

2001 WL 34092855 (C.A.9) (Appellate Brief)  
United States Court of Appeals,  
Ninth Circuit.

Christopher Todd BROWN, Plaintiff -Appellant,  
v.  
CHARLES LI, etc., et al., Defendant-Appellees.

No. 01-55930  
October 09, 2001.

Appeal from the United States District Court, Central District of  
California, Hon. Ronald S. Lew, USDC No. 00-6492 Rswl Aijx

**Brief of Foundation for Individual Rights in Education, Inc., as  
Amicus Curiae in Support of Appellant's Request for Reversal**

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**\*1 STATEMENT OF INTEREST OF AMICUS CURIAE**

The Foundation for Individual Rights in Education (“FIRE”) asks for leave of the court to hear this *amicus curiae* brief. The Foundation for Individual Rights in Education, Inc. is a non-profit, tax-exempt foundation under [Section 501\(c\)\(3\) of the Internal Revenue Code](#), incorporated in 1999 in Massachusetts,

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with offices in Philadelphia and Boston. FIRE's mission statement, found in full text at [www.thefire.org](http://www.thefire.org), sets forth FIRE's goals - to defend and sustain individual liberties and academic freedom at America's colleges and universities, including freedom of speech and thought, due process or at least elementary fairness, legal equality, religious liberty, and sanctity of conscience. When colleges and universities, especially public institutions, fail to adhere to these core values, when they further fail to respond to principled and moral arguments, and when litigation finally ensues, FIRE participates as *amicus curiae* as appropriate. In the case at bar, FIRE corresponded and sought to reason with, but failed to convince, officials at the University of California at Santa Barbara. When that effort failed, FIRE sought cooperating counsel to initiate litigation.

FIRE is dedicated to the pluralistic notion of a wide variety of educational institutions in civil society, each free to pursue goals it chooses by means it determines. There is one *caveat* for *private* institutions: They \*2 should be forthright as to the nature of their goals and means, a sort of “truth in advertising” standard. FIRE believes that a *public* educational institution, however, unlike a private institution, has a legal obligation to adhere to the First Amendment. A public institution must studiously avoid the temptation to use its coercive power to quash critical and disfavored speech or to attack student speech based on the viewpoints expressed. This is especially urgent when, as here, a student seeks to expose and criticize what he deems official malfeasance by educators charged with teaching in and administering our great state universities.

### \*3 STATEMENT OF ISSUES

I. Did the trial court err in failing to consider whether the University created a limited public forum in the form of student “acknowledgement” sections in theses, through its policies and practices?

II. Did the trial court err in granting summary judgment without considering whether the University unconstitutionally censored Appellant's speech, for its disfavored viewpoint, in a limited public forum?

### \*4 STATEMENT OF THE CASE

FIRE adopts the Statement of Facts set forth in the Memorandum of Appellant Christopher Brown (“Brown”).

### SUMMARY OF THE ARGUMENT

The University of California at Santa Barbara and the individual respondents (collectively “the University”) persuaded the trial court to grant summary judgment on April 30, 2001, allowing the University to hide behind the shield of sovereign immunity and with impunity violate Brown's First Amendment rights. FIRE urges this court, on the basis of Supreme Court and its own precedents, to hold that students have a Constitutionally protected right to express criticism in a university-created limited public forum.

The trial court failed to consider Brown's ample evidence that the University created a limited public forum by allowing graduate students to express themselves in the acknowledgement sections in student theses. First, the University created the limited public forum through its own rules and regulations. These regulations make clear that the acknowledgement section is optional and there is no limitation on its form or content.

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Second, the University created a limited public forum through its own consistent practices, which have allowed students to comment in their theses \*5 on a variety of issues, to criticize individuals, to recite poetry, to state unsubstantiated opinions in a decidedly non-academic tone, and even to indulge in puerile speech. At no time has the University stated or suggested that the content of the acknowledgement section could or would be evaluated for content, or that the content of the acknowledgment could be the basis for withholding a degree. Nor at any time has the University promulgated any rule or policy with respect to standards for student acknowledgements. Thus, through its policies and practices, the University created a limited public forum in student acknowledgement sections of theses.

Under well-established precedent, once the University established a limited public forum, it was no longer free to censor student speech expressed in that forum based on the speaker's viewpoint. Brown adduced ample evidence that the University did exactly that.

There is sufficient evidence to raise a triable issue as to whether the University censored Brown because it disagreed with his viewpoint. Moreover, although the University might be permitted to place reasonable time, place, and manner restrictions on Brown's speech, there is no likelihood here, nor even a contention, that the University's actions could meet such a standard. The University here transgressed the First \*6 Amendment, as well as violated academic freedom to the extent this concept is interwoven with First Amendment principles.

#### **\*7 I. THE ACKNOWLEDGEMENT SECTION OF STUDENT THESES ARE LIMITED PUBLIC FORUMS.**

In order to assess whether Brown's claims could be resolved on summary judgment, the trial court should have first analyzed whether Brown's speech arose in the context of a limited public forum, or whether it was expressed outside of such a forum. The trial court failed to do so. In fact, Brown adduced ample evidence that the University, through its policies and practices, created a limited public forum in the acknowledgement sections of student theses.

##### **A. The University's Own Directives Establish That Acknowledgement Sections Are Intended For the Open Expression of Student Opinion.**

The critical issue in analyzing Brown's First Amendment claims is whether his speech arose in a species of public forum. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268, 108 S.Ct. 562, 569, 98 L.Ed2d 592 (1988). There is no dispute that a student's speech may be regulated, evaluated, and even penalized, in appropriate circumstances, when it is expressed in a purely academic context. Professors generally, and, as here, members of the thesis review committee ("the Committee") are entitled to evaluate the academic work of students and to reward or penalize such work on the basis of academic standards. However, where the University creates a limited \*8 public forum for its students to express their views, it is no longer free to censor student speech based on viewpoint.

The Supreme Court teaches that there are three types of public fora. First, a **traditional public forum** is one that traditionally has been used for assembly and speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 954-5, 74 L.Ed.2d 794 (1983). Public fora are "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.*

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citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). The second type of forum is the **designated public forum**. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). A designated forum results where the “government intentionally opens up a nontraditional forum for public discourse.” *Id.* A **limited public forum** is a sub-category where the government intentionally opens a non-public forum to certain groups or discussion of certain topics. *Id.* In a limited public forum, the “state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.” \*9 *Perry*, 460 U.S. at 47, 103 S.Ct. at 955. Finally, a **non-public forum** is not by tradition or designation a forum for public communication. *Id.*

A limited public forum is created when the government designates “a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Cornelius v. NAACP Legal Def. & Educ. Fund Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). See also *Perry*, 460 U.S. at 45, 103 S.Ct. at 955; *Kincaid v. Gibson*, 236 F.3d 342, 352-3 (6th Cir, 2001). A school facility may be considered a limited public forum if the authorities have “by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations.” *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 823 (9th Cir. 1991)(quoting *Hazelwood*, 484 U.S. at 267, 108 S.Ct. at 567).

The District Court erred by not addressing whether the University created a limited public forum. The court appears to have assumed that the acknowledgment section was not a limited public forum and evaluated Brown's claim on the assumption (which is contested) that the acknowledgment section constitutes part of the academic work of the thesis that is subject to evaluation and restriction by the University. [ER 610].

\*10 Brown adduced ample evidence that the University, through words and actions, established the acknowledgement section as a limited public forum for University students to communicate their subjective personal views. First, the University's own regulations make clear that the acknowledgement section is an optional “add-on” to the thesis, unrestricted in form or content. In the UCSB Rules and Regulations For Filing a Thesis (“the Regulations”), the University indicates its policy as to what student theses shall include. The relevant provision states:

You **may** wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you. Within the usual margin restrictions, any format is acceptable for these pages.

[ER 88](emphasis added). Thus, the acknowledgment section is optional, *i.e.*, the academic work in a thesis can and indeed will be evaluated and approved without reference to an acknowledgment section.

Second, the Regulations only suggest what “may” be included in the section; it has no required standard. Thus, the University has put students on notice that they may, at their option, use the acknowledgment section as a forum for expressing their thoughts and ideas. It is a standard rule of construction that the use of the term “may” in a statute or regulation is usually interpreted to grant a choice or discretion. *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988).

\*11 Third, and perhaps most relevant, the University, by suggesting that the student consider dedicating the work “to someone special to you” or that he or she “acknowledge particular persons who helped you,”

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surely gives the student discretion to decide, and to state, who was, but also who was *not*, helpful. A dedication to “someone special to you” cannot constitutionally be restricted, and in this instance does not on its face appear to be restricted, only to people “special” in a *positive* way.

Indeed, Brown adduced admissions from members of the thesis review Committee that there are *no* clear limitations on content of the acknowledgment section. For example, Professor Frederick Lange was asked in deposition:

Q. So it's your view that an acknowledgement has as its sole function the purpose of praising or thanking or expressing appreciation for support?

A. It doesn't have to be praise. Praising I would not necessarily, but thanking for finding some information, for supporting financially, that's correct.

[ER 507].<sup>1</sup> Each faculty member recites a different personal standard. At the very least, what would constitute a proper acknowledgement section is \*12 left on this record an open question, not subject to summary judgment against the plaintiff student, as to whether the University created a public forum. When the Committee members themselves cannot articulate the controlling standards for a “proper” acknowledgement section, it is impermissible to punish Brown for relying on the permissive language of the Regulations and exercising his option to express his views. See *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001)(university's failure to put forth a policy or practice regarding bulletin board created a designated public forum).

#### **B. The University's Own Conduct Indicates that it Considered Acknowledgement Sections a Limited Public Forum.**

Even assuming that the University had intended to apply some unarticulated restrictive standard on the content of acknowledgment sections, because it has not “consistently enforce[d] ... restrictions on the use of the forum, it creates a designated public forum.” *Id.* In this case, there is ample record evidence that the University does not evaluate the content of acknowledgement sections, and in fact has approved theses that \*13 were accompanied by student acknowledgments that are juvenile, critical of individuals, and lacking in academic content. This practice, consistent with the University's permissive Regulations, establishes that the acknowledgment section is intended to be a forum for individual student expression, not academic work subject to evaluation by the University.

Examples of the University's “hands off” approach to the content of student acknowledgments abound. For example, the University has approved theses accompanied by acknowledgement sections that thank individuals who have helped their progress,<sup>2</sup> that quote literature<sup>3</sup>, that perhaps too effusively praise professors,<sup>4</sup> that thank “ignorance”,<sup>5</sup> and, finally, that use foul language to criticize other students.<sup>6</sup> The University created an atmosphere where anything was allowed in the acknowledgement section. Brown took his lead from the University's previous conduct and treated the acknowledgement section like the limited public forum that the \*14 University held it out to be. He was tripped up, however, when his acknowledgement section had the temerity to be critical of, among others, those responsible for approving his thesis and placing it in the library. It is in this context that Brown's acknowledgment section (or, as he put it, “disacknowledgment” section) and the rights that attach thereto, must be evaluated.

**C. At The Very Least, There Is A Genuine Factual Dispute  
As To Whether A Limited Public Forum Was Created.**

In order to survive a motion for summary judgement, the non-moving party must show that there is a question of material fact in contention. *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 872 (9th Cir. 1992). In resolving a motion for summary judgment, all inferences must favor the non-movant. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Assoc.*, 809 F.2d 626, 631 (9th Cir. 1987).<sup>7</sup>

Here, at the very least, there is a question of fact as to whether the University's conduct created a limited public forum in student acknowledgement sections. Although FIRE would respectfully contend that the record is clear that a limited public forum was created, at the very least \*15 Brown is entitled to have the factual question of whether the University's permissive Regulations, coupled with its long-standing practice of permitting all manner of acknowledgments has created a limited public forum. Then, of course, Brown was entitled to an opportunity to demonstrate that the University clamped down on his use of the limited public forum to criticize those who were in positions of authority over the fate of his thesis. In other words, Brown should have been given the opportunity to prove that he was the victim of viewpoint discrimination in a limited public forum.

**II. THE UNIVERSITY MAY NOT CONSTITUTIONALLY ENGAGE IN VIEWPOINT-  
BASED CENSORSHIP OF STUDENT ACKNOWLEDGEMENT SECTIONS.**

**A. Having Established A Limited Public Forum, The University  
May Not Place Viewpoint Based Limits on Student Speech.**

Given that the acknowledgment section is a limited public forum, it is impermissible for the University to condition approval of Brown's master's thesis and refuse the placement of his thesis in Davidson Library based on the viewpoints expressed. The Supreme Court has repeatedly held that there is “no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.” \*16 *Widmar v. Vincent*, 454 U.S. 263, 268-269, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981).<sup>8</sup> A government entity may place restrictions on speech in a limited public forum only if these restrictions are “viewpoint neutral and reasonable in light of the purpose served by the forum.” *Hopper*, 241 F.3d 1074-1075. The University has not created viewpoint neutral regulations and has not advanced any reasonable state interest to defend its abridgement of Brown's speech.

The Supreme Court addressed the issue of viewpoint-based restrictions in a public forum in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed. 2d 700 (1995). The University of Virginia developed a system in which student organizations could be recognized as official university organizations and receive funding. However, the University refused to fund reimburse religious student groups. Religious organizations sued, arguing that the University denied them access to a public forum. The Court held that the University's system regulated speech based on content in favoring some speech while refusing to sponsor other speech. *Id.* The Court held that the failure to fund this speech cast disapproval on a particular viewpoint by the \*17 government and thus was unconstitutional. *Rosenberger*, 515 U.S. at 836, 115 S.Ct. at 2520. *See also Bach v. Sch. Bd. of the City of Virginia Beach*, 139 F.Supp.2d 738, 742 (E.D. Va. 2001) (holding in a limited public forum that it is “difficult to imagine a more content-based

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prohibition on speech than [a] policy, which allows expression of two points of view laudatory and neutral while prohibiting a different point of view negatively critical on a particular subject matter.”)(quoting *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F.Supp. 719, 725 (C.D.Cal. 1996)).<sup>9</sup> Indeed, the principles announced in *Rosenberger* and other cases carry special weight in the university context because of the tradition of a university as a forum for the free exchange of ideas. *Rosenberger*, 515 U.S. at 835, 115 S.Ct. 2520.

### **B. The University Censored Brown's Speech Based On His Critical Viewpoint.**

There is more than ample evidence that the University decided to punish Brown's speech because of its viewpoint. While FIRE does not here rehash the record or the arguments made by Brown in his brief, it is clear that the University decided to punish him for the viewpoints expressed in his acknowledgment section *after* the thesis committee had already approved the \*18 academic content of his thesis. [ER 218-219]. Indeed, the University has admitted that the only reason that the thesis initially was not approved was because of the viewpoint of the “disacknowledgment” section.<sup>10</sup> Additionally, the thesis is still being denied placement in the Library because of these critical viewpoints.

Second, it is undisputed that Brown used his acknowledgment section to severely criticize the University, the teaching staff and even the Governor of California. [ER 39-40]. There is ample record evidence that members of the Committee took personal umbrage at Brown's message. [ER 206]<sup>11</sup> Thus, there is, at the very least, a reasonable inference that a trier of fact could draw that the punishment Brown incurred was the result of the Committee's displeasure with his message.

Third, the University's viewpoint-based censorship is demonstrated by the disparate treatment that Brown's “disacknowledgement” was given in comparison to the treatment other students received. The University refused \*19 to let Brown publish his acknowledgement with its criticism of officials because “this was not the place to express his personal feelings about the University, its staff, departments or any other entity that incurred your displeasure while you were a student at UCSB.” [ER. 321]. Yet the University repeatedly has allowed students in other acknowledgement sections to heap *praise* upon faculty and administration. See [ER 406]<sup>12</sup>, [ER. 323]<sup>13</sup>, [ER 428]<sup>14</sup>, and [ER 446].<sup>15</sup> These acknowledgement sections lauding the faculty were placed in the Library from which Brown's critical commentary was excluded.

The double standard - here so palpable - of allowing praise, or allowing criticism only of persons other than the student's supposed mentors, but then censoring Brown's critical viewpoint when it focuses on whom his criticism was directed towards, is as disturbing as it is obvious. Brown was criticizing the University faculty and the very individuals who were in charge of the thesis approval process.<sup>16</sup> The University had allowed \*20 the acknowledgement section to act as a forum for criticism of other students in the past.<sup>17</sup> The University, though, would not allow criticism of itself and of the student's mentors, teachers, and administrators. When the criticism attacked those in charge of the process, they decided to censor the speech. Given what is known of human nature, this may not be surprising, but it is precisely to counteract such censoriousness that the First Amendment has been accorded primacy in our jurisprudence. The ability to criticize the government and those in positions of authority is one of our most respected and protected First Amendment rights. *Saunders v. Virginia Polytechnic Institute*, 417 F.2d 1127, 1130 (4th Cir. 1969)(student's freedom to express peaceful dissent on campus is more than a privilege; *Tinker* tells us that it is a basic right guaranteed by the first amendment).

Finally, the University's treatment of Brown's academically approved thesis shows that the University was engaging in viewpoint discrimination. The University treated Brown's thesis differently than other theses. The University normally placed all academically approved theses in the Library.<sup>18</sup> Dean Li could not remember another approved thesis that had not \*21 been placed in the Library.<sup>19</sup> Yet even after Brown's thesis was approved, the University refused to place it in the Library along with the other theses.<sup>20</sup> Clearly, the University treated his thesis differently because of the viewpoints expressed. It does not appear that the University even denies this; rather, it seeks to justify this further act of censorship.

At the least, Brown has demonstrated that there is a question of fact as to whether the University established a double standard for student speech, *i.e.*, a standard that allows praise but not criticism of university faculty and officials, a standard not allowed in a limited public forum.

### 1. The Censorship Was Not Based On Academic Criteria.

The University argued below that it should be able to restrict Brown's speech as part of its right and obligation to evaluate his academic work. [ER 600]. There is no dispute that a professor should have free reign to judge a work and grade that work on its academic content. The Supreme Court has stated:

\*22 [w]hen judges are asked to review the substance of a genuinely academic decision ..., they should show great respect for the faculty's professional judgement. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgement.

*Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985), *See also Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995)(so long as the teacher violates no positive law or school policy, she has broad authority to base grades for students on her view of the merits of the students' work).<sup>21</sup>

But while the University has broad discretion in the *academic* arena, it does not have the power to censor, on account of viewpoint, non-academic speech in a limited public forum. The Committee initially refused to grant Mr. Brown his master's thesis, causing him delay and damage, and it still refuses to place the thesis in the library, based on the viewpoints expressed in the acknowledgement section, *not* on the academic merits. [ER 321]. Brown went before the thesis committee and successfully defended his work. The Committee then approved his thesis on its academic merits. [ER \*23 218-219]. After reviewing and analyzing the academic works *sans* acknowledgement section, the Committee determined that Brown met the criteria to graduate with a master's degree. [ER 218-219]. The Committee then signed the thesis. [ER 219]. It did not change its mind until it later reviewed the acknowledgement section. [ER 321]. Brown was later granted his degree only after the University was threatened with a potentially embarrassing news piece on ABC-TV national news.<sup>22</sup> The University still refuses to place Brown's thesis in the library with every other academically approved thesis.

Moreover, if the acknowledgement section had been part of the academic work of the thesis, the University would have specified criteria that the student would have to satisfy in order to win approval and thus

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graduate. The University established no such criteria and left the “format” of the acknowledgement section to the student's discretion. [ER 88]. If the acknowledgement section were part of the requirements that needed to be reviewed, the University would have had a procedure and standards under \*24 which that would be done.<sup>23</sup> The University did not create nor maintain such a procedure.

## 2. The Censorship Was Not A Proper Means of the University's Disassociating Itself From the Acknowledgement Section.

The University has argued that the reason it censored Brown's acknowledgement was to disassociate itself from Brown's speech. A university or a professor has a right to disassociate from the speech of a student. As stated in *Planned Parenthood*, the school must “retain the authority to refuse to sponsor speech that might reasonably ‘associate the school with any position other than neutrality on matters of political controversy.’” *Planned Parenthood*, 941 F.2d at 827 quoting *Hazelwood*, 484 U.S. at 271, 108 S.Ct. at 570. A university also has the right to refuse to associate with speech when “the public, parents of school children in particular, might reasonably perceive school sponsored publications to ‘bear the imprimatur of the school’ ...” *See Id.*

While FIRE endorses the principle that faculty (and, for that matter, students) have the right not to associate with speech with which they disagree, the University here is not associated with Brown's \*25 acknowledgment. The signature page clearly associates the faculty with Brown's *academic* work, for it bears the signatures of all three of Brown's Committee members. The page clearly states that the “Thesis of Christopher Brown is Approved.” [ER 37]. However, the signature page does *not* state that *all* that follows is approved. The Committee distinctly says only that the *thesis*, which is the academic work, is approved.<sup>24</sup> It would be clear to the average reader that the acknowledgment constituted Brown's own opinion and did not express the views of the University or its professors. Indeed, the average reader would understand that, if Brown had *praised* his professors, that praise would be entirely the voluntary act and opinion of the student, as it would be unseemly for professors to insist upon being praised as the price for approving the thesis. Conversely, it would be unseemly for professors to withhold approval merely because the praise they may have expected was instead criticism.

Additionally, the University cannot be considered to be associating itself with Brown's speech since the speech is so *personal*. The views expressed in the acknowledgement were based on Brown's experiences at \*26 the University and are his perceptions as to the gross inadequacies of the University and certain of its personnel.

Brown's fatal mistake, though, lay in exercising his assumed discretion by vocalizing *criticism* of the University faculty and administration. The University was not concerned with Brown's “obscene” language, since it still refused to approve his thesis after he removed such language from his acknowledgment section. The fact that Brown criticized members of the faculty *by name* made his crime worse.<sup>25</sup> The University was determined to suppress this criticism.

However, even assuming there was merit to the University's concern over unwelcome association, there were far less restrictive means available to address it. For example, the University could have placed a disclaimer in front of the acknowledgement section. In fact, this option was discussed several times, and a possible disclaimer was proposed. [ER 349].<sup>26</sup> The University, instead, chose to censor Brown's speech.

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\*27 In support of its summary judgment motion below, the University cited several Supreme Court First Amendment associational cases, including as *Pac. Gas and Elec. Co. v. Pub. Util. Comm'n of California*<sup>27</sup>, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>28</sup>, *Miami Herald Pub. Co. v. Tornillo*<sup>29</sup>, and *Wooley v. Maynard*<sup>30</sup> to support its claim that its censorship was justified in the interest of avoiding the Committee's being compelled to associate with Brown's views. [ER 599]. However, in these cases, the government was forcing private entities to associate with speech with which they disagreed. In the case at bar, a private individual is asking a public entity to continue to allow free expression in a forum that has already been opened to the public. Brown is not asking that the University place its *imprimatur* on his speech, and indeed is happy to have it explicitly disassociate itself from his speech. The University's associational objection thus becomes a red herring.

### \*28 3. The Trial Court Clearly Erred in Considering Alleged Epithets

The District Court clearly erred in considering the use of profanity in the Findings of Uncontroverted Fact and Conclusions of Law. [R. 33]. Brown's use of epithets is simply a non-issue. It is undisputed that Brown had removed the epithets from his acknowledgement section after the University first refused to approve the thesis. [ER 41]. Therefore, the Court relied on a clearly incorrect factual assertion.

Moreover, assuming *arguendo* that the epithets were properly considered, they were protected speech in the context of a political message in a limited public forum. The government cannot choose the words that an individual uses to criticize that government or to opine on a public issue. See *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). As stated by Justice Frankfurter, "one of the prerogatives of American citizenship is the right to criticize public men and measures - and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Cohen*, 403 U.S. at 26, 91 S.Ct. at 1788 quoting *Baumgartner v. United States*, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1524 (1944)). Cohen walked through a California \*29 courtroom with a jacket that read "Fuck the Draft." The Court held that the state could not prohibit the simple displaying of a four-letter word. *Id.* The Court continued:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

*Cohen*, 403 U.S. at 26, 91 S.Ct. at 1788.

The University cannot censor speech based on whether, in its mind, the speech is offensive. Brown is entitled to use the language of his choice to communicate the emotions of his choice. The only speech that could convey the outrage he felt was speech that contained a few well-placed expletives. Allowing the University to choose Brown's words is an unreasonable restriction on speech for, as *Cohen* teaches, the emotive value of the words a critic uses is part of what the First Amendment protects.

### C. The University's Censorship is Not a Reasonable Restriction

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When a government entity decides to regulate speech in a limited public forum, it must craft a regulation that is “viewpoint neutral and reasonable in light of the purpose served by the forum...” *Hopper*, 241 F.3d at 1074-1075. Here, to the extent the University has identified any interest \*30 in censoring student acknowledgment sections at all, it relies on an asserted need to police academic work and to avoid having the University associate itself with offensive speech.

As noted above, the University has not treated acknowledgment sections as academic work, and thus the need to evaluate these sections on an academic basis is neither reasonable nor legitimate.

Further, the University's forced association argument has been shown, *supra*, to be a pretext, for the University could have issued a rebuttal and placed it in the University library. The University contemplated but rejected such a choice [ER 327] because, in the words of one professor:

You see all sorts of disclaimers when you read something and you don't believe them, do you? On TV every word that's said on this program we don't necessarily agree with, and yet the TV presents it. To my mind they present it because it was something that they possibly might have believed. So that to me would not disclaim me for sure.

[ER 366-367]. This exemplifies the unreasonableness of the University's position. According to this theory, the University censored Brown's speech because it was afraid that the average person would not understand or would ignore a disclaimer. The University decided to censor Brown's speech and refused to place his thesis in the Library because it feared that while *Brown's* critical words might be taken seriously by a reader, *its own* disclaimer would not.

\*31 *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) is instructive. A university provided the funding for a student-produced yearbook. The university did not approve of the colors, content, length, and quality. Rather than place a disclaimer in the yearbook that it did not meet the standards of the university and was the product of individual students, the university decided that a wholesale confiscation of the yearbook was appropriate. *Id.* at 354.

The Court first declared that the yearbook was a limited public forum, then decided that the restriction upon speech was not reasonable. The Court held that the university “did not impose reasonable time, place and manner restrictions upon speech in a limited public forum by confiscating all copies of the yearbook.” *Id.* at 357. It additionally stated that the officials' actions “were not reasonable because they were arbitrary and conflicted with the university's own policy.” *Id.* at 354.

*Kincaid* presents a situation strikingly similar to the case at bar. The University could have chosen less restrictive means of dealing with Brown's speech. It could have added a disclaimer to Brown's acknowledgement. Instead, the University chose the *most* restrictive option. Initially it refused to accept the thesis and grant Brown his degree. When threatened media exposure loomed, it granted the degree, albeit late, but withheld publication \*32 via placement in the campus library. The University chose to foreclose Mr. Brown's equal access to a limited public forum that was open to other students, and it did so because of his viewpoint.

**III. THE UNIVERSITY'S CENSORSHIP IS UNCONSTITUTIONAL  
EVEN IF THE ACKNOWLEDGEMENT SECTIONS OF STUDENT  
THESES ARE NOT DEEMED A LIMITED PUBLIC FORUM.**

The University cannot regulate Brown's speech even if the Court determines that the acknowledgement section is not a public forum. A non-public forum is public property which is "not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. A state may regulate speech in a non-public forum "as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

Although the standard the state must meet in a nonpublic forum is more lenient than that applicable to a public forum, bare viewpoint-based censorship will not survive even this more lenient standard. As one court has held:

Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum... or if he is not a member of the class of speakers for whose especial benefit the forum was created..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

\*33 *Burnham*, 119 F.3d at 676 quoting *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451.

There is ample record evidence, discussed above, that the University punished Brown because it disliked the viewpoint of his acknowledgment section. The document that best summarizes the University's feelings towards Brown's viewpoint is the letter sent on June 18, 1999, in which Professor Navorro states:

A Master's thesis is not the place to express your personal feelings about the University, its staff, departments, or any other entity that incurred your displeasure while you were a student at UCSB. The inappropriateness of the inclusion of these pages is compounded by your use of vulgar language. Not surprisingly, Dean Li is refusing to accept your thesis in its present form.

[ER 321]. At the very least, Brown should be allowed to prove at trial that he was punished for his speech. Should he prevail, as is likely, even if the acknowledgement section were a non-public forum, the University's actions would be patently unconstitutional.

**\*34 IV. CONCLUSION**

For the forgoing reasons, the trial court's judgment granting appellee summary judgment should be vacated and the case remanded to the District Court for further proceedings.

Footnotes

1 See also [ER 515-516].

(Q) Which part of those are the university standards as opposed to the personal ones?

(A) That's actually a difficult question. That may not be possible to answer because it is my responsibility - I am charged as a member of the faculty to use my academic and professional judgement and therefore all of them are, in fact, subsumed under that university requirement.

2 [ER 446]

3 [ER 455]

4 [ER 428]

5 [ER 452]

6 "To (1) the dips\*\*ts who decided to put the P-chemist on the forth floor, (2) the inept facilities management monkey who raised the cooling water pressure, and (3) the dumb ass who left his cooling water ON for a laster that was OFF for 2 years and subsequently flooded by lab, desk and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots. I will overcome this latest unholy intervention as with all the rest." [ER 190]

7 The motion in question was originally a Motion to Dismiss that was converted to a motion for Summary Judgement. [ER 610]. On a motion to dismiss, all allegations of the Plaintiff must be taken as true. See *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

8 See also *Hazelwood*, 484 U.S. at 266, 108 S.Ct. 567 (Students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.').

9 See also *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997) (holding that the First Amendment generally prevents the government from proscribing speech of any kind simply because of disapproval of the ideas expressed).

10 "A Master's thesis is not the place to express your personal feelings about the University, its staff, departments or any other entity that incurred your displeasure while you were a student at UCSB." [ER 321]

11 Deposition of Charles Ackemann:

Q. Do you recall what your reaction to it was.

A. Yes, My reaction was that it seemed inappropriate to have at that place, in a thesis or dissertation. Seemed much more appropriate to an op-ed column in a newspaper or some similar widely disseminated publication or a website for that manner.

12 "I would also like to thank all of the professors who have influenced me in one way or another- Jim Speck, Fred Lange, Youli, Dr. Watts, Dr. Kaska, Dr. Ford."

13 "My advisor, David, has always pushed me to finish, and has always believed that I could."

14 Acknowledgement section of Jessie A. DeAro.

15 "I am fortunate to have had David Awschalom for an advisor."

16 [ER 39]

17 [ER 190]

18 "Thesis and dissertations are scientific papers that become part of the archival literature when filed with the University library." [ER 45]

19 Q: In your experience has there ever been a case where someone has been given a master's degree by the University but their thesis has not been published in the library?

A: No.

[ER 152].

20 [ER 162]

21 This is consistent with the four freedoms of the university. The university has the freedom to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study." *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957)). Mr. Brown's claim that he has a right to free speech in the acknowledgements section conflict with none of the above listed freedoms.

22 [ER 150-151]

23 UCSB Graduate Student Bill of Rights: "(4) Graduate students have the right to clear and specific written requirements for achieving an advanced degree." [ER 98].

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- 24 FIRE admits that the Trial Court found in its Findings of Uncontroverted Fact and Conclusions of Law “that the student and committee are jointly responsible for ‘everything between the margins’ of the thesis. FIRE argues that only the academic work of the thesis is subject to committee approval, not the viewpoints express in the acknowledgement section.
- 25 [ER 39]
- 26 “However, it is appropriate for the committee to separate the academic content of the thesis from the acknowledgement section, and to approve the thesis on the basis of the academic content but explicitly not approve the “disacknowledgement” or acknowledgement. This could be done by adding a statement which would be placed immediately preceding the signature page which would say something like: ‘The faculty members signing below want to make it clear that in signing off of the academic work represented by this thesis, we are not approving in any way the personal disacknowlegment contained in the beginning of this dissertation.’” *E-mail from Dan Fredle to Galen Stucky*.
- 27 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986).
- 28 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).
- 29 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974)
- 30 430 U.S. 705, 97 S.Ct. 1428, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)

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