

## **Demonstration Policies at Private Universities: A Case Study and Analysis**

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*Unlike public universities, private universities are not bound by the First Amendment when regulating students' on-campus speech. This has provided administrators at private universities with great leeway in putting restrictions on student demonstrations. This article starts out with a case analysis of Loyola University Chicago, where the demonstration policy was loosened after pressure from the university community. This example frames the research questions of this study, analyzing the prevalence and nature of demonstration policies at private universities. Compared to public universities, private universities are less likely to have a demonstration policy, and the language and procedures contained in these policies tend to discourage or hamper public demonstrations.*

### **Speech Rights at Private Colleges**

Over the course of the last fifty years, some of the most significant instances of the right to assemble occurred at university campuses across the nation. Campus protests have been instrumental in the development of the anti-war and civil rights movements in the sixties and seventies. More recently, The Black Lives Matter movement and associated protests targeting the lack of diversity on college campuses have grabbed the headlines, drawing comparisons with those eras (Rochester, 2016). However, by their very nature campus protests can be disruptive, encourage counter-protest and create safety concerns. University administrators therefore are faced with the difficult task of balancing campus safety with guaranteeing students' ability to partake in organized protest. At public universities, these restrictions must comply with the demands of the First Amendment. When public universities tried limit protests to so-called free speech zones, they were rebuffed by the courts. (See, for example, *Roberts v. Haragan* (2004); *Liberty v. Williams* (2012).) Despite these rulings, many public universities still have them (Harris, 2016).

With the exception of California where the Leonard Law bars non-sectarian colleges from making or enforcing “any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech,” private colleges are not bound by these First Amendment concerns and are free to restrict speech as they see fit. As a consequence, speech rights of students at private universities are more restricted than those of their peers at public institutions. In the 2018 annual report of the Foundation for Individual Rights in Education (FIRE), more private colleges received the organization's “red light policy” label for having speech-unfriendly policies (53.9%) than public institutions (26%) Some have argued that since private schools often receive funds directly or indirectly from federal and local governments, they are de-facto state actors and hence have to abide by the requirements of the First Amendment, but this approach has not been followed by courts (DeCresenza, 2008).

The only legal framework that seems to restrict private schools' ability to restrict speech is the one provided by contract law. In their promotion materials and mission statements, schools often refer to their commitment to free speech and robust debate (some schools, however, explicitly state that speech contrary to their values will not be tolerated). If

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they then enact policies abdicating this commitment, this could under certain circumstances be considered as a breach of contract. Sarabyn (2010) advocated for such an approach to expose the “janus-faced” policies of many private universities.

However, change is more likely to come from within than from breach of contract litigation. Students, (journalism and communication) faculty and other stakeholders can advocate for more lenient speech policies at private colleges with a shared-governance structure. Loyola University Chicago’s demonstration policy serves as an excellent example of such an approach.

### **Case Study: Loyola University Chicago**

In January of 2015, Jane Neufeld, Loyola University Chicago’s Vice President for Student Development, sent out an email to students notifying them of recent updates to the community standards policy regarding on-campus demonstrations. The policy change was in response to concerns about the 10-day notification period required under the previous policy for students planning a demonstration (Runkel, 2015a). The new policy shortened the 10-day notification period to a three-day one, but in doing so drew attention to the fact that there was a policy with a notification requirement at Loyola for demonstrators in the first place. The notification requirement (which had been in place before the change) stipulated that organizers submit a form explaining the nature of their event and schedule a meeting and obtain approval from the Dean of Student’s office.

The new policy drew criticism for still being too restrictive and the university administration updated the guidelines again the following semester. This time, it allowed for demonstrations to take place without getting approval from the office of the Dean of Students. However, these protests only could take place at one specific location on campus, the Damen North Lawn (Runkel, 2015b). This location was picked because it was far from the classrooms (and therefore would be less likely to disrupt classes), tucked between two student centers and close to one of the entrances to the university. The policy also required that organizers of demonstrations used the university’s online reservation system to reserve the area. However, only registered student organizations are allowed to use this system, effectively limiting this right of semi-spontaneous protests to officially registered student organizations. Other stipulations in the policy also favored registered student organizations. Inclusion of language stating that the demonstration policy was drafted in the interest of “protecting the reputation and good name” of the university created the perception that the protest policy also could be used to restrict demonstrations based on their message. An exemption from the notification requirement for religious vigils did little to assuage these concerns. Given these perceived shortcomings of the new policy, critics advocated for a policy that would no longer require any form of registration (“Updates to demonstration policy,” 2015).

During the fall of 2015, representatives of the Student Government and the University Senate continued to work with the administration in revising the demonstration policy. This process was accelerated following a campus protest against racial inequality at Loyola in solidarity with the students at Missouri. The organizers, members of an unregistered student organization, had not asked nor received permission for their demonstration. Rather than subjecting the organizers of the demonstration to disciplinary action, interim president John P. Pelissero announced on December 5, that he had dismissed all the conduct charges against the organizers of the student protest, given the recent “increased interest in revising the current demonstration policy.” Three days later, he announced a moratorium on the demonstration policy while it was under review. In early 2016, after consultation with a variety of stakeholders,

an updated, far less restrictive demonstration policy was rolled out and is still in place today (Dayton, 2016). The current updated policy no longer requires approval from the Dean of Students, though students are encouraged to meet with him two days in advance. It stipulates certain content-neutral time, manner, and place restrictions that students are responsible for following.

By switching the policy from a preventive one designed to prevent any disruption from taking place to a policy that gave students free reign to protest as long as they do not violate certain clearly articulated rules, the administration gave in to those who thought the preventive regime was too restrictive and had a chilling effect on speech. In doing so, Loyola University made a choice that many other private colleges have to make about how to regulate protests and dissent on campus.

Administrators in well-intended efforts to guarantee campus safety might not always give appropriate consideration to students' free speech concerns. Faculty at journalism and communication programs are well-placed to alert the campus community about this and put this issue on the agenda of University Senates or other shared governance bodies. It is therefore important to gain an understanding how private colleges regulate campus protests. This study attempts to give a general overview of how private institutions address this issue in order to enable faculty members to assess how their school's policy measures up to the national trend.

### **Research Questions**

Most schools have some kind of anti-disruption policy, but these often are ill-suited to regulate protests. It is therefore important to find out whether or not an institution also has a specific demonstration policy.

RQ1: Do private universities have demonstration policies?

The Loyola case study showed how the institution changed its policy from a preventive to a retributive one. A preventive policy tries to prevent any disruptions stemming from protest by having students register their protest with university administration or go through some approval or reservation process. A retributive police on the other hand allows students to protest without having to ask for permission, but holds them responsible if they break any rules.

RQ2: Do the institutions with a policy have a preventive or retributive one?

As the Loyola example illustrated, long notification times, policies favoring certain speakers (student groups), or expressions (religious vigils) can also be problematic.

RQ3: Does the policy contain requirements that could put a burden on speech?

In order to have a point of reference, it is also important to compare these policies with those at public universities.

RQ4: Do the policies at private institutions differ from those at public universities?

## Method

Since universities often look to other "aspirational institutions" to model their own policies, the choice was made to look at top ranked private national universities. With the help of student research assistants, the policies of the 96 national private universities that were ranked by U.S. News & World Report in 2017 were analyzed during the Spring and Fall of 2017.

There were 98 nationally ranked universities, but the policies of Maryville University St Louis and Villanova are not publically available and were excluded from the analysis. Immaculata University's policy also is behind a login now, but was not when we first looked at this university's policy. While it cannot be ascertained that the policy has not changed, it was nevertheless included in the analysis based on the information previously obtained. Southern Methodist's policy also was behind a log in, but was available on the Fire web site. The link to Robert Morris' demonstration policy was dead at the time of this writing, so the information previously obtained when the link was active was used here. The policy that could be located for Harvard University only applied to the College of Arts and Sciences. Since no other policy could be located, this is the one used in the analysis.

We gathered information from student handbooks, university policies, from the pages of Deans of Student Affairs or other relevant sections of the site of the institution. Each institution was analyzed by two student researchers. In July 2018, the accuracy of the information was checked by the author who then analyzed the data to determine which institutions had a policy and whether this policy was preventive or retributive. Some attempts to create a coding instrument to measure other aspects of the policies were made, but the differences and nuances in policies were too subtle and nuanced and the language used too vague for a coding instrument to be used. During that same period, with the help of a student research assistant, the author also analyzed the demonstration policies of the top fifty public universities to provide a point of comparison. The decision to use a smaller sample was based on the fact these data only served as a rough point of comparison and were not the main focus of the analysis.

## Results and Discussion

### No Policy

For 13 universities, no policy could be located. For four more universities, only some general statements could be found that could be interpreted as applying to demonstrations but were not specifically mentioning them, leaving 18% of the universities without a policy. By comparison, only three of the 50 public universities (6%) lacked a demonstration policy. The absence of a publicly posted demonstration policy does not necessarily mean that protests cannot take place at these institutions. Given that most of these universities contain statements valuing free speech, it seems that the absence of a policy would mean that demonstrations are in fact allowed. If there is no demonstration policy, a student cannot break it. On the other hand, most universities contain language in their handbooks barring students from engaging in conduct that disrupts the functioning of a university that could be applied to protests. Which of these situations prevails at institutions without published policy cannot be ascertained based on these data.

## Preventive Policies

Of the 79 policies that were found, 42 require protesters to provide some kind of notice to the administration when they are planning to demonstrate or reserve a space beforehand. Some universities only required a minimal notification effort while others put a much heavier administrative burden on students. At Washington University, for example, students are only required to reserve space through an online system while other institutions, such as Fordham or Seattle Pacific University, require organizers to sit down with university officials to discuss their planned protest. Some universities, such as Marquette University, combine both. Marquette requires that someone be appointed as the designated liaison for the protest, that this person meets with the Dean of Students and turns in a form before approval is given and a reservation for space can be made. All these requirements, even if they are not stemming from a need to restrict speech may have the net effect of discouraging protests.

At the University of St. Thomas, where students are required to submit an intent form and meet with the Dean of Students, the policy points out that this process does not “imply an approval process, but rather a consultative process that promotes the rights and responsibilities of students and the university.” But any regime requiring registration and notification of demonstrations, depending on how onerous it is, might discourage students from engaging in protests. Especially when combined with long notification periods as is the case at Southern Methodist (five days), Rensselaer Polytechnic (seven days), Brigham Young (five days), St. Thomas (four days), Immaculata University (four days), Seattle Pacific (four days), Northeastern (seven days), Hofstra (seven days), and Andrews University (ten days).

The notification process is also not always clear, some universities such as Seton Hall stipulate that permission is needed from the Dean of Students to stage a demonstration, but do not explain how this process works. St. John’s University’s policy is equally vague when it comes to clarifying the process of getting approval, while providing great detail on all the conduct and actions by demonstrators that are prohibited. At Benedictine University, students are also required to meet with the vice president for the Office of Student Life, without offering details about the process. These policies also do not stipulate how students can appeal a decision or on what basis these decisions are made.

Combined with punitive language stating that students can be arrested and suspended for partaking in a disruptive demonstration, protests there are treated more as a privilege that is granted than a right that can be exercised. Wake Forest has a similar policy characterized by language and procedures that consider a demonstration mainly as a threat and a nuisance, not as something that students are entitled to and encouraged to engage in. (“Distribution of printed material, flyers, etc. is prohibited....Law enforcement may photograph or video record the event and persons or activities involved with the event....participants may be subject to metal detection devices/equipment and may be required to wear identification supplied by the University”).

The policies of many universities also craft a distinction between (members of) student organizations and regular students. In some cases, like in Stanford’s policy, this distinction is made explicitly: “Events in White Plaza must be organized by University entities (student groups, departments, and programs) and require prior approval from Student Activities and Leadership (SAL).” Southern Methodist University requires that protests “be sponsored by an SMU department or Chartered Student Organization.” (It also requires assurance that the protest is “consistent with the mission and purpose of the department or organization.”).

Demonstration guidelines are often posted on the web pages geared towards student organizations or universities require that a demonstration is sponsored by a student

organization with application forms asking to list the sponsoring student organization. Some universities create confusion by putting demonstration policies both in the student handbook and in the handbook for student organizations. At Northeastern, for example, the student handbook addresses demonstrations, but also states: “Please consult the Campus Activities Student Organization Resource Guide for the most up-to-date policy.” This resource guide then contains additional information but seems to be written specifically with student organizations in mind.

These policies indicate that for some university administrators, protests are considered a student activity akin to a fundraiser, concert, or BBQ, requiring a registration process similar to these events. But this ignores the fact that a student protest can also originate from students without affiliation to a recognized student group. The University of Denver does not stipulate that only student organizations can protest, but requires that organizers use the Live25 system to reserve a location for the event, but this seems to be only accessible for student organizations (“Student organizations and DU departments may place room reservation request though [25Live](#).”).

Requiring students to reserve space or notify administrators when they plan to stage a protest does not necessarily lead to the problems identified above. However, whereas public institutions have to ensure that registration and approval processes are not arbitrary or overly burdensome, their colleagues at private universities do not have these restrictions.

### **Retributive Policies**

As the overview above shows, colleges requiring students to register their protest with administrators risk making the process to hold a demonstration onerous. The alternative approach is to allow protests and demonstrations to go forward and hold students responsible if these demonstrations do not follow certain stipulated rules (not blocking exits, not disrupting classes, following the student code of conduct, . . .) or become too disruptive. A total of 32 universities follow this approach. These policies might encourage (University of Chicago, Duke, Loyola University Chicago, Carnegie Mellon, University of Southern California), but do not require notification. Some universities only state that demonstrations need not disrupt or interfere with others, other institutions are more detailed in listing what is expected from protesters. Universities that require some kind of registration but make exceptions for impromptu demonstrations also were included in this group.

Some universities such as Cornell explicitly stipulate that no permission needs to be sought (in most instances): “Outdoor picketing, marches, rallies, and other demonstrations generally pose no threat of long-lasting exclusive use of University grounds or property. No university permit is required for such outdoor activities.” Emory’s policy clarifies that “[n]ot having registration for space is not reason to shut down protest.” Georgetown as well allows demonstrations to take place “regardless of whether the space has been reserved for that purpose, as long as the actions do not violate other university policies, disrupt university business, or curtail the free speech rights of others.”

Other universities in this category do not mention explicitly that no permission is needed, but state that demonstrations should not be disruptive and do not mention any requirements regarding asking permission or giving notice. Some do point out the right of the universities to regulate the time manner and place of protests, but absent an explicit requirement that students do notify them, it can be assumed that these restrictions are applied to ongoing protests. De Paul University, for example, states that it “may also reasonably regulate the time, place and manner of speech and expression for a variety of reasons, including

to allow for the continuance of University business or to ensure the safety and security of the campus and members of the DePaul community,” but this does not seem to come with an obligation of the students to notify.

### **Speech-Unfriendly Retributive Policies**

In the analysis, five universities had policies that seemed to indicate that they allowed protests without prior approval, but nevertheless seemed to be rather restrictive and speech unfriendly because of other reasons. The Illinois Institute of Technology, Case Western Reserve University and Gardner-Webb University, only referred to protests as a potential violation of student conduct by stating that participating in a disruptive protest is not allowed. On their face, these policies seem to indicate that participating in non-disruptive demonstrations is not a violation of student conduct and therefore allowed (without permission), but by only addressing the right to demonstrate as a negative right, (not engaging in disruptive protests), without clarifying what constitutes a disruption or establishing the right to protest as an important value to the university, these policies seem to provide students with little guidance.

Worcester Polytechnic Institute (WPI) and Shenandoah University, even though they affirm a right to protest, also use language that also seems to be chosen to dampen students’ desire to protest. WPI’s policy states that students “come to learn, not to demand; to be guided, not to direct. If they do not like some of the rules, regulations, traditions, and policies of WPI, they do not have to enter....” Shenandoah also recognizes the right to dissent, but warns those thinking about taking it too far: “Demonstrations that disrupt normal activities of the institution will not be tolerated at Shenandoah. Any student who participates in any form of disruptive action is subject to immediate interim suspension and lawful prosecution in the courts.”

### **Implications and Limitations**

Assessing the freedom to protest at universities based on the policies posted on their web sites does not paint a complete picture. As mentioned above, a significant number of private colleges do not have a demonstration policy (or we could not locate it). At the very least, this absence of a publicly available demonstration policy seems to indicate that these universities do not think that demonstrating should be clearly articulated as a right that students have. The lack of guarantees to such a right, particularly at a private university, seems to allow administrations to apply general non-disruption policies to students. Even if some of these universities might actually be tolerant of demonstrations, administrations should nevertheless, in the interest of transparency, provide clarity to prospective students about their policies. Some of the universities with a retributive policy also sometimes use language that still gives administrators leeway to punish students after the fact for “interfering with the rights of others” or for “disruption.” Policies only tell part of the picture, but the general trends observed here show that the majority of private universities that have a demonstration policy have some approval or notification process in place.

Of the 96 policies studied, only 32 (33%) had a policy that made it clear that students can protest without approval as long as they comply with a set of rules (this number excludes the five retributive policies discussed above). By contrast, 37 of the 50 public universities studied (74%) embraced this approach for at least some demonstrations. The policies at public universities also tended to suggest and encourage students to notify them rather than require

it. The majority of the policies that did require notification at public universities only did so for demonstrations of a certain size. However, it is important to put this difference in context. Some students might prefer institutions where they will not be exposed to demonstrations or expressions of certain viewpoints. In these instances, a restrictive policy makes sense. Further research could clarify to what extent these policies meet a student demand and whether religious institutions favor more speech restrictive policies.

### Legal Context

It might be tempting to frame the decisions of administrators as thinly veiled attempts at censorship. In the example of Loyola University Chicago discussed earlier, students were eager to paint the policy as an attempt to police their speech, but administrators maintained that safety was their one and only objective, not censorship. Demonstrations do create a certain risk at a campus that go well beyond the disruption of classes. A group of students marching through a campus, crossing streets, blocking access to emergency exits present safety concerns that could expose universities to legal liability.

From the beginning of the previous century until the sixties, colleges were granted parental authority over the students, and with it came legal liability. This paternal responsibility, *in loco parentis*, was slowly eroded during the 1960s when students asserted more individual rights and finally abandoned in 1979 *Bradshaw v. Rawlings*, when the Third Circuit established that universities were not responsible for the well-being of their students or for their actions, shielding administrations from a wide range of law suits. In the case, the court refused to hold a college liable when a minor who got drunk at a college-sponsored event where alcohol was served, injured another student in a crash (Lee, 2011).

However, over the last twenty years or so, the pendulum has swung back in the other direction. The decline of the *in loco parentis* doctrine has not stopped courts from holding universities responsible for students' actions under different theories of general liability (Newcomer, 2017). As a result, universities do not always get to walk away when students are engaging in behavior that leads to injury. This new realization caused many universities to assume a bigger responsibility in supervising their students, if not out of parental concern, then out of concern for legal liability.

As a result, recent decades have seen an increase in universities regulating hazing, alcohol abuse and sexual assault on campus. College administrations have also taken further measures to ensure mental health and other factors affecting students' well-being in the realization that students are not full-fledged adults, but are still growing up. At smaller private colleges, these obligations can be even more pronounced.

Given this context, it is perhaps not surprising that Deans of Student Affairs at universities in general and private universities in particular want to be proactive in regulating potentially high-risk activities such as student demonstrations. Balancing students' higher expectations regarding the duty of care their administrations have towards them with their desires to enjoy individual freedoms, in addition to the looming risk of liability, makes the task of crafting and enforcing demonstration policies one that will always leave some parties dissatisfied.

### Concluding Remarks

For educators in journalism and communication programs at private colleges, this reality presents a challenge and an opportunity. The norms of the professions we train our

students to enter tend to value freedom of information and many of our classes, such as media law courses, are designed to foster a reverence for the principles of free speech within our students. While some private institutions reserve the right to regulate content that contrasts with their beliefs or that discourage protests altogether, most claim to adhere to the principles of free speech and to merely regulate the time, manner and place of a protest. However, some of these demonstration policies are incompatible with this stated principle and faculty lose credibility if they extol the value of free speech in the classroom at an institution with policies that do not reflect this value. On the other hand, this can also be embraced as a teachable moment. For example, media law classes can study an institution's demonstration policy and evaluate whether or not it could withstand constitutional scrutiny.

Assuming that a college commits itself to the values of free speech and freedom of assembly, its policies should reflect this commitment. This does not necessarily mean that a notification and approval process should be off limits, but too often the language, procedures, and requirements set out in these policies constitute an impediment to the exercise of free speech. A policy that allows students to protest without prior approval as long as they respect certain norms will therefore in most instances provide a more speech friendly environment. As the example of Loyola University mentioned previously shows, change can be affected under the right set of circumstances, and journalism and mass communication faculty members can be instrumental in this process.

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