Friday, December 15, 2017

As the end of the term approaches here at NYU-Shanghai, it is a good time once more to examine the question of whether American universities’ campuses in China enjoy academic freedom. I have posted on this question several times before (see here, here, and here), and some recent commentary suggests that a new post is in order.

In particular, in order to avoid the sort of conceptual confusion that risks degenerating into vacuous moral grandstanding, any discussion of “academic freedom” needs to distinguish between three entirely distinct questions: (1) What are the bare facts about how NYU-Shanghai (and, by extension, other similar American universities’ campuses in China) actually operate? (2) What is the appropriate baseline against which to measure the academic freedom enjoyed at NYU-Shanghai? and (3) what are the risks of an American universities’ being complicit in an oppressive government’s actions that are unrelated to that universities’ academic affairs?

I am in a good position to answer (1), having taught Constitutional Law for a total of fifteen months over a period of three years at NYU-Shanghai. As for (2) and (3), these are normative questions about which you, gentle reader, should make up your own mind. After the jump, I will offer my defense of NYU-Shanghai, measuring a fact-based view of its actual academic freedom against what I believe is the most defensible baseline and the most plausible
definition of “complicity.” (Warning: This is a long post, because, in the face of a lot of acrimonious accusations, I am aiming, more than usual, for pedantic accuracy here).

1. **What are the facts about censorship at NYU-Shanghai?**

First, what are the bare facts about what the faculty and students can say at NYU-Shanghai? The short answer is: Believe it or not, anything we want. There is a tendency for critics to deduce from some purely theoretical concept of how Leninist China “must” operate that such a statement cannot possibly be true. (Most such critics have never actually visited our campus, seen a class, or talked to our students and faculty. See, e.g., Kent Harrington’s hatchet job in *Foreign Affairs*. To such writers, I plead: Please do a little legwork beyond quoting a bunch of blogs. I am happy to talk to you via email or Skype or put you in touch with students or faculty members of your choice).

As for data, my own course provides a few points. I teach a class entitled “The U.S. Constitution: Is It Relevant to China?” The point of the course is to present some basic American constitutional concepts to undergraduates, 50% of whom are typically PRC citizens, exploring contemporary controversies in American and Chinese constitutional law. The format features frequent debates in which I require teams of students to present opposing sides of an issue, arguing on behalf of positions that they may or may not in fact agree with.

Some of the course material concerns controversial legal issues in the American context, and some, equally controversial issues in the Chinese context. Yet I have never felt the slightest pressure to modify any aspect of my course, and my students, both Chinese and non-Chinese, approach classroom
debates with no-holds-barred advocacy. From my conversations with my colleagues here at NYU-Shanghai and from sitting in on other law classes (there are not that many: we are not a law school), I have found precisely the same sort of absolutely unlimited discussion.

But do not take my word for it. The GAO’s report on American universities’ campuses in China found that campuses like NYU’s that have independent legal status, facilities that are physically separate from partner Chinese universities, unlimited access to the internet, and extensive student life programs have high levels of academic freedom. NYU-Shanghai meets all of these criteria. As the GAO report noted,

“Faculty we interviewed told us they did not face academic restrictions and could teach or study whatever they chose. For example, several faculty members asserted that neither they nor their colleagues would tolerate any academic restrictions, and one faculty member told us he and his colleagues intentionally introduced class discussions on politically sensitive topics to test whether this would trigger any complaints or attempted censorship.”

(Full disclosure: That anonymous faculty member is me).

Even NYU’s most relentless critics like Representative Chris Smith have not found any fault with the levels of academic freedom here at NYU-Shanghai, once they have actually visited the campus. Indeed, Representative Smith gave a blistering speech to the NYU-Shanghai community at our campus attacking the Chinese government’s human rights record. Nobody interfered with his ability to express his views, including views that were patently offensive to some of the students in the room. Instead, they waited patiently for him to finish before presenting counter-arguments.

2. What is the appropriate baseline by which to measure academic
freedom at NYU-Shanghai?

Does the absence of express censorship at NYU-Shanghai mean that we have total academic freedom, in the most expansive linguistically tolerable sense of that term? Of course not.

There are lots of ways in which speech can be chilled beyond explicit rules, and those chilling factors are certainly present at NYU-Shanghai (as at other universities). For instance, we do not control the Exit-Entry Bureau of China and cannot invite speakers or faculty to the campus who cannot get a visa from the Chinese authorities. (*Mutatis mutandis* the same goes for American-soil schools seeking speakers from outside the United States). Likewise, China could deny visas to any of our current faculty who are too critical of Chinese policies. I know from personal conversations with scholars who need physical access to China for their research that the prospect of being denied a visa deters them from speaking or writing too frankly about China’s policies. (Again, that chilling effect exists for professors at American schools on U.S. soil who want access to China). The prospect that someone might report your classroom remarks to Chinese authorities might chill your speech in the classroom (here or in New York City), even if officially there are no official restrictions, especially if you are a Chinese citizen who fears social or employment repercussions from state employers. Finally, our academic freedom ends at the front entrance of the school on Century Avenue: Neither our faculty nor students can do research or engage in public expression in China in ways that violate the ordinary background rules of life in a Leninist regime. For instance, public criticism of Party or State can be easily prosecuted as “subversion of state power” or “picking fights and causing disturbances” in violation of Article 105 or Article 293(4) respectively of the Chinese Criminal Code.

Are these sorts of restrictions reasons to believe that NYU-Shanghai has
made an unacceptable compromise of academic freedom by opening a campus in China? In asking this question, NYU-Shanghai’s critics routinely fail to define any baseline of freedom against which to measure NYU-Shanghai’s performance. Such a baseline, however, is critical: If one is aiming to assess NYU's decisions, then one needs to compare the status quo at NYU-Shanghai with some state of the world deemed to be academically freer that would be produced if NYU-Shanghai either bargained harder with their Chinese partners or if NYU-Shanghai did not exist at all.

Judged by any reasonable definition of any such baseline, I believe that it is difficult to argue that NYU-Shanghai should demand from the Chinese that their students and faculty should be immune from China’s general immigration and criminal laws when those students and faculty are off campus. No sovereign nation would ever agree to such a condition: It would be unacceptable not only to the Chinese government but also to other Chinese citizens. Why would anyone reasonably expect that NYU could somehow wrangle such special privileges from China? Has any foreign university ever received such special treatment from the United States government — or any government, for that matter?

If it is unrealistic for NYU-Shanghai to demand total immunity from Chinese law, then NYU-Shanghai’s critics must be demanding instead that NYU-Shanghai not create any Chinese campus at all, because acquiescing to China’s ordinary immigration and criminal laws off-campus is too great a price to pay for the freedoms we enjoy on-campus. But this position is even more implausible, because it leaves everyone with less academic freedom than they otherwise would have. Anyone who would be excluded by China’s Immigration laws from lecturing at NYU-Shanghai, for instance, would still be excluded in the absence of an NYU-Shanghai campus. If NYU-Shanghai did not exist, Kwame Anthony Appiah (or the Dali Lama or whomever) would not somehow magically be able to get a visa to give a lecture at, say Fudan
University. The only effect of NYU’s deciding to stay out of China, therefore, is that Chinese students would (1) still not be able to hear what those excluded speakers have to say and (b) also not be able to hear what I and my colleagues have to say. If one’s goal is to protect academic freedom, what possible sense does it make for NYU to stay out of China because of scruples about not being able to import anyone they like to be physically present on campus? By that standard, all universities in the United States ought to shut down, because, under *Kleindienst v. Mandel*, the First Amendment’s Speech clause does not guarantee non-citizens the right of entry to speak to citizens who want to hear them speak.

The same confusion about baselines infects complaints that our Chinese students here might be chilled by government spies who report what the students say to vindictive authorities. It is possible that such spies exist (although, from my personal experience, our Chinese students seem unconcerned about their existence). But they exist as well at American universities located in the United States. Again, if universities become unacceptably tainted by the possibility that a student will fear that Chinese authorities will hear about their classroom remarks, then American schools should simply stop accepting any students from Communist China. Of course, such exclusion of foreigners to insure one’s own moral purity would degrade, not enhance, academic freedom. *Mutatis mutandis* the same holds for NYU’s refusing to create a campus in Shanghai: Such moral posturing would leave no one better off (since presumably the government would continue to spy on Chinese students at existing Chinese and U.S. universities), and it would leave many worse off — namely, everyone in our student body who would like to have the option of attending NYU-Shanghai despite the hypothetical presence of people who would snitch on them to the Chinese government or Communist Party.
3. Is NYU-Shanghai “complicit” in the bad actions of Chinese officials?

Behind much of the rhetoric about academic freedom is, I suspect, an entirely different concern: NYU’s critics worry that NYU becomes “complicit” in the bad deeds of Chinese officials by maintaining a campus in China. Robert Precht of Justice Labs stated this worry last spring when he wrote that “[t]he problem of complicity arises because of the very close business relationship between the universities and the Chinese government.” By “receiving generous subsidies from the government,” Rob argues that American universities potentially become complicit in “the government’s” bad acts.

There is, however, a deep confusion at the heart of this “complicity” argument: It ignores the basic fact that the Chinese Communist Party is a “they,” not an “it.” There are many, many departments, commissions, provinces, towns (40,000), counties (3,000), cities (hundreds), and many other subunits within Party and State of Communist China. It is hard to see how one becomes “complicit” in the bad deeds of, say, the Beijing Bureau of Public Security because one has cut a deal with the Pudong Municipal Government and the Ministry of Education. By similar reasoning, one becomes complicit in the misdeeds of Joe Arpaio in Maricopa County whenever one enters into an agreement with, say, New York City or the National Institute for Health.

I recognize that theories of complicity can be extremely elastic. Some people see complicity everywhere from any sort of association, however remote, with practices they deem to be evil. There are religiously sponsored medical clinics who will not post a sign required by state law notifying patients of the availability of abortion, arguing that mere physical proximity to such information will make them complicit in the practice to which the notices refer. Even under such a capacious theory of complicity, however, the notion
that NYU becomes complicit in, say, the arrest and trial of a human rights lawyer by police and procurators that have no connection whatsoever with NYU simply because NYU enters into an agreement with the Pudong government or the Ministry of Education strikes me as fanciful even by the unusually metaphysically terms of strained complicity arguments.

4. But what about all of those Communist Party members in your university’s administration?

I know and respect Rob, so I have a hard time understanding why he would embrace a theory of complicity in China that makes no sense in the United States (or anywhere else). My only hypothesis is that Rob and others who criticize NYU for its dealings with the Chinese government adhere to the notion that the Chinese Communist Party is such an unusually unified and especially evil organization that one’s dealings with any member of the Party taints one with the sins of any other member. My suspicion is reinforced by another post in which Rob declared that, because, under governmental rules, a member of the Chinese Communist Party must occupy a leadership position at NYU-Shanghai, it follows that NYU-Shanghai must not really be able to protect academic freedom. (Rob went so far as to accuse us of some sort of fraud because of this requirement of representation of the Communist Party in our leadership).

It is actually pretty funny to hear that Rob is shocked, shocked to find that Communism is going on here at NYU-Shanghai. That Rob would find the requirement of Communist Party members in the leadership alarming suggests a stereotype of the Party as a monolithic organization in which every member endorses every action that every other member ever took. My own experience runs against that stereotype. In the fifteen months that I have spent in China, I have met several Party Secretaries and Deputy Secretaries at several Chinese universities. Some have been working for years to outlaw sex
discrimination in the workplace after successfully protecting Hep B patients. Some are inveterate advocates of due process for criminal suspects, including trial-centered justice and an end to coerced confessions. Some oppose strongly the recent draft supervision law that, they believe, will undermine Chinese citizens’ constitutional rights. Branding them all as untrustworthy and oppressive is the sort of paranoid thinking that I have gradually come to expect from, say, Steve Bannon, not from usually fair critics like Rob.

In particular, **Chancellor Yu Lizhong**, NYU-Shanghai’s Party Secretary, is one of the most beloved educators in China. Parents flock to him at NYU events, because they trust him: He is a celebrity in China for his straightforward style, his honesty about the costs and benefits of an expensive western-style education, and his warmth towards our students. Chancellor Yu speaks with the quiet authority of someone who – like many Party members – has suffered from the Cultural Revolution. I am pretty sure that he does not need a lecture from Rob or anyone else about the value of freedom, academic or otherwise.

Yes, we have lots of Communists here at NYU-Shanghai, including Communists in the leadership like Chancellor Yu. Before you go into a pearl-clutching panic, keep in mind that many of those Communist Party members are students who came here precisely because they wanted a western-style education and they counted on Chancellor Yu’s good faith guarantees, backed by his reputation for integrity, to deliver. Far from dominating the school with their imagined anti-liberal conspiracies, my students who are Communist Party members often feel marginalized by fellow students and keep their Party membership under wraps. (I go out of my way to encourage them to be proud that they want to participate in their country's governance).

The irony of Rob’s statements about NYU-Shanghai’s alleged fraud is that there are nationalists in the Chinese Communist Party making accusations
strikingly similar to Rob’s about NYU-Shanghai – but from the other direction. They warn that foreigners and capitalists are infiltrating Chinese universities with insidious plots to undermine Communism through western values. So we at NYU-Shanghai have to put up with Rob’s baselessly claiming that we are stooges for Leninism while Chinese nationalists contend that we must be a front for the CIA.

Caught between the CCP’s and America’s nationalists, students who come to NYU-Shanghai, Communist and non-Communist alike, are demanding an education where they can learn without being hectored and preached at by the zealots of any ideology. As I have noted in an earlier post, I have found that NYU-Shanghai delivers such an education more effectively than many American universities, which seem to be undergoing their own little Cultural Revolution in which the True Believers shout down speakers, shut down documentaries and plays, and invade classrooms in the name of their various fighting faiths.

In sum, I believe that the record reflects that NYU-Shanghai has successfully been delivering a type of liberal education increasingly threatened in both China and the United States. Whether this type of education meets one's standard for "academic freedom" depends on the baseline by which one measures acceptable limits on such freedom. If one believes that the appropriate baseline for assessing freedom of NYU-Shanghai students in China is the precise set of freedoms enjoyed by NYU's students on Washington Square inside and outside the campus, then, no, NYU-Shanghai's students are obviously not "free." They cannot, for instance, march in street demonstrations or hand out leaflets denouncing the government. But that standard strikes me as normatively indefensible. If NYU refused to open a campus in any country that lacked the United States' libertarian commitments, then no one would gain any new leafletting or street-marching rights, but everyone would lose the opportunities provided by NYU abroad.
NYU’s departure would leave everyone less free to the benefit of no one but a few moral purists who would cut off Chinese students' noses to spite China's face. While there is a theory of complicity that makes such a price worth paying, I am inclined to think that frustrating students' and faculties' academic aspirations is an odd way to protect their freedom.

Posted by Rick Hills on December 15, 2017 at 04:17 AM | Permalink

Comments

I teach at the Peking University School of Transnational Law in Shenzhen and my experience is similar to Rick's. No one has ever told me what to say in my classes. I probably have more freedom here than I would at a US law school. No one is making me use made-up pronouns, or discuss diversity issues in a BA class. Basically, the Party does not care what foreign professors say in a foreign language about foreign law. However, if I were to start organizing a student group to push for human rights in China (there's some freedom of speech in China but no freedom of association) or if I started talking about independence for Tibet (that's a taboo subject, just like the merits of affirmative action or transgender rights in the US) in my contract drafting class, I'm pretty sure I'd hear about it.

As for all the communists around - well, we have found that Party membership is a very good indicia of success among applicants. About 50% of our students are members of the Party. They tend to be the smartest, most highly motivated students. However, they are not leftists. They don't think profit is a dirty word. They mourned Coase's death and they revere Judge Posner. They just belong to the Party because that's how you get ahead in China. They are, however, very nationalistic.

Posted by: Douglas Levene | Dec 15, 2017 5:48:05 AM
Thanks, Douglas. Your experience matches my own -- and also the experience of several other law profs teaching in China who responded off-line to my post.

The idea that China might be more open to free discussion than the United States tends to get Americans' panties all up in a bunch. (See, e.g., this angry tirade against Sam Altman by Jack Morse at Mashable: http://mashable.com/2017/12/14/sam-altman-is-awful/ ). But it should not remarkable that each regime practices a different sort of censorship. Regimes plausibly classified as Enlightened Despotism like 18th century Prussia or 21st century China tend to allow a lot of discussion that contradicts popular mores -- but only behind closed doors in foreign languages (French or English respectively). Popular democracies allow a lot of discussion out in the open in the vernacular that is critical of regime elites. The latter regimes censor speech through pervasive social pressure to engage in virtue signaling and preference falsification.

Posted by: Rick Hills | Dec 16, 2017 7:57:45 PM

Focusing on the third and fourth parts it reads like an advocacy piece: here are the strongest arguments in favor of the ethics of NYU operating NYU-Shanghai. Which is fair enough it's your blog post to with what you'd like.

But I wonder what you think from the judging side rather than the advocacy side. Clearly you come down on the side that it is ethical, but how close to the line is it? Which parts of the argument are truly necessary and which are just gravy?

Take for example membership in the Chinese communist party. You dismiss criticism on this basis "paranoid thinking" and point out there are many good people that are members of the CCP. Yet, good or otherwise they have all voluntarily taken a loyalty to an organization that has, and continues to,
unapologetically do some fairly horrific things. Going back to the necessary vs gravy part, is this okay with more because you think the loyalty oath doesn't mean anything or because you don't think the CCP is especially horrific. So for example, if it was the former, would you make the same argument about working with -- at least nominal -- members of the Nazi party in 1938?

Posted by: john | Dec 17, 2017 7:38:27 PM

Prof. Levene,
Separate from your (very interesting and relevant to the post) statements about academic freedom in China you included an en passant zinger "No one is making me use made-up pronouns." I take it this was a (perhaps unintentionally insulting) reference to the desire of trans or genderqueer people to have pronouns that reflect their lived experience and not the way you had to prefer to experience them. I am not aware of many (indeed not any as far I know, but who knows what's out there) law schools that *require* professors to use certain pronouns but I just wanted to gently nudge you on your use of "made-up" in this aside. Your intention I think was to draw a sharp line between the existing pronouns such as "Ms." and newer entrants, but I think you unintentionally and incorrectly suggest that pronouns descend from a Platonic heaven and have not been an ever-evolving business. It may interest you to learn that non-binary gender pronouns actually have a very long history in English beginning with the 1850s -- here is a good scholarly treatment [http://www.english.illinois.edu/~people-/faculty/debaron/essays/epicene.htm](http://www.english.illinois.edu/~people-/faculty/debaron/essays/epicene.htm). Perhaps more telling, even the pronoun Ms. (which I know I have used in the classroom and I would assume you would treat as appropriate for classroom use) only dates back to 1901 (a history short than the first non-binary pronouns) and like most pronouns came into being with the need to recognize a particular group who was left out of existing pronoun usage (a good public history here [http://www.nytimes.com/2009/10/25/magazine/25FOB-onslanguage-](http://www.nytimes.com/2009/10/25/magazine/25FOB-onslanguage-)}
While I know it was not the focus of your post, I nonetheless in a spirit of goodwill invite you to see the problem in a new way. Sincerely yours,
I. Glenn Cohen

Posted by: I. Glenn Cohen | Dec 17, 2017 11:43:05 PM

John asks: “would you make the same argument about working with -- at least nominal -- members of the Nazi party in 1938?”

No, I wouldn’t, and it is a fair question to ask what makes the CCP different than the Nazis. The simplest answer is that aspirations and principles matter here. The past and present aspirations of the CCP are mostly decent enough, albeit dogmatic and often suicidally foolish. Certainly none of the CCP’s goals ever included mass murder or even terror. Mao’s Little Red Book does not read like Mein Kampf. “Class warfare” was carried out in ruthlessly barbaric ways during the 1950s, but, in principle, the CCP’s principles did not require extermination of anyone, just confiscation of their productive (as opposed to personal) assets. Thus, it was possible for the Party to launch a vicious attack on class enemies at the same time that it was promulgating a liberal-sounding 1954 Constitution that left its own cadres confused. (For an interesting account of their confusion, see Neil Diamant’s recent article at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/24D86786874B8B40006030687E9E5BAE/S2059163217000287a.pdf/what_the_expletive_is_a_constitution_ordinary_cadres_conf ront_the_1954_prc_draft_constitution.pdf).

No one in the Party, in other words, has taken any oath to do horrific things. (Since you bring up the CCP’s oath, I urge you to read it: It really is not ethically offensive. See here for Chinese and English translation: https://www.p-wood.co/2017/05/13/oaths/). The goals to which Chinese Communists have committed themselves, in fact, are fairly abstract and
anodyne and now even include protection of private property. Of course, the things that leaders of this organization have done in pursuit of those goals are often nasty. But they have frequently done these things to the Party’s own members, suggesting that the membership is hardly 100% board with the nastiness. (One reason why many party members are not enthusiastic about the draft supervision law that is on the National People’s Congress’s spring agenda is that that law — an anti-corruption measure that allows party members to be detained for up to six months for interrogation about corruption — is directed against them).

Were the CCP to endorse mass executions, extermination of minority groups, torture, as part of their official agenda, then it would be much more difficult to avoid complicity with those goals when cooperating with the CCP’s members. With a criminal regime, boycott is a minimum necessity of ethics (and open warfare against such a regime might actually be required). But the CCP has not endorsed crimes against humanity: At worst, they’ve endorsed the methods of many thin-skinned authoritarians from Louis XIV to the present: Strict rules against lèse-majestée (e.g., locking up people who attack or mock the Party) are bad and violate provisions of the ICCPR — but they just ain’t Nazi-bad IMHO.

These questions are, for me, a matter of degree and factual detail — too much detail for a blog post.

Posted by: Rick Hills | Dec 17, 2017 11:54:28 PM

Rick,

You claim to know and present the "bare facts" about NYU-Shanghai and academic freedom.

But in our 2015 exchange it seemed that you had never seen or read the
contract between NYU and China that governs the program. Is that true? If it is true, on what basis can you conclude that you do, in fact, know the bare facts? If it is not true, can you share the agreement with us so that we can fairly judge your interpretation as summarized here (an ordinary exercise where, in fact, academic freedom does prevail)?

Your approach seems at odds with ordinary academic standards: you reach a conclusion, cite a US government report that supports that conclusion and then explain that at least one data point for that report's conclusion is your own conclusion!

Posted by: Steve Diamond | Dec 19, 2017 8:02:07 PM

Steven, I am mystified by your touching faith in the Communist Party. Do you really believe that a contractual guarantee of academic freedom by the CCP would somehow protect us against Party leaders who decided that they did not like this experiment with Western-style education? No? Neither do I: The contract is, to my mind, a parchment barrier of no particular importance. Where exactly would we enforce such a document in any case — Pudong intermediate court? Surely, the result of that litigation (NYU-SH v. Pudong Municipal Govt) would be foreordained.

So why are you obsessed with a document that, in the final analysis, guarantees nothing? I would assume that the experience of faculty and students on the ground counts for much more.

Now you are free to call me and my colleagues liars when we tell the GAO that we say and teach what we please at NYU-SH. But the idea that some contractual provision guaranteeing academic freedom would confirm the truth of what we say seems silly to me: If we are a bunch of liars, then surely you don't trust the Pudong Government to tell the truth, right?