FIRE
Foundation for Individual Rights in Education

January 19, 2021

Chancellor Michael D. Amiridis
University of Illinois at Chicago
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Chicago, Illinois 60607-7128

Sent via Electronic Mail (chancellor@uic.edu)

Dear Chancellor Amiridis:

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 concerned by a public statement attributed to the University of Illinois at Chicago (UIC) John Marshall Law School indicating that it has initiated an investigation into a faculty member's examination question because its fact pattern referenced—without using—a racial slur and a "profane expression[for] women." As a public institution bound by the First Amendment and to fundamental principles of academic freedom, UIC is obligated to refrain from initiating investigations or disciplinary action over faculty members' protected expression. We call on UIC to immediately end any such investigation.

I. UIC's Response to Prof. Kilborn's Civil Procedure II Exam Question

Our understanding of the facts is, except where otherwise noted, derived from public reporting by *Above the Law* recounting controversy over an exam question[1] and a student petition criticizing that question.[2]

[1] Kathryn Rubino, *Law School N-Word Controversy Is More Complicated Than It Appears At First Glance*, ABOVE THE LAW, Jan. 13, 2021, https://abovethelaw.com/2021/01/law-school-n-word-controversy-is-more-complicated-than-it-appears-at-first-glance.
[2] *Call to Action: Insensitive and Racist Content on UIC John Marshall Law School Exam*, CHANGE.ORG, *archived at* https://archive.is/evpGP.

Jason J. Kilborn has been a Professor of Law at John Marshall since 2007. He teaches, among other things, Civil Procedure II, which "explore[s] real and hypothetical situations implicating these rules [of civil procedure] together, to prepare you to do the same on your own after you leave law school."[3]

On December 30, 2020, the Black Law Students Association published a letter, apparently sent to you and to Dean Darby Dickerson the previous week, alleging:

> On December 2, 2020, UIC John Marshall Law students sat for a Civil Procedure II (JD-421-0) final examination instructed and administered by Professor Jason Kilborn, a white male. The question at-issue contained a racial pejorative summarized as follows: "'n____' and 'b____' (profane expressions for African Americans and women)." The fact pattern involved an employment discrimination case where the call of the question was whether or not the information found was work product.[4]

The letter condemned "[t]he unnecessary use of the N-word in an academic setting," describing the object of their condemnation alternatively as the "use [of] such language on the final exam" and as the "visual of the N-word" and "use . . . in an implied state. . . ."[5]

On January 2, a student responded to a BLSA Instagram post about the controversy, explaining that she was a member of the both the BLSA and Kilborn's class and warning that the BLSA's letter was erroneous because the exam did not contain the words at issue:

> I took this class and this exam. I am [a part] of BLSA and there was no discussion of the issue to members. This is being taken out of context and is very wrong. This statement is leaving the impression that the Professor used the n-word. The word was blanked out it was a work product question, but the fact pattern detailed that it was a discrimination case. "Employer's lawyer traveled to meet the manager, who stated that she quit her job at Employer after she attended a meeting in which other managers expressed their anger at Plaintiff, calling her a "n____" and "b____" (profane expressions for African Americans and women) and vowed to get rid of her."[6]

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[3] Jason J. Kilborn, *Civil Procedure II Syllabus*, https://jkilborn.weebly.com/civil-procedure-ii.html (last visited Jan. 14, 2021).
[4] Letter from the Black Law Students Association, UIC John Marshall Law School, *et al.* (Dec. 30, 2020), *available at* https://twitter.com/uic_jmls_blsa/status/1344290657825935360.
[5] *Id.*
[6] INSTAGRAM, comment by @celestesworld (Jan. 2, 2021), https://www.instagram.com/p/CJjcfTopFTT/c/17892069844796462.

On or about January 7, 2021, a petition was created on Change.org, repeating the complaints of the coalition letter and arguing that the "integration of this dark and vile verbiage on a Civil Procedure II exam was inexcusable and appropriate measures of accountability must be executed by the UIC administration."

A journalist writing for *Above the Law* raised similar questions, noting that the "n____" and "b____" text was a faithful reproduction of the exam question, reflecting the *professor*'s substitution of expurgated text for the pejorative words. *Above the Law* also published a statement provided to it by John Marshall urging that faculty "should avoid language that could cause hurt and distress to students" and said administrators were "working with UIC's Office for Access and Equity to conduct a thorough review of this matter. . . ."

II. Kilborn's Civil Procedure II Exam Question Is Protected by Academic Freedom

An investigation into Kilborn's exam question violates his pedagogical autonomy—protected by the basic tenets of academic freedom—to determine what material to test and how it should be tested. These rights are protected by the First Amendment, the law school's published commitments to academic freedom, and the conditions of the University of Illinois at Chicago's accreditation.

A. The First Amendment, University of Illinois at Chicago Policy, and the University's Accreditation Protect Faculty Members' Academic Freedom.

It has long been settled law that the First Amendment is binding on public colleges like UIC.[7] Accordingly, faculty members retain a First Amendment right—and, at UIC, rights under contract and university policy—to freedom of expression and academic freedom.[8] As the United States Supreme Court explained in overturning legal barriers to faculty with "seditious" views:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[9]

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[7] *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).
[8] *See, e.g.*, *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 680 (6th Cir. 2001) (The "argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction" is "totally unpersuasive."); *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the AAUP's standards on academic freedom, the post was "a contractually-disqualified basis for discipline").
[9] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

The protection of freedom of expression and academic freedom is also important to John Marshall's accreditation by the Higher Learning Commission, which requires that institutions be "committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning."[10] Likewise, the University of Illinois at Chicago recognizes that faculty members "are entitled to freedom in the classroom in developing and discussing—according to their areas of competence—the subjects that they are assigned."[11] These commitments create moral and legal obligations on the part of the university.[12]

B. Academic Freedom Protects the Right to Discuss, Present, and Test Pedagogically-Relevant Material.

Academic freedom grants faculty members substantial breathing room to determine how to approach subjects and materials relevant to their courses. How to approach these materials is a question left for the faculty member in the classroom—not the administrator, donor, legislator, or authorities outside of it.

That may include subjects that some, many, or most students may find upsetting or uncomfortable, including discussion of America's fraught and unresolved history of racism and discrimination. Faculty members confronting and examining that history must be free of institutional restraints in navigating these issues. Even express use of racial slurs in a pedagogically-relevant context is not uncommon. Princeton University, for example, defended a professor who used the word in an anthropology course to discuss cultural and linguistic taboos.[13] Law professors use it to teach the "fighting words" doctrine;[14] journalism professors discuss how to tell stories that involve it;[15] and sociology professors study the impact of the term in defining who is welcomed in various spaces.[16]

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[10] HIGHER LEARNING COMM'N, CRITERIA FOR ACCREDITATION 3 (effective Sept. 2020), http://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision_2019_INF.pdf.
[11] UNIV. OF ILL. AT CHICAGO, FACULTY HANDBOOK § VI. POLICIES GOVERNING FACULTY APPOINTMENTS: ACADEMIC FREEDOM AND FACULTY RESPONSIBILITY, *available at* https://facultyhandbook.uic.edu/sections/section-vi-policies-governing-faculty-appointments/academic-freedom-and-faculty-responsibility.
[12] *See, e.g.*, *McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (private Catholic university breached its contract with a professor over a personal blog post because, by virtue of its adoption of a statement on academic freedom, the blog post was "a contractually disqualified basis for discipline").
[13] Colleen Flaherty, *The N-Word in the Classroom,* INSIDE HIGHER ED, Feb. 12, 2018, https://www.insidehighered.com/news/2018/02/12/two-professors-different-campuses-used-n-word-last-week-one-was-suspended-and-one.
[14] Frank Yan, *Free Speech Professor Takes Heat for Using Racial Epithets in Lecture at Brown*, CHICAGO MAROON, Feb. 9, 2017, https://www.chicagomaroon.com/article/2017/2/10/free-speech-professor-takes-heat-using-racial-epit.
[15] Frank Harris III, *Without Context, N-Word Goes Best Unsaid*, HARTFORD COURANT, Feb. 13, 2018, https://www.courant.com/opinion/hc-op-harris-ct-teacher-uses-n-word-20180209-story.html.
[16] *See, e.g.*, Elijah Anderson, *The White Space*, SOCIOLOGY OF RACE & ETHNICITY, 2015 Vol. I pp. 10–21, *available at* https://sociology.yale.edu/sites/default/files/pages_from_sre-11_rev5_printer_files.pdf.

These rights are protected not only by institutional commitments to academic freedom, but also by the First Amendment. In *Hardy v. Jefferson Community College*, the United States Court of Appeals for the Sixth Circuit unequivocally rejected "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction" as "totally unpersuasive."[17] There, a white adjunct instructor teaching "Introduction to Interpersonal Communication" lectured community college students about "language and social constructivism," discussing how "language is used to marginalize minorities and other oppressed groups in society."[18] Students, solicited by the instructor for examples, suggested the words "lady," "girl," "faggot," "nigger," and "bitch."[19] The instructor's use of those words as "illustrations of highly offensive, powerful language" was "clearly" relevant to his lecture exploring the "social and political impact of certain words," and was not "gratuitously used . . . in an abusive manner."[20]

Finding that the instructor's speech was protected by the First Amendment, the Sixth Circuit held that expression, "however repugnant," that is "germane to the classroom subject matter"—including the very words implied, but not used, on the Civil Procedure II exam here—is speech on "matters of overwhelming public concern -- race, gender, and power conflicts in our society."[21] Consequently, the college's administrators were not entitled to qualified immunity because punishing the lecturer was "objectively unreasonable."[22]

The instant controversy presents a peculiar situation—a law professor is the subject of an investigation not because he used a racial slur, but because of a hypothetical that *referenced* its use. Nevertheless, even if UIC's investigation was commenced because of a mistaken belief that the examination did, in fact, use the words at issue, that use would *still* be protected expression. The question is a hypothetical involving employment discrimination, which Kilborn correctly observes is "among the most common topics of federal civil litigation," and is premised on a fact pattern that is, unfortunately, not unusual. Further, Kilborn's choice to use a redacted reference to the language reflects a pedagogical choice to approach that subject matter *without* using the words at issue.

Because the examination question is protected by fundamental principles of academic freedom, the initiation of an investigation into that material is itself a violation of Kilborn's academic freedom, even if UIC ultimately imposes no formal discipline. Investigations into protected expression are an implicit threat of discipline and will have a chilling effect on faculty members' willingness to confront challenging or difficult material.[23] That is an

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[17] *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 680 (6th Cir. 2001).
[18] *Id.* at 674.
[19] *Id.* at 675.
[20] *Id.* at 675, 679.
[21] *Id.* at 683.
[22] *Id.*at 675, 683.
[23] *See, e.g.*, *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (public university's investigation into a faculty member's writings on race and intelligence violated the First Amendment).

unacceptable result at an institution of any caliber, and an unconstitutional result at a public university.

III. Conclusion

Kilborn's examination hypothetical is well within the breathing room afforded by academic freedom. That freedom does not shield its exercise from criticism, including by students, colleagues, and administrators. Criticism, after all, is a form of "more speech," the remedy the First Amendment prefers to censorship. However, academic freedom places firm limits on *how* UIC may respond.

FIRE calls on UIC to disclaim any intent to punish Kilborn over his protected expression. We request receipt of a response to this letter no later than the close of business on January 29, 2021.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

Cc: Darby Dickerson, Dean, UIC John Marshall Law School
Susan Poser, Provost and Vice President for Academic Affairs
Nancy Freitag, Vice Provost for Faculty Affairs
George Papadantonakis, Chair, Senate Committee on Academic Freedom and Tenure