



Foundation for Individual Rights in Education

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August 8, 2012

President Mark G. Yudof
University of California
Office of the President
1111 Franklin Street, 12th Floor
Oakland, California 94607

Sent via U.S. Mail and Facsimile (510-987-9086)

Dear President Yudof:

The Foundation for Individual Rights in Education (FIRE; thefire.org) writes today to express our shock and dismay at the recommendation of members of your Advisory Council on Campus Climate, Culture and Inclusion that the University of California System enact unconstitutional “hate speech” policies. As the leader of a public university system legally and morally bound by the First Amendment, you must reject this misguided and illiberal recommendation. FIRE urges you to do so promptly and unequivocally.

On July 9, the fact-finding team of the Advisory Council released its “University of California Jewish Student Campus Climate Fact-Finding Team Report & Recommendations” (“the Report”). Authored by Council members Richard Barton, National Education Chair of the Anti-Defamation League and partner at Procopio, Cory, Hargreaves and Savitch LLP, and Alice Huffman, President of the California State Conference of the NAACP, the Report aims to “identify steps needed to make campuses more inclusive and welcoming for Jewish students as well as all community members.” In pursuit of this laudable goal, the Report errs dramatically in recommending that the UC System deliberately violate the First Amendment.

Specifically, the Report advises:

2) UC should adopt a hate speech-free campus policy.

While many campuses have adopted hate-free campaigns or issued commitments affirming the free and open exchange of ideas while maintaining a civil and supportive community, UC does not have a hate-free policy that allows the campus to prevent well-known bigoted and hate organizations from speaking on campus (aside for [sic] time, place, and manner provisions), such as the KKK. UC should push its current

harassment and nondiscrimination provisions further, clearly define hate speech in its guidelines, and seek opportunities to prohibit hate speech on campus. The President should request that General Counsel examine opportunities to develop policies that give campus administrators authority to prohibit such activities on campus. **The Team recognizes that changes to UC hate speech policies may result in legal challenge, but offer that UC accept the challenge.** [Emphasis added].

This recommendation demonstrates an inexcusable contempt for the First Amendment and the essentiality of freedom of expression at our nation's public colleges and universities.

As an initial matter, FIRE reminds you that First Amendment rights are fully protected on public college campuses. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he 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.’”) (citation omitted). As a scholar of the First Amendment, you no doubt know this to be long-settled and clearly established law.

You are also no doubt aware that there is no “hate speech” exception to the First Amendment. Indeed, the Supreme Court of the United States has struck down anti-“hate speech” regulation on First Amendment grounds. *See R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (invalidating bias crime statute and observing that “[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”). As the Court explained in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), “[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.”

This principled national commitment can have difficult consequences, and in the rough and tumble of life in our diverse democracy, all of us have been exposed to ideas that we find noxious and repellent. But the Court has recognized that “in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’” *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). Further, “a function of free speech under our system of government is 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). As Chief Justice John Roberts wrote last year in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011):

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Given the exceptional clarity and consistency of the Court’s jurisprudence regarding the impermissibility of content-based prohibitions on expression, the Report’s call for UC to impose precisely these types of restrictions on its students and faculty by “clearly defin[ing] hate speech in its guidelines, and seek[ing] opportunities to prohibit hate speech on campus” is untenable. It is especially disappointing to hear calls for content-based censorship on an American public campus, a traditional space for debate aptly and memorably identified by Justice William Brennan as “peculiarly the ‘marketplace of ideas.’” *Healy*, 408 U.S. at 180 (internal citation omitted).

The Report’s recommendation that UC “push its current harassment and nondiscrimination provisions further” in an attempt to promulgate and enforce content-based bans on “hate speech” is an equally stunning affront to the First Amendment. Indeed, the Report’s recommendation ignores over two decades of court decisions striking down exactly these types of efforts by universities to use harassment and nondiscrimination policies to censor unwanted or unpopular speech. As you must know, federal and state courts across the country have consistently invalidated overbroad and/or vague harassment or civility policies at colleges and universities over the past twenty years. *See McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy, on First Amendment grounds); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (striking down unconstitutional sexual harassment policy); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring “harassment by personal vilification” policy unconstitutional). The weight of this precedent makes clear that the Report’s misguided request for “General Counsel [to] examine opportunities to develop policies that give campus administrators authority to prohibit such activities on campus” would, if implemented, pit the University of California System squarely against the First Amendment.

To be clear: In a fight against the Bill of Rights, UC will not win—nor should it.

Shockingly, the Report anticipates the obvious legal problems with its call for content-based censorship—but nevertheless advises that UC “accept the challenge.” I trust that your Office of the General Counsel will recognize that implementing and enforcing a policy that deliberately deprives UC students and faculty of First Amendment rights would expose UC officials to personal liability under 42 U.S.C. § 1983. Under Section 1983 of the Civil Rights Act of 1871, individuals who have been deprived of a federal statutory or constitutional right may pursue monetary damages against the responsible official acting under color of state law. Public

officials—in this case, UC administrators—are entitled to the defense of qualified immunity only if their actions do not violate “clearly established” law of which a reasonable person in the official’s position would be aware. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because it has long been settled by our nation’s courts that the protections of the First Amendment apply in full for students on public university campuses, the Report’s recommendation that UC “accept the challenge” and knowingly violate the First Amendment leaves university officials in a precarious situation. Further, because 42 U.S.C. § 1988 provides for the award of attorney’s fees for successful Section 1983 suits, California taxpayers might well be left covering the bill for the Report’s foolish bravado and stunning contempt for the First Amendment. In this time of difficult budget decisions and unpopular tuition hikes, I trust you agree that the vast sums of public money that would be wasted defending UC’s doomed decision to censor its students could be put to far more advantageous use elsewhere.

As you know, this is not the first time FIRE has communicated with you regarding our concerns about UC’s policies regulating speech. My colleague Azhar Majeed wrote you on May 15, 2012, to express FIRE’s serious concern about the threat to freedom of expression posed by the University of California System’s “Campus Climate” policy, as well as the “Principles of Community” policies maintained by individual UC institutions. Given the significant threat to First Amendment rights presented by the continued maintenance of the systemwide Campus Climate policy, which allows for the investigation of students for constitutionally protected expression, we were disappointed not to have received a response. After reading the Advisory Council’s recommendation, our disappointment has become alarm.

FIRE is aware of the often contentious debate on UC’s campuses regarding international politics. We recognize the tensions that the Israeli-Palestinian conflict has engendered amongst students on all sides of the question. But official censorship of speech would not quell these tensions; rather, it would inflame them. As Alan Dershowitz—Harvard Law professor, member of FIRE’s Board of Editors, and an outspoken defender of Israel—commented to *The Forward*, the Report’s recommendation is “a very serious mistake . . . The first victims of the policy would be pro-Israel advocates. It will backfire.” As the Court observed in *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978):

But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

Indeed, it is precisely the depth of the feeling this debate stirs in students that requires UC *not* to censor speech that some students may sincerely find deeply offensive, hateful, outrageous, bigoted, or otherwise unacceptable, but to instead encourage students to answer these views with their own. We ask that UC remember and embrace the wisdom of Supreme Court Justice Louis D. Brandeis, who, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375–77 (1927), described the only acceptable response to “hate speech” in our free society:

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth;

that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine ...

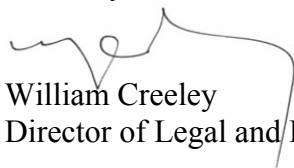
They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that *the fitting remedy for evil counsels is good ones*.

Fear of serious injury cannot alone justify suppression of free speech and assembly ... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced ... [N]o danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, *the remedy to be applied is more speech, not enforced silence*. [Emphases added.]

The University of California System is the birthplace of the campus Free Speech Movement; it would be a bitter irony if it were now to become the proud opponent of student expressive rights. As you observed in an open letter to the UC community earlier this year, “University campuses are proper venues for collisions of ideas and viewpoints. Conflicting viewpoints not only are inevitable but also healthy in this context.” FIRE fully agrees, and we trust you will maintain this admirable and necessary commitment to freedom of expression as you weigh the Report’s recommendations.

Thank you for your attention to our concerns. We request a response by August 29, 2012.

Sincerely,



William Creeley
Director of Legal and Public Advocacy

cc:

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