



June 12, 2020

Dr. Jay Clune
Office of the President
Nicholls State University
P.O. Box 2001
Thibodaux, Louisiana 70310

Sent via Electronic Mail (jay.clune@nicholls.edu)

Dear President Clune:

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.

We are concerned by an email you sent to the students and faculty of Nicholls State University on June 8, 2020, reading, in pertinent part:

We will respond with the swiftest, harshest action allowed by law if any member of our campus community is found acting or communicating in a manner that does not support our values.

While we, as a university, encourage the expression of free thoughts and ideas, Nicholls will not tolerate any form of hate speech. Free speech does not protect hate speech. We ask that all of our community *be mindful of the things they post and how they interact with people on social media*. We hold our students, faculty and staff to a high standard, and we encourage those groups to refer to the Student Code of Conduct and the Employee Handbook as a reminder.¹

This is not an accurate statement of the law, but instead a roadmap to violating the well-established First Amendment rights of Nicholls State students and faculty. If followed, it will do nothing to meaningfully address racial harassment and misconduct. Instead, it will expose the university to needless civil liability.

¹ E-mail from Jay Clune, President, Nicholls State Univ. (June 8, 2020, 6:13 PM CDT) (on file with author).

I. The First Amendment, Binding on Public Universities, Protects Offensive Expression

It has long been settled law that the First Amendment is binding on public colleges like Nicholls State.² Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,³ recognition and funding of student organizations,⁴ interactions with student journalists,⁵ conduct of its police officers,⁶ and maintenance of policies implicating student and faculty expression⁷—must be consistent with the First Amendment.

The principles enshrined in that amendment are not for the purpose of protecting only speech that is uncontroversial or inoffensive. To the contrary, the First Amendment exists precisely to protect speech that some or even most members of a community may find controversial or deeply offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on- or off-campus. This core First Amendment principle is why the authorities cannot prohibit the burning of the American flag—or, for that matter, the Confederate flag.⁸ In ruling that the First Amendment did not allow the government to punish signs outside of fallen soldiers’ funerals (including signs that read “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations”), the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”⁹

This principle applies with particular strength to public universities. 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.”¹⁰ These images were no doubt deeply offensive at a time of profound political polarization and civil unrest, yet “the mere dissemination of ideas—no matter how offensive to good taste—on a state university

² *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.’”) (internal citation omitted).

³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁴ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

⁵ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

⁶ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

⁷ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” it being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); see also *Peterson v. Moore*, No. 15-14190, 2017 U.S. Dist. LEXIS 130638, at *15 (E.D. Mich. June 27, 2017) (addressing burning of the confederate flag).

⁹ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

¹⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

campus may not be shut off in the name alone of ‘conventions of decency.’”¹¹ Expressive rights, in short, may not be curtailed on the basis that others find the expression offensive or outrageous.

This is because “governmental officials cannot make principled distinctions” between what speech is sufficiently inoffensive.¹² As the Supreme Court aptly observed in *Cohen v. California*, although “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.”¹³

Accordingly, while Nicholls State is free to “encourage the expression of free thoughts and ideas,” the First Amendment forbids it from drawing a line between speech it views as acceptable (“thoughts and ideas”) and expression “contrary to the values” of university administrators. The line separating the speech that may be lawfully punished is already drawn by the First Amendment, which binds Nicholls State.

II. The First Amendment Makes No Categorical Exception for “Hate Speech”

While some examples of hateful expression may not be protected speech because they fall into other exceptions to the First Amendment—such as “true threats” or “fighting words”¹⁴—the Supreme Court has repeatedly held that expression does not lose First Amendment protection solely because some, or even many, deem it to be hateful.¹⁵ The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground.”¹⁶

This principle does not apply with any less force on the campuses or in the classrooms of public universities.¹⁷ If words, images, or other expression viewed as “hateful” were

¹¹ *Id.*

¹² *Cohen v. California*, 403 U.S. 15, 25 (1971)

¹³ *Id.* at 24–25.

¹⁴ So-called “fighting words” are those “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). The “small class” of words within this narrow exception is now limited to speech amounting to a “direct personal insult or an invitation to exchange fisticuffs.” *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (quoting, in part, *Texas v. Johnson*, 491 U.S. 397, 409 (1989)). A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹⁵ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

¹⁶ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

¹⁷ See, e.g., *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member’s use of system-wide listserv to send “racially-charged emails” was not unlawful, as the First

unprotected, it would have an impermissible chilling effect on faculty members' rights of academic freedom to choose how to present and discuss America's history of—and ongoing struggle with—racism and discrimination. Indeed, we regularly defend faculty members whose repetition of racial epithets in a pedagogically-relevant context is called into question by university administrators or criticized by students.¹⁸ While some exercise their own free speech rights by questioning the wisdom of exercising that right, academic freedom provides faculty the right to determine how best to confront America's painful legacy. This right is shielded by the First Amendment,¹⁹ which—as the Supreme Court explained in overturning legal barriers to faculty members with “seditious” views—is of “special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”²⁰

If the state could punish expression it deems to be hateful, it would imperil a broad range of political speech, and would unquestionably be used against those a “hate speech” exception would be intended to protect. For example, when the University of Michigan briefly enacted a prohibition against hate speech—a measure struck down by a federal court²¹—it was almost universally used to punish students of color who offended white students.²² Indeed, a century-old Connecticut law banning *commercial advertisements* with hateful language is now used by police officers to criminally charge people who verbally insult police, including white officers.²³

In our own work defending faculty and students' expressive rights, we have seen an alarming increase in efforts to punish the speech of students and faculty of color, as well as their allies, when it is critical of systemic racism. For example, we've witnessed a student successfully raise community pressure to investigate an adjunct lecturer who criticized racism and warned that some white people “may have to die for Black communities to be made whole in this

Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”)

¹⁸ See, e.g., Press Release, Found. for Individual Rights in Educ., VICTORY: Professor exonerated for quoting iconic black writer at The New School (Aug. 16, 2019), <https://www.thefire.org/victory-professor-exonerated-for-quoting-iconic-black-writer-at-the-new-school> (professor cleared of harassment charges for quoting James Baldwin during a classroom discussion).

¹⁹ See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674 (6th Cir. 2001) (denying qualified immunity to administrators who fired a Caucasian adjunct instructor for leading a “classroom discussion examining the impact of such oppressive and disparaging words as ‘nigger’ and ‘bitch.’” (cleaned up)).

²⁰ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

²¹ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989).

²² “[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression.” Thomas A. Schweitzer, *Hate Speech On Campus And The First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)).

²³ Adam Steinbaugh, *UConn: We can't stop the unconstitutional process our police started*, FOUND FOR INDIV. RIGHTS IN EDUC., Nov. 1, 2019, <https://www.thefire.org/uconn-we-cant-stop-the-unconstitutional-process-our-police-started>.

struggle to advance to freedom,” such as Heather Heyer, murdered at Charlottesville by a white supremacist.²⁴ We have also seen similar pressure on universities to investigate or punish faculty who criticized gentrification,²⁵ called on others not to help those in power “who practice bigotry,”²⁶ or lampooned the white nationalist theory that miscegenation amounts to “white genocide.”²⁷

This pressure on critics of racist ideology and expression is not limited to faculty members. We have also seen a student newspaper at a public university lose its student funding after a student group, complaining of “fake news,” mounted a campaign to encourage students to vote against renewing the newspaper’s funding.²⁸ Not coincidentally, the campaign began after the newspaper published an article revealing that a member of the student group had crafted flyers nearly identical to those of American Vanguard, a white supremacist group.²⁹

While you might object that you would not act in the same manner as some of these examples, the First Amendment “does not leave us at the mercy of the *noblesse oblige*,” and an unconstitutional grant of authority cannot be left in place merely because its holders “promised to use it responsibly.”³⁰ You cannot anticipate now the pressure that other ideological groups, donors, or legislators will bring to bear against speech they view as hateful or contrary to the university’s values, nor can you be sure that your successor would use such an authority as wisely as you might.

III. Conclusion

The First Amendment does not shield a speaker from every consequence of their expression, but it does limit the *types* of consequences that may be imposed and who may impose them. It

²⁴ Adam Steinbaugh, *FIRE warns University of Georgia and state attorney general to end speech-chilling investigation into TA’s protected expression*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Jan. 25, 2019, <https://www.thefire.org/fire-warns-university-of-georgia-and-state-attorney-general-to-end-speech-chilling-investigation-into-tas-protected-expression>.

²⁵ Press Release, Found. for Individual Rights in Educ., VICTORY: Rutgers reverses finding against professor who posted about resigning from the white race on Facebook (Nov. 15, 2018), <https://www.thefire.org/victory-rutgers-reverses-punishment-of-professor-who-posted-about-resigning-from-the-white-race-on-facebook>.

²⁶ Adam Steinbaugh, *Trinity College professor’s ‘let them fucking die’ posts are protected speech; continued investigation unwarranted*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., July 7, 2017, <https://www.thefire.org/trinity-college-professors-let-them-fucking-die-posts-are-protected-speech-continued-investigation-unwarranted>.

²⁷ Adam Steinbaugh, *Russia-linked Twitter account helped Drexel professor’s ‘White Genocide’ tweet go viral, prompting university investigation*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Oct. 20, 2017, <https://www.thefire.org/russia-linked-twitter-account-helped-drexel-professors-white-genocide-tweet-go-viral-prompting-university-investigation>.

²⁸ Press Release, Found. for Individual Rights in Educ., FIRE analysis: Rutgers violated the Constitution by defunding student newspaper (June 3, 2019), <https://www.thefire.org/fire-analysis-rutgers-violated-the-constitution-by-defunding-student-newspaper>.

²⁹ Kira Herzog & Chloe Dopico, *Rutgers Conservative Union flyer mimics one created by white supremacy group*, DAILY TARGUM, Mar. 1, 2017, <https://www.dailytargum.com/article/2017/03/rutgers-conservative-union-flyer-mimics-one-created-by-national-white-supremacy-group>.

³⁰ *U.S. v. Stevens*, 559 U.S. 460, 480 (2010).

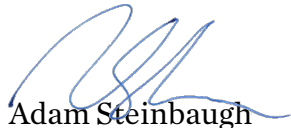
does not inhibit a speaker from public criticism responding to their expression—including criticism by you, faculty members, students, or the broader community. That is a form of “more speech,” the remedy the First Amendment prefers to censorship. *Whitney v. California*, 274 U.S. 357, 377 (1927).

Your assertion that the First Amendment does not protect “hate speech” is wrong, and it will have an unconstitutional chilling effect on protected expression, particularly given that you coupled that erroneous assertion with a promise to enforce it to the “harshest” extent. In making a commitment that you cannot lawfully carry out, you set false expectations for your students, promising them an illusory remedy for broader social ills.

In times of great social and political upheaval, our governmental and educational institutions face substantial pressure to foreclose on expression protected by the First Amendment. This, however, is when institutions must be most vigilant in refusing to do so. Penalizing protected expression is not a cure for the underlying challenges faced by society, and abandoning a robust defense of freedom of expression will inure to the detriment of rights across political, social, and ideological spectrums.

We respectfully request receipt of a response to this letter no later than the close of business on Friday, June 26, 2020.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

From: President's Office <presidents.office@nicholls.edu>
Date: June 8, 2020 at 6:13:16 PM CDT
To: Faculty <faculty@nicholls.edu>, Staff <staff@nicholls.edu>, All Students <all.students@nicholls.edu>
Subject: A Message from the President

Dear Colonels,

We reaffirm our solidarity with our Black community. Racist, hateful, and hurtful language is contrary to the values of Nicholls State University. We entrust our students, faculty, and staff with the responsibility of creating a welcoming and safe environment for all, free from racism and hatred. We will respond with the swiftest, harshest action allowed by law if any member of our campus community is found acting or communicating in a manner that does not support our values.

While we, as a university, encourage the expression of free thoughts and ideas, Nicholls will not tolerate any form of hate speech. Free speech does not protect hate speech. We ask that all of our community *be mindful of the things they post and how they interact with people on social media*. We hold our students, faculty and staff to a high standard, and we encourage those groups to refer to the [Student Code of Conduct](#) and the [Employee Handbook](#) as a reminder.

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Jay Clune, President
Nicholls State University