. Academic freedom mandates that the classroom be a place of great intellectual and professional autonomy, with instructors able to establish much of the norms of their own teaching environment. The classroom is largely an autonomous teaching space, in which neither the university nor the academic profession of biology dictate to an individual instructor the details of how the content of biology is to be delivered. But the classroom is still an educational space. Students are not free to say whatever they wish inside the classroom—they are constrained by the social contract of the classroom, of an orderly, sometimes one-sided conversation, whose tone and format are set by the instructor. And while instructors may enjoy a great deal of autonomy and latitude in the delivery of content and dictating the intellectual grounds within a course, they too are bound by the same course social contract and cannot use their position to attempt to indoctrinate students. As Fish notes, while the "imperative of academicizing demands the exclusion of no topic from the classroom; ... [i]t demands, rather, that whatever topic you have selected for consideration be the object of analysis rather than the vehicle of an agenda."[89] The "you" in Fish's quoted words would, of course, refer to the course instructor, and I think we can take the topic to be the course subject matter—and further, think of the course title, description, and syllabus as a form of social contract that sets the bounds of discussion. The classroom and the academic course held within it are, therefore, a place marked by speech restraints and content discrimination. A course

89 *Supra* note 12 at 32.

in biology is not the time for a soliloquy from Hamlet except to the extent that it advances the advancement of the teaching of biology (which should be widely construed), and so too are personal political soliloquies a corruption of the instructor's use of their unique podium.

Instructors are often required to discriminate amongst students based on their facility with received ideas and their skill in applying taught or assigned knowledge. Academics is often a performative skill that requires differentiation in status and outcomes, but facility in the use of ideas is far different from indoctrinating those ideas. Individuals are much more than their academic status, and this intellectual autonomy must persist, without any attempt of instructor, department, university, or government imposing any orthodoxy upon them. As Greg Lukianoff put it: "[T]eaching a student about the philosophy of Stoicism ... is not the same thing as requiring that your students all become classical Stoics."[90] Viewing a university as a republic of dissent preserves this precious intellectual autonomy that individuals deserve as members of a liberal society, regardless of academic or any other order of status. So, while the United States Supreme Court's famous phrasing on the classroom as "peculiarly the 'marketplace of ideas'" may be inexact as to freedom of expression, it is quite squarely a reflection of the anti-censorship spirit of classical liberalism and the marketplace of ideas. It is useful to recall that the famous phrase concluded thus:

> The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[91]

Universities, through scholars and instructors, may certainly adjudicate the contest of academic performance, but they, like governments, must not act as an ultimate tribunal on what counts as truth, or impose an "authoritative selection" by sanctioning the ideas, beliefs, or creeds individuals hold as their own personal version of the truth. The classroom may not be a true free speech zone, but it remains a zone of significant professional autonomy and, ultimately, is an anti-censorship zone. It is anti-censorship not primarily as a matter of freedom of expression, but as

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90 Fish, *supra* note 12 at 32, citing Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (New York: Encounter Books, 2012) at 103.

91 *Keyishian*, *supra* note 19 at 603; *Rosenberger*, *supra* note 19 at 831.

a product of the republican division of powers established under academic freedom to permit the pursuit of truth. The republican tradition holds for the classroom in that those in power—whether government, university officials, or instructors—may not sanction students on the basis of the ideas they hold.

2. The Open Lecture

The second zone of academic expression on university campuses is the open lecture, or the invited academic lecture. Unlike the university quad, the open forum of the invited lecture is certainly academic in nature and should be protected under the guise of academic freedom. The visiting speaker is an integral feature of academic life, which presents community members an opportunity to engage with academics outside of their own institution, and ensure that their own repository of ideas and local champions of proclaimed truth are not unduly parochial or "cloistered" to echo Milton.[92] So long that a planned lecture is academic in nature, with a basic category check that the event is not a child's birthday party, for instance, then the talk should proceed no matter how controversial or unpopular the academic speaker may be (or unpopular the student club that is hosting the event). There is a direct correspondence between classical liberalism and academic freedom in this zone of the open lecture because to censor or cancel the speaker not only deprives the speaker of the opportunity to communicate, it also deprives the audience of the right to hear the speaker's ideas, to engage with them, and to consider the truth for themselves.

Under freedom of expression, the issue is framed in terms of individual rights—the rights of both the speaker and the audience. However, academic freedom is arguably broader. Under the republican division of powers required by academic freedom, university leaders do not have the authority to cancel an academic event on content-based grounds, and neither do the majority of academic staff. The open lecture, therefore, presents a good example of the republic of dissent in operation, for it combines both pillars of a republican balance of power with a classical liberal protection for dissent. Recall Post's example of the young astronomer who is convinced that the moon is made of green cheese. It is for

92 Milton, *supra* note 47 at 18.

fellow astronomers to consider the green cheese thesis, not non-academic, non-astronomer university administrators. And even where the majority of the university's astronomy department is dead set against the speaker, even they should not be able to cancel the talk, for it would deprive the audience, and independent minded astronomers, a chance to think, to reason, and to decide for themselves. It is not a universal human right of an individual to be able to speak at a university, but academic freedom does create a right of the academic audience to hear and engage with other academics.

Maintaining the open lecture as a venue for possible academic dissent is appealing on both practical and principled grounds. For one, it would be impractical to subject every single invited speaker to peer review and an assessment of disciplinary merit, especially if this were to resemble an independent, external peer review process. It is commonplace for faculty to invite guest speakers and to make the presentation open, but this practice would surely be undermined if every invitation required peer review. And if every invited guest is not subject to the same scrutiny, this raises an issue of equality amongst faculty, of why most faculty may invite guests without reservation while a minority may not.

On the grounds of principle, the open lecture should not be subject to majority approval or peer review because the exercise should be conducive to offering new, speculative, and untested ideas. The open lecture should permit for the communication of new ideas without the same exacting standards required of a published work. Indeed, the open or guest lecture may provide the process by which new academic ideas are tested and defended en route to publication and mainstream adoption within a discipline. Furthermore, a principled protection of academic dissent via the open lecture, without the prospect of a majority veto, is called for because academics often wade into topics that may be subject to intense political disagreement, and it can be difficult to distinguish between disciplinary and viewpoint criticism. Academic visitors are often objected to because of their previous controversial public statements on political or cultural topics—perhaps on a foreign conflict or on the place of equity, diversity, and inclusion (EDI) in higher education—that might have seemingly nothing to do with the visitor's area of academic expertise or even the proposed topic of the open lecture. If, for example, a visiting astronomer has offered controversial views on EDI-based hiring in the sciences, it is certainly legitimate for community members to disagree

with and contest these views; but were the astronomy department, or its members, to cancel the lecture due to backlash, this would be a violation of academic freedom.[93] And again, the violation is not of some right of the visitor to speak, but of a resident faculty member to invite the guest, and of other interested faculty to attend and engage with the speaker. Under the republic of dissent, neither the university administration nor the majority of academic staff should be able to veto the academic minority in their good faith communication or consideration of dissent.

3. Scholarly Performance

Scholars who belong to the academic guild should not be sanctioned for the views they hold or express so long as those views are otherwise lawful and do not involve personal misconduct.[94] The lesson of the dissenting astronomer also extends to scholarly performance—another republican zone of anti-censorship. Scholarly performance is another instance that is not quite consistent with freedom of expression and yet is clearly a zone of anti-censorship. Obviously not everyone enjoys academic freedom, and one must first qualify for the academic guild in order to gain its professional privileges. Academic freedom does not operate for members of the public, nor applicants to universities, nor applicants to faculty appointments; these belong to the zone of university management. Though once again, if the university accepts an individual into their academic fold, then academic freedom requires that the university surrender substantial authority over content-based decision-making over an academic's career—not all authority, but content-based authority. While academic freedom is not a shield for gross incompetence, unethical behaviour, or personal misconduct, it is nevertheless a content shield.

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93 This hypothetical draws upon and resembles an episode that occurred at the Massachusetts Institute of Technology (MIT), in which a department head canceled a lecture of a visiting scientist over backlash to an opinion piece he had published in *Newsweek*. The hypothetical differs in that it considers a guest lecture invitation made by a resident faculty member, not a named lecture series invited by the department head, which was the case at MIT (see Colleen Flaherty, "A Canceled Talk, and Questions About Just Who Is Politicizing Science", *Inside Higher Education* (5 October 2021), online: <insidehighered.com> [perma.cc/E9NC-9PA3]]).

94 Academic freedom provides no insulation to unlawful expression, such as fraud, libel, or infringements of intellectual property, for example, nor is it a defence to misconduct or harassment when it is directed at specific persons.

The university may certainly discriminate amongst scholars in the provision of honours, as in the elevation in status or promotion to more lucrative positions, but not as a matter of sanction.

Recall Post's "moon made of green cheese" example from above, in which a university rejects a junior astronomy scholar's tenure application, effectively concluding his employment contract. It may not constitute a formal termination of employment since it is an expiry—according to contractual terms—but for the junior scholar, it will no doubt feel the same. As I suggested earlier, Post's view that the university requires the authority to make this decision is either incorrect or incomplete, based on the nature of the decision-making structure of academic freedom. Under academic freedom, and within the republic of dissent, the location of decision-making power is crucial. If the university, or one of its departments, undertook the decision unilaterally, without outside consultation, then I think this would be a clear violation of academic freedom. Let me illustrate the point by modifying Post's example a little. With apologies to both Professor Post and to Dr. Seuss,[95] let us suppose our junior astronomy scholar believes that the moon is made of green eggs and ham. The university and its astronomy department, is not, in my opinion, entitled to say to the junior astronomer:

> You must go, Sam-I-am, we do not like green eggs and ham.

The university, like the government, is not entitled to "like" academic ideas. They can favour disciplines and applicants as a facet of academic management, but they cannot sanction ideas amongst its current academic membership. Again, reward is not the same as sanction. The republican division of powers prevents university leaders and officials from having authority over members of a discipline or academic guild on contest-based grounds.

The university is entitled to say, however:

> You must go, Sam-I-am, you have taught nothing but green eggs and ham.

Academic freedom, or freedom of expression for that matter, should not excuse the repeated failure to teach students in the basic competencies of

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95 Dr Seuss, *Green Eggs and Ham* (New York: Random House, 1960).

a given field, and for which a course and its instructor purport to hold out expertise. Similarly, the university is also able to say:

> You must go Sam-I-am, no one has published your theories of green eggs and ham.

This third hypothetical, like the second, situates the grounds for the young scholar's rejection in disciplinary competencies. In short, Sam-I-am has not been able to demonstrate sufficient skill or competency within the academic guild of astronomy, assuming no other publications, and therefore cannot remain a part of it, until and unless another institution decides to hire Sam. Now, if Sam had tenure, this would be a different matter. I suspect that this is why Post chose an untenured scholar for his example. The introduction of tenure—and its protection of unpopular, unorthodox, or provoking ideas—detracts from the ideal of academic professionals who, like Prometheus, hand down illumination to the grateful mortals below. Nevertheless, I think the principle of free inquiry, without a content veto for governments, universities, or disciplines, is where we find the anti-censorship spirit of academic freedom and the republic of dissent. The introduction of tenure illustrates a moment when neither the university, departmental colleagues, nor other astronomers can punish Sam for his belief in green eggs and ham. Rival astronomers can reject Sam's manuscripts all they want, and the university can give prestigious chair positions to everyone save Sam; but he is not going anywhere, that Sam-I-am, so long as he teaches about the moon without green eggs and ham.

II. THE REPUBLIC OF DISSENT AND THE LIMITS OF BALANCING

Much attention has been paid to the shifting climate on university campuses in regard to expression, in which internal stakeholder groups, including students, faculty, and administrators, have displayed lessening support for freedom of expression and academic freedom. Prioritized instead are commitments to EDI and calls for civility in discourse so that everyone can comfortably participate. As one university Chancellor declared: "What we cannot and will not tolerate at the University ... are personal and disrespectful words or actions that demean and abuse either

viewpoints themselves or those who express them."[96] With an awareness of the serious emotional and psychological harm that expression can cause—an awareness that was aided by the work of critical race theorists—community members increasingly look to university officials to curb offensive expression and protect them from harm. By tempering the most extreme expression, officials, it is said, can help foster an environment in which all can feel free to participate equally, including historically excluded or marginalized groups. This is nothing new; it reflects a general progressive argument for the regulation of expression, and it has a well-established constitutional precedent (even including reference to the literature of critical race theory).[97]

I would describe this more progressive outlook to expression as: (1) more attuned to serious emotional psychological harm that can result from the expression of others, which was aided by the path-breaking work of critical race scholars; (2) recognizing freedom of expression as important, but not paramount, and instead considered alongside other social values such as EDI; and (3) ensuring that officials moderate the most harmful of expression, thereby fostering a greater participatory environment and increasing overall participation in the community.

This approach to regulating expression, which I label here the "balancing model," mirrors the Canadian model of regulating offensive expression. For one, the "no hierarchy and balancing" mantra is the singular hallmark of modern Canadian jurisprudence, as reflected by the University of British Columbia's (UBC) *Senate Policy on Academic Freedom*. In *Dagenais v. Canadian Broadcasting Corp.*, Chief Justice Antonio Lamer declared:

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96 This excerpt is from a public statement issued by Chancellor Phyllis Wise of the University of Illinois at Urbana-Champaign on her official presidential blog, following controversial tweets by Steven Salaita, an incoming academic appointee (see Adam Chandler, "A Six-Figure Settlement on Campus Free Speech", *The Atlantic* (12 November 2015) <theatlantic.com> [perma.cc/86KP-24PL]).

97 Chief Justice Dickson, writing for the majority in *R v. Keegstra*, referenced prominent scholars associated with critical legal studies, including Mari Matsuda and Richard Delgado, as evidence of the "growing body of academic writing in the United States which evinces a stronger focus upon the way in which hate propaganda can undermine the very values which free speech is said to protect" (see [1990] 3 SCR 697 at 741, 1990 CanLII 24 (SCC) [*Keegstra*]).

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[98]

On the central ethos of balancing, Mathew Harrington puts it well:

> This principle has been repeated so often that it has become something of a creedal statement, in which all and sundry profess a willingness to treat each and every Charter right with exquisite equanimity. Indeed, the "no hierarchy of rights" doctrine requires its adherents to regard any suggestion that certain rights might be more equal than others as anathema.[99]

Second, as to the need for oversight to protect individuals from the psychological and emotional harm from expression, the landmark decision of *R. v. Keegstra* (*Keegstra*) relied heavily on the work of critical race theory to justify government content scrutiny and the censorship of hate speech.[100] Third, the majority in *Keegstra* also claimed that restricting harmful expression could foster greater participation and expression.[101]

Currently, with the lone exception of the Alberta Court of Appeal,[102] Canadian courts have continued to follow Supreme Court precedent in *McKinney v. University of Guelph* (*McKinney*)[103] in declining to apply the *Canadian Charter of Rights and Freedoms* (*Charter*) to universities.[104]

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98 1994 CanLII 39 at 877 (SCC).

99 Matthew P Harrington, "Canada's New Hierarchy of Rights" in Derek BM Ross & Sara E Mix-Ross, eds, *Canadian Pluralism and the Charter: Moral Diversity in a Free and Democratic Society* (Toronto: LexisNexis, 2019) 297 at 297.

100 See *Keegstra*, *supra* note 97 at 741.

101 *Ibid* at 741, 763–65.

102 *UAlberta*, *supra* note 79. The majority's reasons in *UAlberta* were in many ways anticipated by the well-known concurring reasons of Justice Paperny in *Pridgen v. University of Calgary* (see 2012 ABCA 139 at paras 103–04 [*Pridgen*]).

103 [1990] 3 SCR 229 at 269, 1990 CanLII 60 (SCC).

104 The Supreme Court's approach has been confirmed multiple times by various courts, see e.g. *Lobo v Carleton University*, 2012 ONCA 498 at para 4; *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at paras 25, 39–41; *Yashcheshen v University of Saskatchewan*, 2018 SKQB 57 at para 34.

And even with the Alberta Court of Appeal decision in *UAlberta Pro-Life v. Governors of the University of Alberta* (*UAlberta*),[105] the court applied the *Charter* narrowly to protect student expression in the university quad but stressed that academic expression was a different matter entirely, largely covered by collective agreements.[106] The university's defence in *UAlberta* was framed in terms of institutional autonomy, not as a matter of administrative deference for the *Charter* balance it had struck between competing rights and values. In *UAlberta*, therefore, freedom of expression had the field alone, because the university had not engaged in *Charter* balancing. If, or rather when, the *Charter* is found to apply, university officials will be empowered to balance expression against other values within their wide-open mandate of providing higher education to the public.

While it may be that the Supreme Court's jurisprudence has evolved since *McKinney* so that the *Charter* will in the future be found to apply to universities,[107] it remains that the concern of this paper is with the university social contract as a general and transnational principle, not the workings of Canadian constitutional law. Moreover, the fact that the *Charter*'s balancing model does not yet apply to Canadian universities as a matter of constitutional law does not mean an institution cannot choose to adopt it voluntarily. Indeed, there could be an intuitive appeal in having one's campus social contract on expression mirror that of the surrounding constitutional order of society. So let us consider what this model of balancing might look like in practice and whether it is compatible with academic freedom and the republic of dissent.

A. The University of Balancing

Like many institutions of higher education, in recent years, UBC has experienced numerous controversies involving visiting speakers, such as

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105 *UAlberta*, *supra* note 79 at para 137.

106 *Ibid* at para 111.

107 Academic commentary on the topic, with an admittedly small sample size, has followed the lead of Justice Paperny in *Pridgen*, and suggested that the *Charter* should apply following the Supreme Court's decision in *Eldridge v. British Columbia (Attorney General)* (see Dwight Newman, "Application of the Charter to Universities' Limitation of Expression" (2015) 45:1/2 RDUS 133 at 137–38; Michael Marin, "Should the Charter Apply to Universities?" (2015) 35:1 NJCL 29 at 74).

Jordan Peterson, Jenn Smith, Ben Shapiro, Frances Widdowson, and Andy Ngo.[108] UBC community members were apparently deeply concerned and alarmed by the visiting speakers invited to campus, and frustrated that these controversial speakers were permitted under the authority of the University's *Senate Policy on Academic Freedom*,[109] which was adopted in 1976. Despite its title, the policy is more of a general social contract for expression on campus rather than a policy specifically addressing academic freedom. The policy reads:

> The members of the University enjoy certain rights and privileges essential to the fulfilment of its primary functions: instruction and the pursuit of knowledge. *Central among these rights is the freedom* ... to teach and to learn *unhindered by external or non-academic constraints*, and to engage in full and *unrestricted consideration of any opinion* ... Suppression of this freedom ... would prevent the University from carrying out its primary functions ... *Behaviour that obstructs free and full* discussion, not only of ideas that are safe and accepted, but of those which may be *unpopular or even abhorrent, vitally threatens the integrity of the University's forum. Such behaviour cannot be tolerated.*[110]

Though the Chicago Principles are widely lauded as the gold standard for freedom of expression on campus, this decades-old UBC statement reads as a firm and unequivocal liberal commitment to freedom of expression. This may also explain why it is seemingly out of step with modern Canadian society.

In 2017, following increased calls for change from university stakeholders, and in the wake of the rise of social justice issues on many American campuses, UBC's then-President, Santa Ono, struck a working group to reconsider its policies on expression.[111] The working group was

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108 Takeuchi, *supra* note 9.

109 University of British Columbia, "Senate Policy on Academic Freedom" (last accessed 18 March 2024), online: <academic.ubc.ca> [perma.cc/4BLT-SMCD] [UBC, "Policy on Academic Freedom"]; University of British Columbia, "Academic Freedom" (last accessed 18 March 2024), online: <academic.ubc.ca> [perma.cc/K5RU-KRQU]; Neil Guppy, "Academic Freedom at UBC: Historical Notes" (last accessed 18 March 2024), online (pdf): <academic.ubc.ca> [perma.cc/C64N-YYJG].

110 UBC, "Policy on Academic Freedom", *supra* note 109 [emphasis added].

111 Nguyen, "Balancing Act", *supra* note 9.

apparently comprised of approximately ten members, mostly academics from a range of disciplines.[112] Below are several highlights from their report, entitled *Freedom Matters*:

> Three principles underlie our commitment to free expression.
>
> First, the common good of society depends upon an unfettered search for knowledge and its free expression ...
>
> Second, UBC's scholarly community comprises people with diverse viewpoints and disciplinary perspectives. By enabling these disparate voices to *participate equitably* ...
>
> Third, as a self-governing democratic institution, even one in which rights and freedoms are, or have been, distributed unequally, the *resolute and equitable protection* of free expression, *in balance* with other constitutionally protected rights and freedoms, offers the best path toward an inclusive environment and a better world.
>
> As the leading formal expression of Canadian values in this regard, the Canadian Charter of Rights and Freedoms recognizes freedom of expression ... But Charter *rights and freedoms are neither absolute nor ranked in any kind of hierarchy.* When Charter rights conflict, they must be *balanced and reconciled*;
>
> UBC's commitment to freedom of expression, however, should go beyond the observation of basic legal requirements. *We must hold in balance concurrent legal and moral responsibilities* regarding freedom of expression *while providing a respectful, constructive and inclusive environment for all* ...
>
> In UBC's 2018 strategic plan, President Ono has offered a framework within which to decide how to *balance freedoms and rights* ...
>
> We must ensure that freedom of expression is shared among all. *Freedom of expression must never be abused or used to disadvantage members of our community who enjoy less power.*

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112 The process apparently was not very transparent. See Alex Nguyen, "'More Aspirational and Educational': UBC Publishes Official Statement on Freedom of Expression", *The Ubyssey* (8 July 2018), online: <ubyssey.ca> [perma.cc/8VQY-6KC8].

> UBC's commitment to freedom of expression *is resolute*; we must protect it assiduously, *in concert with our commitment to an inclusive community.* Finding *the balance* will be an ongoing collective challenge.[113]

For a statement on freedom of expression, this document reads as a *paean* to balancing.[114] Apart from the questionable usage of the words unfettered and resolute—where the authors seem to mean measured and equivocal—the statement is an excellent demonstration of what an equitable and balanced university social contract might look like if adopted.[115] According to UBC's website, many of the written responses from stakeholders called for "a short, blanket endorsement of free expression, but many more argued for a statement of context exploring how that

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113 University of British Columbia, "Freedom Matters", (last accessed 18 March 2024), online: <academic.ubc.ca> [perma.cc/55FE-WPQ2] [UBC, "Freedom Matters"] [emphasis added].

114 UBC was not the only Canadian university to reconsider its social contract on expression. Wilfred Laurier University also did so after the controversy involving Lyndsay Shepherd. On the controversy, see Alison Braley-Rattai & Kate Bezanson, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" (2020) 29:2 Const Forum Const 65 at 76–77; Brian Platt, "Wilfrid Laurier University's President Apologizes to Lindsay Shepherd for Dressing-Down Over Jordan Peterson Clip", *The National Post*, (21 November 2017), online: <nationalpost.com> [perma.cc/4NKL-CRUR]. Although the new Wilfred Laurier University statement waxes poetic about something vaguely Rousseauian called "inclusive freedom," it does not serve as a model of balancing because the university ultimately commits to not censor speech, and to only regulate expression based on time, manner, and place restrictions, and that these should never be abused to interfere with the University's "overarching" commitment to freedom of expression. Essentially, its statement of commitments reads much like those of the Chicago Principles (see Wilfred Laurier University, "Statement on Freedom of Expression" (29 May 2018), online: <wlu.ca> [perma.cc/C3R3-4HPJ]).

115 While *Freedom Matters* makes for a very good example of balancing, it does require an asterisk in that it has not yet, as of the time of writing, been officially adopted by the university. Curiously, it was only released after information on it had been leaked to and written about in the national media as having been 'shelved.' And when released, it was only described as an aspirational, conversational document. As to news on its shelving, see Simona Chiose, "UBC Shelves New Freedom of Expression Statement", *The Globe and Mail* (7 November 2017), online: <theglobeandmail.com> [perma.cc/37LF-RYNS].

freedom applies, how it can be protected for all members of the UBC community and how it interacts with other freedoms and rights."[116]

As a model of balancing, the most important feature of the *Freedom Matters* document is that it places the Canadian *Charter* approach—specifically, the rejection of a rights hierarchy and the commitment to balancing competing values—front and centre. Interestingly, a separate memo from a professor at the UBC faculty of law, which was published as part of the *Freedom Matters* initiative, also emphasized the *Charter* mantra of no hierarchy and balancing.[117] This reliance on *Charter* principles is noteworthy because British Columbia courts, including the Court of Appeal, have repeatedly held that the *Charter* does not apply to universities in the province.[118] The use of *Charter* language in *Freedom Matters*, therefore, reflects an independent university social contract, not a matter of constitutional law.

The differences between *Freedom Matters* and the classical liberal model for campus expression are evident. The classical liberal model of university expression rests on three premises: (1) freedom of expression is the university's paramount guarantee and institutional value, (2) the institution must remain neutral with respect to content, and (3) community values must not interfere with or trump the autonomy of individuals or academic disciplines. The equitable model dramatically departs from the classical model on all three counts.

First, *Freedom Matters* no longer treats freedom of expression as the paramount value in the university social contract. Instead, expression sits equally amongst other values. UBC's previous, classical liberal *Policy on Academic Freedom* states that freedom of expression is the "central" right guaranteed by the university, in its mission of "instruction and the pursuit of knowledge," and that "behaviour that obstructs free and full discussion ... cannot be tolerated." This reflects the widely adopted AAUP *Statement of Principles on Academic Freedom and Tenure* of 1940, in which the elevation of expression is clear: "The common good depends upon

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116 UBC, "Freedom Matters", *supra* note 113.

117 Emma Cunliffe, "Freedom of Expression, Academic Freedom, and Equality: Seven Institutional Responsibilities" (2017) [unpublished, archived at Allard Research Commons] at para 2, online (pdf): <commons.allard.ubc.ca> [perma.cc/A6KV-2A5F].

118 See *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39 at paras 147–52; *Maughan v University of British Columbia*, 2009 BCCA 447 at paras 52, 54.

the free search for truth and its free exposition."[119] UBC's *Freedom Matters* statement, by contrast, endorses the view that there is no hierarchy of rights, and that expression must be balanced against other rights and values.

The departure of *Freedom Matters* from the classical model on the second and third elements follow from the first. When freedom of expression is no longer a paramount guarantee, and expression is to be balanced against other values, this depends upon the content scrutiny of university officials. How else can you balance two rights at once, if not for content scrutiny? This means the second element, the classical commitment to content neutrality, is violated. The third element, the guarantee of autonomy for individuals and academic disciplines, also gives way under the balancing model. A balancing—or equitable model—allows for community values and concerns about harm to the audience to trump the rights of the speaker and other audience members. Again, this echoes the central mantra of the modern Canadian approach to expression in its *Charter* era. In *Charter* disputes, the rights and values expression is balanced against are likely to be equality and multiculturalism, though it is not much of a cognitive leap to substitute EDI to reflect more modern university usage.

B. Inclusivity and Autonomy

The classical liberal model requires institutional neutrality in the marketplace of ideas. The problem is, as with most markets, that people do not possess the same opportunities and advantages in coming to, or participating in, the marketplace of ideas. For generations, people from marginalized groups have often been underrepresented in higher education; with the few present no doubt constrained and unable to participate or draw upon their experiences equally. Moreover, the classical view famously articulated by Mill, that even bad ideas have value in that they invoke a confirmation of the reasons for rejecting them, does not have as much resonance when the idea is a hateful rejection of another's basic human dignity. So, it is understandable that university leaders have increasingly sought to reconcile their institution's traditional commitment to freedom of expression with the promotion of EDI. In relation to this goal, however, it is arguably crucial to distinguish between institutional

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119 AAUP, "1940 Statement of Principles", *supra* note 39 at 14.

policy balancing and quasi-constitutional balancing. It is suggested that while the former may be consistent with academic freedom, the latter is not.

Although conversations over campus expression often treat free expression and EDI as binary poles in opposition, there are ways, as others have argued,[120] in which the promotion of inclusivity is compatible with freedom of expression (and I would add academic freedom). For example, bolstering the classroom's traditional norms requiring civility and a basic respect for others would help promote an environment in which all members feel an equal opportunity to participate.[121] Additionally, if a university promotes diversity in its hiring or student intake, this could be supportive of increasing the potential viewpoints available without lessening freedom of expression or academic freedom. There is a myriad of ways in which a university can be supportive of individual participation and capacity building that are conducive to freedom of expression and academic freedom. For example, if a university supports the increased participation of marginalized groups in the study of astronomy, this does not infringe upon the academic freedom of an astronomy instructor.

Nevertheless, it must be stressed that support and commitment to EDI are institutional priorities that can be balanced alongside other institutional priorities, but this balancing differs from the one performed on constitutional grounds. Consider the following excerpt from the official statement on freedom of expression from Wilfrid Laurier University (Laurier):

> Laurier challenges the idea that free expression and the goals of diversity, equity, and inclusion must be at odds with one another. Instead, the university embraces the concept of "inclusive freedom" which espouses a commitment to the robust protection of free expression, and the assurance that all members—including those who could be marginalized, silenced, or excluded from full

120 See e.g. Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017) at 37, 42–43.

121 For a discussion of classroom civility and the distinction between "intellectual safety" and "dignity safety," see Eamonn Callan, "Education in Safe and Unsafe Spaces" (2016) 24:1 Philosophical Inquiry in Education 64 at 64.

> participation—have an opportunity to meaningfully engage in free expression, enquiry, and learning.[122]

This resounding commitment to inclusive freedom, which draws on the work of Sigal Ben-Porath,[123] nonetheless contains this subsequent qualification:

> Some challenging cases of free expression will have to be navigated, but it is not the role of the university to censor speech. To grant the institution such power would set a dangerous precedent.

Laurier's statement on expression, then, is not a Canadian-style model of constitutional balancing because it expressly disavows the ability of the institution to censor expression on content-based grounds.

Constitutional balancing inherently involves the justification of an infringement of one constitutional right, guarantee, or "value" in the name of promoting a competing constitutional right or a significant governmental objective. In short, under a model of constitutional balancing, censorship is sometimes permissible because freedom of expression needs to give way to other constitutional rights or governmental priorities. Adopting a balancing model for society may be unexceptional, and beyond the scope of this paper, but universities that adhere to academic freedom have a division of powers over content, expression, and ideas that regular society does not. If a university censored expression on content-based grounds, this would not only set a dangerous precedent—encouraging stakeholders to look to the university to take a public stand on the latest political conflict or issue of the day—it could also undermine the basic university division of powers that ensures the independence of scholars.

Violations of academic freedom frequently involve issues of inappropriate interference with academic autonomy, and while this interference often relates to expression, it can also be described as a misuse of authority. Put differently, the republican features of academic freedom are in place to ensure that those in power do not interfere with or undermine the autonomy of the academy, or the pursuit of knowledge by its individual members. One of the most notorious examples of academic

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122 Wilfrid Laurier University, *supra* note 114.

123 *Supra* note 120 at 37.

interference in Canada in recent memory occurred when the Dean of Law at the University of Toronto abruptly shut down the hiring of the incoming director of the university's International Human Rights Program, Valentina Azarova. This incident occurred after a donor, and sitting tax court judge, raised concerns about Azarova's work on the rights of Palestinians in territories occupied by Israel.[124] This intervention occurred after Azarova had been the unanimous choice of the three-person hiring committee, and after she had received a not-yet-finalized job offer.[125] The Canadian Association of University Teachers took the extraordinary step of censuring the University of Toronto. The censure was not lifted until the university finally relented, nearly a year later, and offered the position again to Azarova, which she unsurprisingly declined.[126]

The University of Toronto hiring scandal is in some respects a traditional case of a university official catering to a powerful external influence, but it does raise the issue of increased stakeholder influence that could be encouraged under a balancing model. A potential concern with the balancing model of expression is that it seemingly invites influence from all quarters. This is not to suggest that the balancing model would open the floodgates to university officials pandering to donors, but simply that when there is a system that balances expression against other social priorities, it would reasonably follow that complaints from stakeholder groups would be a legitimate means by which the university is alerted to the potential harmful consequences of expression on campus.

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124 Sean Fine & Joe Friesen, "U of T Law School Under Fire for Opting Not to Hire Human-Rights Scholar After Pressure from Sitting Judge", *The Globe and Mail* (17 September 2020), online: <theglobeandmail.com> [perma.cc/8WHW-9DHC]; Shanifa Nasser, "Censure Against U of T Temporarily Suspended After School Reverses Course in Hiring Controversy", *CBC News* (20 September 2021), online: <cbc.ca> [perma.cc/2PSQ-FUGY].

125 Jane Gerster, "Following Controversy, U of T Resumes Search for International Human Rights Program Director", *CBC News* (7 June 2021), online: <cbc.ca> [perma.cc/AL64-SUKM].

126 Shanifa Nasser, "Censure Against U of T Temporarily Suspended After School Reverses Course in Hiring Controversy", *CBC News* (17 September 2021), online: <cbc.ca> [perma.cc/ST22-L56E].

C. *Balancing Act*

This section presents a comparison of the balancing and classical models in hypothetical practice. The hypothetical involves an open lecture delivered by a visiting speaker, which happens to have provided some of the most inflammatory instances in the campus culture wars.[127] The visiting speaker example is also useful because it is one that depends on the strength of norms, not formal laws or collective agreements. The cancelled visiting speaker likely has no financial interest in pursuing a costly constitutional challenge in the name of principle alone, and neither do they have any protections of employment or belonging to a faculty association at the host institution. In Canada, academic freedom is largely protected by collective agreements, but this does not mean that this is sufficient or all-encompassing of academic freedom.

Suppose that a controversial scholar has been invited to give a public lecture by either a student group or a resident faculty member. The visiting scholar is known for their controversial opinions on sensitive public topics, such as the legacy of residential schools.[128] Many university stakeholders claim that the scholar's work threatens their identity and causes them psychological and emotional harm and want the visitor's talk cancelled. Under the balancing model, the question becomes to whom is the balancing to be entrusted, and on what basis are they to balance expression? I will define the major decision-making points regarding the visiting speaker and draw a contrast between the classical liberal model and the balancing, equitable model.

1. The Priority

Under the classical liberal model, the university priority is the unfettered pursuit of truth through teaching and research, which is never

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127 For an overview of some of the more infamous instances of cancelled visiting speakers, see Bradley Campbell & Jason Manning, "The End of Academe: Free Speech and the Silencing of Dissent", *The Chronicle of Higher Education* (21 January 2018), online: <chronicle.com> [perma.cc/93KZ-KQFG].

128 One example is the University of Lethbridge's cancellation of an invited lecture by Frances Widdowson after public backlash (see Ose Irete & Joel Dryden, "University of Lethbridge Says Speech from Controversial Professor Moved off Campus", *CBC News* (30 January 2023), online: <cbc.ca> [perma.cc/3VGX-PZK2]).

achievable but constantly pursued through its main and primary right and guarantee: freedom of expression.

In contrast, for the balancing model, EDI is an institutional priority alongside that of the freedom of expression. Freedom of expression is important, but not paramount. There is no hierarchy of rights, and freedom of expression must be balanced against and reconciled with EDI.

2. The Decision-Maker

A university official books rooms in a content-neutral fashion. For the classical liberal model, no content discrimination or balancing is required. Only time, manner, and place restrictions are made.

By contrast, the balancing model lets university officials book rooms while retaining the discretion to balance freedom of expression against the different values of EDI.

3. The Nature of the Decision

How do they decide? Under the classical liberal model, the university does not get to decide whether the speaker is able to speak or deliver their talk.

Conversely, the balancing model lets the university and its officials decide and balance interests. Conveniently, the judicial review standard for administrative decision-making involving *Charter* rights and values, like the decision to cancel a room booking at a university, is simply that of reasonableness.[129] As the Supreme Court observed in *Doré v. Barreau du Québec*:

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129 Consider how the University of Ottawa's *Report of the Committee on Academic Freedom* expressly takes up the Canadian model of balancing:

> [T]he best approach is that of *Doré v. Barreau du Québec*, 2012 SCC 12, which decides whether or not the speech is reasonable by considering constitutional guarantees and the values stemming from them in light of the university's goals, namely post-secondary education. Anyway, the courts will decide these cases under administrative law, where reasonableness will be a determining factor. The factors to be considered will be context, applicable policies, collective agreements, the university's mission and precedent. Freedom of expression does not automatically become unlimited once a person is outside the classroom (see University of Ottawa, *Report of the Committee on*

> [T]he reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with the *Charter* protection, it is a reasonable one.[130]

The effect of this reasonability analysis is to create "a form of *Charter* s 1 analysis to fit with administrative principles about deference."[131] This can be viewed within a broader trend, in which the Supreme Court has promoted greater independence for public authorities by affording them "deference on most questions of fact and law, including those involving the *Charter*."[132]

Given the broad public service mission of universities, including both the pursuit of knowledge and providing higher education to a diverse and multicultural society (or the priority of reconciliation), universities will have very wide latitude to balance as they see fit. But what if an official wants to minimize freedom of expression in the balance? They might highlight that the speaker can go elsewhere and the audience can watch the speaker online or get the content elsewhere. What if an official wants to minimize equity in the balance? They could easily argue that attendance is voluntary and that individuals assume any harm by choosing to attend. No doubt one could make a compelling case for either side because the public service of higher education is so broad as to encompass both expression and inclusiveness and then label it a reasonable balance. The great appeal of balancing is how discretionary and malleable it is.

4. Timing of the Decision

When do they decide? Under the classical liberal model, they never decide—only time will tell what the truth in the marketplace of ideas is. In the balancing model, officials decide before the event, when a room

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Academic Freedom (Ottawa: University of Ottawa, 2021) at 29, online (pdf): <uottawa.ca> [perma.cc/4XEH-3JD4]).

130 2012 SCC 12 at para 7.

131 *UAlberta*, *supra* note 79 at para 159.

132 Marin, *supra* note 107 at 2.

booking request is made. Or, more likely, after people complain and demand that the event be cancelled.

5. Influence on the Decision

Does the majority get to have a say? Under the classical liberal model, of course not—that is the entire premise of the marketplace of ideas.

In contrast, under the balancing model, yes—students, faculty, alumni, donors, and government officials can all try to influence the decision. Different voices will likely have different levels of influence on the decision, but university decision-makers can consider whatever feedback or influence they like.

Table 1. Models of University Decision-Making on Expression

Category	Classical Liberal Model	Balancing Model
Priority	Truth-seeking is paramount; free expression is the core guarantee	EDI and freedom of expression are equal priorities; rights must be reconciled
Decision-maker	Officials act neutrally; no discretion to assess content	Officials have discretion to weigh expression against EDI values
Nature of the decision	University cannot interfere	University decides; balances competing interests
Timing of the decision	No pre-judgment; truth emerges over time	Decisions made pre-or post-event, often in response to complaints

Influence on the decision	Majority opinion is irrelevant; ideas stand on their own	Majority opinion matters; influence varies by voice and context

In sum, in every single category the balancing model can be seen to be in direct opposition to the classical liberal model. In terms of freedom of expression, the gains of fostering equity and a more inclusive community come at the expense of an environment that fosters unfettered debate and the pursuit of knowledge; and the advantages of a system that offers the protection of the vulnerable come at the expense of a system that permits individuals themselves to consider and decide. Both sides or models offer compelling arguments and advantages, and ultimately it will be for individual readers to decide which philosophy of expression is preferable. The small point offered here is that the move to embrace a balancing model for campus expression is not simply a choice between political philosophies—it is also a change in the jurisdiction or fundamental authority over academic content.

As to jurisdiction, what the above hypothetical of the visiting speaker illustrates is that non-academics are empowered under the balancing model to make content-based decisions on non-academic grounds, such as the feelings of the audience. Moreover, once university leaders cancel one controversial speaker on content-based grounds, no matter how noble the justification, this might imply that all other speakers carry the university's imprimatur, whether they wish for it or not, because it signals to the community that only speakers deemed permissible by university officials are allowed to speak. Further, it also follows that only some student groups and some resident faculty members will enjoy the privilege of inviting guests or receiving the public backing of the institution.

Academic freedom, and the republic of dissent, is compatible with a classical liberal model of expression because it ensures that an institution's regulation of visiting speakers is conducted in a content-neutral fashion. Under academic freedom, it is inappropriate for university officials to evaluate the suitability of an academic visiting speaker based on the perceived harm or offence that will be felt, just as it would be inappropriate for the university to prohibit the teaching of James Joyce's *Ulysses* because

it is claimed to be vulgar or profane.[133] The decision to cancel the visiting speaker, though unprotected by law or collective agreements, is certainly an offence against academic freedom because it robs the academic audience of the opportunity to act as interlocutor to the dissenting speaker, to challenge and question, and, ultimately, to decide for themselves. The cancellation of the visiting speaker is an offence against the republic of dissent because it grants to non-academic administrators the authority over academic expression, and the ability to cater to the powerful, the majority, or simply the most vocal; and, in essence, to dictate what ideas and what speakers may appear upon the university's intellectual stage.

CONCLUSION

The republic of dissent is like a federal republic. And in a federal republic the crucial constitutional question is not whether a particular decision or policy is sound, but whether an official or level of government has the authority to make that decision. Academic freedom is quintessentially a system of checks and balances because it restrains and divides decision-making power. For all the rhetoric of university scholarship as a service to democracy and humanity, academic freedom has always been, in essence, an anti-majoritarian doctrine. To recall the words of the 1915 Declaration, the university should be an "inviolable refuge from such tyranny" of public opinion, and it should serve as an "intellectual experiment station."[134] Academic freedom should provide for a republic of dissent in which scholars are not sanctioned for expression made in good faith, not simply because of an individual right to expression, but because the university social contract does not grant university officials the power or discretion to sanction academic expression. From the point of view of the republic of dissent, it is possible to see that cancelling an academic speaker is a double offence against academic freedom: (i) it deprives the academic audience members of their right to hear and decide for themselves, and (ii) it is a jurisdictional violation when university non-academic officials adjudicate academic content on non-academic grounds.

When students and other scholars call on administrators and university officials to cancel an academic speaker with whom they disagree, they

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133 See e.g. *United States v One Book Called "Ulysses"*, 5 F Supp 182 (SDNY 1933).

134 AAUP, "General Report", *supra* note 29 at 32.

are effectively calling on the university to break its foundational social contract with all its members. Academic freedom is a system that helps ensure that the university does not devolve into an adhocracy under the unitary thumb of administrators, government, or the majority. Academic freedom is a system of pre-commitment, based on enlightened self-interest. While it may be tempting to look to universities to sanction those with whom we disagree and find threatening, the sanctioning eye of university administration may one day turn upon you. Even if today you hold all the correct sensibilities and are safely ensconced in the majority, one day you may misspeak, or worse yet, have an unorthodox idea. And to echo the famed speech of Sir Thomas More in Robert Bolt's play *A Man for All Seasons*,[135] if you help the righteous mob topple academic freedom in their pursuit of dissenters, where will you hide when the mob turns on you? How will you withstand the winds that shall blow then, all the walls of academic freedom being flat?

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135 Sir Thomas More:

> Oh? (*Advances on* Roper) And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? (*He leaves him*) This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake (see Robert Bolt, *A Man for All Seasons* (New York: Vintage Books, 1990) at 66).