Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

Respectful Workplace Policies

Discussion Paper
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In 1995 former York University President Harry Arthurs, speaking at a conference of University Presidents, said of academic freedom:

Academic freedom is a central, arguably the central value of university life. Anything which interferes with it has to be justified by reference to prior or higher values. I can think of very few, other than perhaps the protection of human life: certainly not institutional solidarity; certainly not institutional reputation.[1]

CAUT policy[2] strongly affirms Arthurs' position. Freedom to teach, carry out research, to criticize the institution, to exercise one's constitutional rights without fear of institutional censorship or reprisal and to participate in collegial governance constitute the heart of academic freedom and are *the* fundamental principles of university life. Other institutional concerns and purposes must be pursued in conformity with this robust version of academic freedom.

CAUT's position is strongly supported by its membership. Unfortunately, however, some 20 years after Arthurs' ringing affirmation, many university presidents would not share his view of academic freedom. Indeed by 2011, at the centenary celebration of the Association of Universities and Colleges Canada (now Universities Canada), university presidents adopted a new and truncated statement on academic freedom.[3] From now on, according to Universities Canada, academic freedom is to be constrained by the requirement that it must be exercised within a context of institutional priorities and sensibilities. Gone is the commitment to the right to extramural speech or freedom of expression, key components of academic freedom long-recognized in CAUT policy. Also absent is the right of faculty to criticize their institution, their administrators, and policies and procedures. CAUT has strongly criticized this attack on academic freedom, calling it "an attempt to reverse 100 years of advancement in the understanding of academic freedom."[4]

Reverberations from the growing administrative attempt to undercut academic freedom continue to echo through post-secondary policymaking. An example of this is the new challenge to academic freedom posed by employer-driven *Respectful Workplace* policies. Often rolled into documents attempting to meet legally mandated anti-discrimination and anti-harassment policies, the new regulations typically go well beyond the law: they not only prohibit harassment and discrimination, but require all members of the university community to act in accordance with ill-defined notions of respect, civility and concern for the dignity of others. Such policies impose a regulatory framework with complaints procedures, investigations, and disciplinary follow-up to enforce the requirement for respectful behaviour.

At first glance, such policies may seem anodyne. After all, nobody disputes the goal of civil dialogue and debate. In daily interactions, it is not unusual to hear colleagues voicing a desire for more civility. But in moving from exhortation to regulation core values of academic freedom and freedom of expression are endangered. When such aspirations are codified within a disciplinary framework, the prevention of offense, however vaguely defined and subjectively experienced, is made a governing principle of university life at the expense of academic freedom. Respectful workplace policies imperil academic freedom by promoting the view that the exercise of academic freedom requires civility and that civility is the more important value. To the contrary, academic freedom in teaching, research, collegial governance, and extramural utterance can only thrive when expression is unfettered, however unwelcome or offensive it may be.

1. H. W. Arthurs. "Academic Freedom: When and Where?," Crowe Foundation, 1995, [http://www.crowefoundation.ca/documents/Academic-Freedom-When-and-Where_Arthurs-AUCC-Conference-October-5-1995.pdf].
2. "Policy Statement on Academic Freedom," CAUT, 2011, [https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom].
3. "Statement on Academic Freedom," Universities Canada, 2011, [https://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/].
4. Wayne D. Peters and James L. Turk. "Open letter to the Association of Universities and Colleges of Canada," *Report of the Ad Hoc Investigatory Committee Into the Enbridge Centre for Corporate Sustainability At the University of Calgary*, Appendix D, CAUT, 2017, [https://www.caut.ca/sites/default/files/caut-ahic-report-calgary-enbridge-centre-for-corporate-sustainability_2017-10.pdf], pp.74-77.

Generally, respectful workplace policies bundle the requirement for respect or civility with anti-harassment language to produce a comprehensive harassment policy that covers a very broad spectrum of speech and behaviour, from rudeness to sexual harassment. What were until recently regarded as matters of comportment are now categorized with actions and behaviours prohibited by law. The result is that the obligation to maintain civility and respect is confused with legally mandated requirements to address harassment, discrimination, and workplace violence. Failure to achieve civility is implicitly equated with violation of the law.

In these policies, the standards of respect or civility are too often entirely subjective.

There is a presumption that 'reasonable people' ought to understand and agree on what is disrespectful behavior or speech. However, as most know, misunderstandings often arise in debate and discourse, since one person's definition of incivility could well be very different from that of another. Incivility to some may be a raised voice while to others that same tone is a sign of engagement! Lacking any objective standard of harm, all that is required is that a complainant perceives an insult or is caused discomfort.

It is easy to see how these policies can be used to attack unpopular or unwanted ideas. As students and faculty at Brock University discovered, calling for policy changes and raising complaints publicly about a policy can lead to charges of harassment with the threat of serious discipline.[5] At Capilano University, an administration proposal to cut a number of courses had resulted in widespread student and faculty protest. As part of this protest a faculty member, George Rammell, created a satirical sculpture of the University president entitled *Blathering on in Krisendom*, a satirical reference to University President Kris Bulcroft. Professor Rammell also made an accompanying video to explain the cuts. The Chair of the Board of Governors ordered the sculpture seized and destroyed under the University's *Respectful Working Environment Policy and Harassment Policy*.[6] It was argued that the sculpture constituted personal harassment and intimidation. A CAUT investigation found that Professor Rammell's academic freedom had been violated and recommended among other things that he receive compensation and a public apology.[7]

Another recent example of this is the case of Steven Salaita. A specialist in Indigenous Studies, in the spring of 2013, Dr. Salaita had accepted a tenured position at the University of Illinois Champagne-Urbana and had resigned his tenured position at Virginia Tech. Then, as he was preparing to move to Illinois, the Israeli incursion into Gaza took place. A supporter of Palestinian rights, Salaita posted a number of on-line comments strongly criticizing Israeli actions in terms many supporters of Israel found deeply wounding. When protests about these posts reached the University of Illinois, the University took the unprecedented action of rescinding Salaita's appointment.[8] The justification for this was that many of Salaita's prospective students would be offended by his views and that UIUC had to be a "university community that values civility as much as scholarship."[9]

5. John A. Baker, Mark Gabbert, and Penni Stewart, *Report of the Ad Hoc Investigatory Committee To Examine the Situations of Drs. Isla, Van Ingen & Corman, & Messrs. Wood & Fowler at Brock University*, CAUT, 2015, [https://www.caut.ca/docs/default-source/reports/caut-ahic-report---brock-isla-van-ingen-corman-wood-fowler-(2015-11).pdf?sfvrsn=4], (accessed 25 July 2016).
6. Jason Brown and Terri Van Steinburg, *Report of the Ad Hoc Investigatory Committee on the Seizure and Dismantling of "Blathering on in Krisendom", a Satirical Sculpture by George Rammell, Departmentof Studio Art, Capilano University,* CAUT, 2015, [https://www.caut.ca/docs/default-source/reports/caut-ahic-report-capilano-rammell-sculpture-studio-art-(2015-06).pdf?sfvrsn=2].
7. Ibid., p. 13.
8. For the details of Salaita's firing see: *Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign,* AAUP, April 2014, [https://www.aaup.org/report/UIUC], (accessed 29 December 2016). Hereinafter cited as *UIUC Report*. A useful chronology of events is found in: Henry Reichman, Joan Wallach Scott, and Hans-Joerg Tiede, *Report on the Investigation into the Matter of Steven Salaita*, Appendix A, Office of the Senate, University of Illinois at Urbana-Champaign, 2015, [http://www.senate.illinois.edu/af1501.pdf], (accessed 30 December 2016). Hereinafter cited as *CAFT Report*.
9. Christopher G. Kennedy, "An atmosphere for learning", *CAFT Report,* Document 9, 2014, [http://www.senate.illinois.edu/af1501.pdf], pp.64-66, (accessed 30 December 2016).

In the ensuing controversy, the American Association of University Professors condemned the University's actions as an assault on Salaita's academic freedom,[10] Salaita's suit for violation of his first amendment rights survived a preliminary hearing,[11] and the University's chancellor resigned.[12] The matter was eventually settled out of court and Salaita was compensated for his unjust dismissal.[13] Though he was vindicated, Salaita's career has been seriously disrupted.

The Salaita case shows how insidious the impact of respectful workplace policies can be. Armed with the principle of civility as the justification for protecting students from distress over Salaita's strongly expressed views, the University committed a gross violation of Salaita's academic freedom. The assumption was that if **what** Salaita said and **how** he said it were disturbing to some, then he was no longer protected by his right to academic freedom. Certainly, Salaita had used strong and provocative language to express the outrage he felt over the Gaza incursion. Of course, he had the constitutional right to use this language, rights which are included in the definition of academic freedom. Salaita's tone and language of outrage was as much an issue as the substantive content of his protests; and when civility is a requirement, objections to tone can all too easily cover unacceptable attempts to repress the content of speech Moreover, as some commentators have pointed out, censoring outrage has the effect of suggesting that there is nothing to be outraged about. Finally, the affective side of a person's position on a particular question is arguably part of its content.[14] And it is surely as important for students to know that a teacher finds their position on a particular matter deeply repellent as it is to be reassured that their opinion is supported.

The Salaita case reminds us that, whether technically covered by the Charter of Rights or not, the university must always consider itself governed by Charter values.[15] As such, it must put the highest priority on remaining an arena for free expression where censorship is a last resort to be taken only when the law is violated. It is in principle unacceptable for the university to establish disciplinary policies that protect members of the academic community from being exposed to speech they merely find disturbing. In the end, if academic freedom does not protect expression that some may find offensive, then it protects nothing; for the essence of academic work is to question conventional wisdom in any field and to engage students, colleagues and the public in critical reflection even when such criticism causes outrage.

It is ironic that the relation among academic freedom, freedom of expression, and legal prohibitions on speech are sometimes better understood by authorities outside the university than by academic administrators. Examples of this are two recent decisions of the Human Rights Tribunal of Ontario dismissing claims of discrimination originating from Brock University. In both these cases, the tribunal took the line that the fundamental importance of academic freedom and free expression to university life precluded complaints under the *Human Rights Code*, never mind if the speech in question was disturbing or offensive.

10. *UIUC Report*, p. 19.
11. Salaita v. Kennedy et al, No. 1:2015cv00924 – Document 59 (N.D. Ill. 2015), pp. 22-30.
12. Scott Jaschick, "Illinois Chancellor Quits", Inside Higher Ed, 2015, [https://www.insidehighered.com/news/2015/08/07/chancellor-u-illinois-urbana-champaign-resigns], (accessed 29 December 2016).
13. "Settlement Reached in Professor Fired for "Uncivil" Tweets", Center for Constitutional Rights, 2015, [https://ccrjustice.org/home/press-center/press-releases/settlement-reached-case-professor-fired-uncivil-tweets], (accessed 29 December 2016).
14. Michael Meranze, "The Order of Civility", Remaking the University, 2014, [http://utotherescue.blogspot.ca/2014/09/the-order-of-civility.html], (accessed 23 September 2014). On the matter of tone, see *CAFT Report*, Appendix B, p.36, which discusses it in a general critique of the standard of civility as a limit on speech in the university, referring to the impossibility of distinguishing between the "cognitive" and "emotive" aspects of speech. See also Salaita v. Kennedy et al, No. 1:2015cv00924 – Document 59 (N.D. Ill. 2015), pp. 26-7.
15. See Jamie Cameron, "Giving and Taking Offense: Civility, Respect and Academic Freedom," in *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University*. Ed. James L. Turk, Toronto: James Lorimer, 2014.

The first case arose from the complaint of the University's Roman Catholic chaplain that a faculty member's opposition to a church-sponsored overseas study program amounted to discrimination based on religious grounds. In this case, Adjudicator Ken Bhattacharjee concluded that "the mere fact that the applicant found the respondent's views to be offensive and hurtful is not enough to find that they were discriminatory."[16] The decision upheld the principle that universities should not be the subject of judicial intervention "where what is at issue is expression and communication made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be."[17] The adjudicator concluded that:

In my view, given the importance of academic freedom and freedom of expression in a university setting, it will be rare for this Tribunal to intervene where there are allegations of discrimination in relation to what another person has said during a public debate on social, political and/or religious issues in a university.[18]

The adjudicator expressed his concern that such an intervention "would likely have a chilling effect on freedom of expression whereby individuals would engage in self-censorship to avoid being named a respondent in a human rights Application."[19]

The second case involved a student's complaint that he had been discriminated against on grounds of race when the University failed to prevent the delivery, at a student conference, of a paper that contained racist language. In dismissing this complaint, Adjudicator David A. Wright relied in part on Adjudicator Bhattacharjee's earlier Brock decision.[20] Adjudicator Wright also cited the Alberta Court of Appeal case *Pridgen v. University of Calgary*, 2012 ABCA 139 (CanLII) at paras. 115-117 which reads in part:

Academic freedom and the guarantee of freedom of expression contained in the Charter are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge.[21] [Wright's emphasis]

The applicant had argued that the student paper in question had discriminated against him in the provision of academic services; but Adjudicator Wright ruled that the term "services" in the *Code* had to be understood in such a way as "to favour freedom of expression and academic freedom in the writing and presentation of academic papers". [22] Had, for example, the university denied the applicant access to courses on grounds of his race, that would have been a violation of the *Code*. Nor would academic freedom protect hate speech, as legally defined.[23] But the *Code* could not be understood "to regulate academic discourse within a university."[24]

What is striking about these decisions is their high regard for the university as a haven for free expression, their robust view of the links between rights to free expression and academic freedom, and their determination to avoid the creation of a chilling effect on these freedoms. In the words of the CAUT committee charged with investigating the situation at Brock University from which the first case emerged, such decisions remind us of the "unique character and requirements of the university as a workplace where academic freedom and freedom of expression overlap and strengthen one another."[25]

Academic staff associations should not let these respectful workplace policies go unchallenged. As is stated in the 2007 *CAUT Bargaining Advisory on the Negotiation of Institutional Policies*:

16. McKenzie v. Isla, 2012 HRTO 1908, para. 40.
17. Ibid., para. 35.
18. Ibid.
19. Ibid., para. 39.
20. Marceau v. Brock University et al., 2013 HRTO 569, para. 14.
21. Pridgen v. University of Calgary, 2012 ABCA 139, para. 15.
22. Marceau v. Brock University et al., 2013 HRTO 569, para. 16.
23. Ibid., paras. 16, 19.
24. Ibid., para. 22.
25. John A. Baker, Mark Gabbert, and Penni Stewart, *Report of the Ad Hoc Investigatory Committee To Examine the Situations of Drs. Isla, Van Ingen & Corman, & Messrs. Wood & Fowler at Brock University*, CAUT, 2015, [https://www.caut.ca/docs/default-source/reports/caut-ahic-report---brock-isla-van-ingen-corman-wood-fowler-(2015-11).pdf?sfvrsn=4], (accessed 25 July 2016).

Allowing the policy to be implemented without raising association concerns about its impact on terms and conditions of employment may well be interpreted by an arbitrator as consent to the policy, preventing the association from raising a challenge later. The second danger is more general: the creation of a workplace in which the employer is encouraged to look for ways around negotiating with the association.[26]

The Advisory suggests that associations negotiate an article restricting the scope of institutional policies, and ensuring that any policies that are negotiated will have the consent of the academic staff association.[27] This remains good advice.

Post-secondary institutions have an obligation to address legally defined harassment, discrimination and violence in the workplace including sexual violence. But for all the reasons given above, such policies should not be expanded to impose a requirement of civility and respect. Some forms of incivility may be the basis for valid claims of harassment under the law, in which case they should be labelled and treated as harassment. Short of that, no disciplinary action should be taken. Elevating politeness to a regulative principle of academic life enforceable by discipline and justified by the purely subjective responses of complainants presents a fundamental threat to academic freedom.

Associations should not incorporate respectful workplace policies into collective agreements. Even incorporating language on civility or respect or acknowledging the employer's policy implies acceptance. Where an employer has instituted a Respectful Workplace/Civility Policy, the Academic staff association should work to have it rescinded and replaced with policies limited to addressing offenses defined in law. Short of that, every effort should be made to ensure that the policy and its procedures:

- acknowledge **unambiguously** at the outset the primacy of academic freedom and any articles in the collective agreement;
- are subject to grievance and arbitration;
- are required to be consistent with terms of the collective agreement;
- include provision for due process in investigations; including timeliness, openness, transparency, prohibition of the use of anonymous materials, access of the respondent to all material upon which an investigator relied to come to a decision, and the requirement that the respondent be provided with the identity of all complainants;
- include confidentiality provisions that protect the privacy of the complainant and the respondent but clearly affirm the respondent's right to consult the faculty association at all stages of the process;
- include provision for the Association to receive notice of complaints and be informed throughout the process;
- acknowledge that any discipline arising from an investigation will be subject to the discipline clause of the collective agreement;
- do not exceed requirements of current Federal and Provincial legislation.

Academic staff associations should endeavor to ensure that such policies acknowledge without qualification that academic freedom is fundamental and that fostering values such as respect, inclusivity, and civility are not intended to limit academic freedom or freedom of expression. Ensuring that such policies and their procedures are subject to grievance and arbitration protects association members from harm ensuing from the application of the policy and ensures due process. Requiring the policy to be consistent with the terms of collective agreements and provide confidentiality and timely, transparent investigation procedures upholds the principles of fairness and due process governing the agreement. Similarly, it is critical to include a provision that requires that in the event a member is found to have breached a policy, any discipline will be exercised under the discipline article of the collective agreement. It is equally important to ensure that members are only disciplined within the parameters of the collective agreement which usually demands progressive discipline since the sanctions for harassment are often severe.

26. "The Negotiation of Institutional Policies," Bargaining Advisory, CAUT, 2007, Web (Members' Area).
27. Ibid, p. 1.

Confused with legitimate and legally mandated policies to address discrimination, harassment, and workplace violence, Respectful Workplace Policies are increasing in number across the country. Academic staff associations have a duty to their members, to students, and to the public to make every effort to ensure members' rights and freedoms are protected and that the principles underlying academic freedom and freedom of expression are vigorously promoted and protected. This means assuring protection against discrimination, harassment, and violence, but resisting all attempts to regulate expression that may offend some but is not illegal.

Only then can we assure the unique nature of the University as a site where, to return to then President Arthurs, academic freedom is "all the time and everywhere."