



October 23, 2019

Thomas C. Katsouleas
President
Office of the President
University of Connecticut
352 Mansfield Road, Unit 1048
Storrs, Connecticut 06269-1048

Hans D. Rhynhart
Associate Vice President and Chief of Police
University of Connecticut Police Department
126 North Eagleville Road
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URGENT

Sent via Express Mail and Electronic Mail (president@uconn.edu, hans.rhynhart@uconn.edu)

Dear President Katsouleas and Chief Rhynhart:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is deeply concerned by the investigation and arrest of two students by the University of Connecticut Police Department pursuant to a statute that any reasonable police officer would have known is unconstitutional. However offensive the use of a racial epithet, not directed at any person, the First Amendment protects offensive language, and neither the University of Connecticut nor its police officers may abridge students' First Amendment rights.

I. UConn Students Are Investigated and Arrested After Public Use of a Racial Slur.

The following is our understanding of the pertinent facts, which is based largely on statements by the University of Connecticut ("UConn") and the reports of its police officers. We appreciate that you may have additional information to offer and invite you to share it with us.

However, if the facts here are substantially accurate, UConn has exercised authority forbidden to it by the First Amendment.

On the evening of October 11, 2019, three UConn students left a pizza restaurant near UConn’s campus and returned to their apartments at UConn’s Charter Oak apartment building.

While walking outside, two of the students, Jarred Karal and Ryan Mucaj, began playing the “penis” game, wherein one or more people dare each other to say a transgressive word — usually “penis,” as the students here started with — more loudly than the other, increasing in volume.¹ An African-American student playing video games in his apartment overheard the students shouting “penis” and began recording them on his phone, “hoping to get the group of males saying or doing something funny.”² Karal and Mucaj then replaced the word “penis” with the racial slur “nigger,” beginning the dare anew “in a much softer tone and . . . not screaming nearly as loud as they had been previously.”³ The student recording the exchange couldn’t hear the use of the word as he recorded it and only heard it when he replayed the video and turned the volume up, at which point he contacted police.⁴

Using footage gathered from the pizza restaurant, on-campus surveillance footage, WiFi access data, and card-swipe data from the Charter Oak apartment building, UConn police officers identified the three students.⁵ On October 21, Karal and Mucaj were arrested and charged under Connecticut General Statute 53-37, which provides that it is a misdemeanor for any person who “by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons[.]”⁶ Conn. Gen. Stat. § 53-37.

UConn declined to comment on whether Karal, Mucaj, or the third student with them that night might be subject to discipline, citing the Family Educational Rights and Privacy Act.⁷

II. UConn’s Investigation and the Ridicule Statute Abridge the First Amendment

While the word used by Karal and Mucaj is deeply offensive to many, it does not fall into any recognized exception under the First Amendment. But investigating and arresting students who use offensive language, UConn has departed from its clear and non-negotiable constitutional obligations.

¹ Russell Blair, *UConn police used surveillance video, ID scanner footage from bar to track down students arrested for yelling racial slur*, HARTFORD COURANT, Oct. 22, 2019, <https://www.courant.com/news/connecticut/hc-news-uconn-racial-video-arrest-20191022-qiwm4ju5tzcrpgyv4ajb3z6yte-story.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Gabriella DeBenedictis, *Two students arrested in connection to racist comments*, DAILY CAMPUS, Oct. 22, 2019, <https://dailycampus.com/stories/2019/10/22/two-students-arrested-in-connection-to-racist-comments>.

⁷ Blair, *supra* note 1.

A. As a public university, UConn and its police officers are government actors bound by the First Amendment.

It has long been settled law that the First Amendment is binding on public colleges like UConn. *Healy v. James*, 408 U.S. 169, 180 (1972) (applying the First Amendment to Central Connecticut State College, and holding that the “precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

B. Offensive or hateful speech is protected by the First Amendment, which renders Connecticut’s “ridicule” statute clearly unconstitutional.

There is no question that the word used by Karal and Mucaj is offensive; indeed, the point of the ‘dare’ is to use offensive language. The word they chose has been recognized by as “perhaps the most offensive and inflammatory racial slur in English, a word expressive of racial hatred and bigotry.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001). However, the mere act of audibly reciting the word does not categorically place its speaker outside of the protection of the First Amendment. *See, e.g., Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674 (6th Cir. 2001) (denying qualified immunity to administrators who terminated a Caucasian adjunct instructor who led a “classroom discussion examining the impact of such oppressive and disparaging words as ‘nigger’ and ‘bitch’”).

i. The use of the word by Karal and Mucaj does not fall within the First Amendment exception for fighting words.

Certain uses of offensive language may be penalized without abridging the First Amendment, most notably where the use amounts to fighting words. “[T]here are no per se fighting words,” and whether particular speech falls into this narrow category turns on “the manner and circumstances in which the words were spoken” and whether they “were likely to arouse to immediate and violent anger the person to whom the words were addressed.” *State v. Baccala*, 326 Conn. 232, 238–39 (2017) (quoting, in part, *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976)). Here, the language used by Karal and Mucaj was not directed at any particular person not participating in the deliberately transgressive nature of the exchange. Even where words are “otherwise profane, obscene, or threatening,” they may “not be deemed fighting words if said with a ‘disarming smile.’” *Id.* at 240 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)). Accordingly, the remarks at issue here cannot be said to be likely to lead to an immediate, violent response from the person to whom the language was directed.

ii. **Deeply offensive speech remains protected by the First Amendment.**

The principle of freedom of speech does not exist to protect only non-controversial expression. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because many find it to be offensive or disrespectful. For example, in holding that burning the American flag was expression protected by the First Amendment, the Supreme Court urged that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Decades earlier, the Court observed that it was “a function of free speech under our system of government . . . to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

This is particularly so on the campus of a public university. For example, the Supreme Court unanimously upheld as protected speech a student newspaper’s front-page use of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.” *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973). The university’s response was a result of the “disapproved content of the newspaper rather than the time, place, or manner of its distribution.” *Id.* at 670 (emphasis in original.) The *Papish* Court unanimously rejected the view that a public university could regulate speech falling short of unlawful obscenity: “[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* Expressive rights, in short, may not be curtailed on the basis that others find them offensive or outrageous.

This is because the authorities, if granted the power to distinguish the civil from the offensive, would have unfettered discretion to penalize speech. As James Madison wrote about the First Amendment, “[s]ome degree of abuse is inseparable from the proper use of everything.”⁸ More recently, in *Cohen v. California*, the Court aptly observed that although many would see as “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971). “That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength,” because it demonstrates the recognition “governmental officials cannot make principled distinctions” between what speech is sufficiently inoffensive, and the “state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us.” *Id.* at 25.

⁸ James Madison, “Report on the Virginia Resolutions, Jan. 1800,” reprinted in 5 THE FOUNDERS’ CONSTITUTION 141, 43 (Philip Kurland & Ralph Lerner eds., 2000), available at http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

iii. Group libel statutes, including Connecticut's, are unconstitutional.

The statute utilized to effectuate the arrest of Karal and Mucaj is clearly unconstitutional, both because it is inapplicable on its face to the speech at issue and because it reaches clearly protected expression.

The statute under which Karal and Mucaj were arrested, Conn. Gen. Stat. § 53-37, provides, in full:

Sec. 53-37. Ridicule on account of creed, religion, color, denomination, nationality or race. Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons, shall be guilty of a class D misdemeanor.

First, the statute is limited on its face to a person whose “advertisement” contains ridicule or contempt for particular persons or groups. Its intent, as evidenced by the 1916 bill enacting it, was to impose a penalty “for making discrimination in advertisements of places of public accommodation.” S.B. 153, Jan. Sess. (Conn. 1917), *available at* <https://tiny.cc/53-37>. A reasonable officer, having read the statute, would have known it to be inapplicable to the speech at issue, and would have known that he or she lacked probable cause to use it to effectuate an arrest.

Second, if the statute were not limited to advertisements, it would amount to a prohibition on libel of particular groups. However, the near-unanimous conclusion of scholars and courts alike is that *Beauharnais v. Illinois*, 343 U.S. 250 (1952), in which the Supreme Court upheld a similar statute, is no longer lawful. *See, e.g., Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985); *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973).⁹

iv. UConn’s investigation into protected speech violates the First Amendment.

Even short of arrest, UConn’s maintenance of a lengthy investigation, coupled with its refusal to clarify to reporters whether it might pursue disciplinary action against the students involved, is itself a violation of the First Amendment.

The First Amendment is not *only* implicated when formal punishment is meted out, but may be violated by actions, including those short of formal discipline, which impermissibly chill

⁹ *See also* Eugene Volokh, *No, Gov. Dean, there is no ‘hate speech’ exception to the First Amendment*, WASH. POST, Apr. 21, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/21/no-gov-dean-there-is-no-hate-speech-exception-to-the-first-amendment> (noting that “*Beauharnais* is widely understood to no longer be good law” and collecting cases and scholarship).

speech. An investigation of constitutionally protected speech can itself violate the First Amendment. When “an official’s act would chill or silence a person of ordinary firmness from future First Amendment activities,” that act violates the First Amendment. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like UConn, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (“[A]n investigation conducted in retaliation for comments protected by the first amendment could be actionable . . .”).

In *Levin v. Harleston*, for example, The City College of The City University of New York launched an investigation into a tenured faculty member’s offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor’s expression—which the university president stated “ha[d] no place at [the college]”—constituted “conduct unbecoming of a member of the faculty.” 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court’s finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm.

Here, UConn has embarked on an investigation lasting longer than a week seeking to determine who used offensive words in a public space. To identify the speaker, law enforcement officers have gathered images from multiple surveillance cameras, both public and private, searched wireless internet data in students’ residential settings, and pulled data from the access cards students use to enter their residences. It defies belief that, in the course of such a lengthy investigation, neither the university nor its police ascertained whether the speech or statute met First Amendment scrutiny.

III. Charges Against Karal and Mucaj Must Be Dropped and UConn Must Disclaim the Possibility of Further Punishment

UConn’s stunning departure from its constitutional obligations is all the more alarming in light of the length of its investigation and the resulting arrests. In the course of a ten-day investigation over a high-profile controversy, the university and its law enforcement officers must have learned both that the students’ speech was protected and that the statute through which it justified their arrests was unconstitutional. If they did not, it is a remarkable failure for an institution ostensibly dedicated to furthering freedom of expression, and it is

disappointing that the leadership of such an institution would praise law enforcement for arresting its students.

More to the point, a public college administrator or police officer who violates clearly established law—as here—will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, October 25, 2019, confirming whether the University of Connecticut Police Department will drop the charges against Karal and Mucaj and that the university will not pursue further disciplinary action or criminal sanctions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'AS', is written over the printed name 'Adam Steinbaugh'.

Adam Steinbaugh
Director, Individual Rights Defense Program