



March 11, 2005

To Whom It May Concern:

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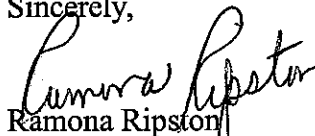
Legal Director
Mark D. Rosenbaum

I am the Executive Director of the ACLU of Southern California. Peter Eliasberg has been the Managing Attorney at the ACLU of Southern California since 2003 and is also the Manheim Family Attorney for First Amendment Rights. I spoke with Mr. Eliasberg about Mr. Antebi at the time Mr. Eliasberg was drafting a letter to the general counsel of Occidental College in May 2004.

I agreed with what Mr. Eliasberg wrote at the time, and continue to agree, that the various on air comments that Mr. Antebi allegedly made would not constitute speech that could be punished consistent with the First Amendment. I have no doubt that many people would find those comments sophomoric, insulting or even highly offensive. Nevertheless, it is my belief, and ACLU of Southern California policy, that the First Amendment does not permit public colleges and universities to restrict speech, on the basis that many people find that speech highly offensive. I am also aware that California law provides the same speech protections to students at private colleges, such as Occidental, as would be available to students at public colleges and universities under the First Amendment.

I also concurred with Mr. Eliasberg's conclusion that any attempt to punish Mr. Antebi for his comments would be inconsistent with the ACLU of Southern California's policy on "Racist and Other Group-Based Harassment on College Campuses." Any punishment would also be inconsistent with a sample harassment policy that the three affiliates California affiliates of the ACLU jointly agreed upon in August 2000 and provided to the University of California in an effort to resolve litigation concerning the University's former policy, which was at the time far more speech restrictive. Both the ACLU of Southern California's Policy on "Racist and Other Group-Based Harassment on College Campuses" as well as the August 2000 sample harassment are enclosed.

Sincerely,


Ramona Ripston
Executive Director

ACLU/SC POLICY CONCERNING RACIST AND OTHER
GROUP-BASED HARASSMENT ON COLLEGE CAMPUSES

Policy #191

The ACLU has always been committed to protecting freedom of speech to guarantee the free exchange of ideas. This commitment includes the protection of speech which expresses unpopular or abhorrent ideas, or uses language or modes of communication which are offensive. Nowhere is this protection of greater importance than on our college campuses, where the free exchange of ideas foster knowledge, individual growth, and tolerance for new and different ideas. As the Supreme Court has observed: "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'"

At the same time, the ACLU is also committed to the proposition that on college campuses, full participation in the educational process must be available on a nondiscriminatory basis to all, regardless of race, national or ethnic origin, alienage, sex, religion, sexual orientation, or disability. If, for example, minority students are forced to endure harassment directed at them as minority group members by other students or by college staff or teachers, they may be functionally excluded from such full participation. If sufficiently severe or pervasive, exposure to hostile expression based on group membership can deny students their right to full participation in the educational process with the result that historic patterns of discrimination are perpetuated, contrary to the constitutional objective of equal protection.

In light of the First Amendment considerations outlined above, however, any attempt to punish such harassment must be carefully drawn so as to address the severe and pervasive nature of the conduct as directly as possible, and to avoid infringement on the First Amendment protected expression of even repugnant ideas. In particular, campus policy should not bar the ability of professors to teach their philosophies or students to express their views no matter how offensive, but must instead focus on speech or expression used as a weapon to harass specific victims.

Accordingly, the ACLU enacts the following policy:

Campus administrators are obligated to take all steps necessary within constitutional bounds to minimize and eliminate a hostile educational environment which impairs access of students to equal educational opportunities. Campus administrators must: speak out vigorously against expressions of hatred or contempt based on race, national or ethnic origin, alienage, sex, religion, sexual orientation, or disability; promote equality and mutual accommodation and understanding among these groups and the balance of the community (including steps to assure diversity within the faculty, administration, staff, and student body and to incorporate into the curriculum and extra-curricular activities educational efforts to reduce racism and other forms of discrimination); and

eliminate discriminatory educational policies, practices, and procedures that exist on campuses.

The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus. Campus administrators may not enact campus codes of conduct prohibiting discriminatory harassment of students, faculty, administrators and staff on the basis of speech or expression unless at a minimum all of the following principles are reflected and included:

1. The expression of ideas, including but not limited to racist, sexist, homophobic or other offensive ideas is protected by the First Amendment.
2. The intentional destruction or defacement of private or public property without the consent of its owner is not protected by the First Amendment.
3. Expression that makes a person reasonably fear physical injury to his or her person is not protected by the First Amendment.
4. The intentional harassment of a person by another person or persons is not constitutionally protected.* Actionable harassment can include, but is not limited to words, gestures, or conduct that harasses a specific person or persons on the basis of race, national or ethnic origin, alienage, sex, religion, sexual orientation, or disability. Actionable harassment must be addressed specifically to the individual or individuals whom it harasses.
5. The code of conduct is enforced in a manner that is consistent with due process protections (including the right of any individual charged with violation to notice and a hearing), contains specific illustrations of expected occurrences which demonstrate when the policy does or does not apply, is proportionate to the gravity of the violation, and does not impose prior restraint upon expression.

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Although "harassment" is an imprecise term, it defines a type of conduct which is legally proscribed in many jurisdictions when it is directed at a specific individual or individuals and when it is intended in some measure to frighten, coerce, or unreasonably harruy or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation. See ACLU Policies 72 on sexual and other forms of discriminatory harassment on campus. See, also Policy 316.

(Adopted by the ACLU/SC Board of Directors May 15, 1991)

Draft Campus Harassment Standard

The intentional harassment of a person by another person or persons is not constitutionally protected. Actionable harassment must (1) target a specific person or persons; (2) be addressed directly to the person or persons whom it harasses; (3) be intended in some measure to frighten, coerce, or intimidate its target; and (4) be sufficiently severe or pervasive to substantially impair a reasonable person's participation in University activities or use of University facilities. "University activities" include activities on University property as well as off-campus activities sponsored directly by the University.

Actionable harassment can include, but is not limited to, words, gestures, or conduct that harasses a specific person or persons on the basis of race, national or ethnic origin, alienage, sex, religion, sexual orientation, or disability.

The following are some examples of how this harassment standard would apply:

- (1) A student hangs a sign outside his dormitory window reading "Fuck Netanyahu and Pinochet."

This sign is protected political speech that is not punishable under the harassment standard because, among other things, it does not target a specific person who participates in University activities or uses University facilities; it is not addressed directly to any person; and it is not intended to frighten, coerce, or intimidate its target.

- (2) A student carves a swastika with a penknife into the door of another student in his or her dormitory.

The intentional defacement of property is not protected activity and may therefore be punished.

- (3) A student tapes a drawing of a swastika onto the door of a Jewish student in his or her dormitory.

This action directly targets a person within the University community and is directly addressed to that person. Whether the action was intended to frighten, coerce, or intimidate its target, and whether this single incident of harassment is sufficiently severe to substantially impair a reasonable person's participation in University activities, cannot be answered without careful additional inquiry into the facts surrounding the incident, including, e.g., the motives of the alleged harasser, the nature and frequency of anti-Semitic speech or conduct within the

University community, and the victim's prior experience, if any, as a target of anti-Semitic speech or conduct within the University community.

- (4) A flyer containing a racist cartoon is posted on the law school bulletin board.

This action alone does not appear to target any specific person or persons and is not directly addressed to that person or persons. Thus, it is not a punishable act of harassment.

- (5) A group of white males follow two black women as they walk across campus, taunting them with racist and sexist epithets such as "I've never had a nigger before."

The speakers are not engaging in protected speech because their speech targets specific persons, is addressed directly to the people it harasses, and is intended in some measure to frighten or coerce or intimidate. The episode is sufficiently severe to "substantially impair a reasonable person's participation in University activities and use of University facilities," because the speakers are using hostile epithets and language that contain an implicit threat of sexual assault. The repeated use of hostile and threatening language in this context would likely create the type of fear in a reasonable person that would impair her use of and travel around the University campus.