



March 22, 2021

Robert Schapiro
University of San Diego School of Law
5998 Alcalá Park, Warren Hall
San Diego, California 92110

Sent via Electronic Mail (rschapiro@sandiego.edu)

Dear Dean Schapiro:

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 the University of San Diego School of Law's ("USD Law's") investigation into Professor Thomas Smith over a post on his personal blog. While this blog post may be offensive to some, it is an exercise of Smith's right to "speak or write as [a] citizen . . . free from institutional censorship or discipline" promised to him as a faculty member at USD Law. Accordingly, we call on USD Law to cease its investigation.

I. Student Complaints Lead to Investigation into Smith's Blog Post

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To that end, please find enclosed an executed waiver authorizing you to share information about this matter.

Smith is a professor of law at USD Law and has been a faculty member at USD Law since 1992.¹ He maintains a personal blog, "The Right Coast,"² which is a member of a network of legal blogs edited primarily by law professors.³ Although "The Right Coast" recognizes that Smith is a law professor and occasionally references happenings related to the university, the blog does not list his affiliation with USD Law or otherwise purport to be an offering of the university.

¹ Thomas Smith, UNIV. OF SAN DIEGO SCH. OF LAW (last visited Mar. 19, 2021), https://www.sandiego.edu/law/about/directory/biography.php?profile_id=2625.

² RIGHT COAST (last visited Mar. 19, 2021), <https://rightcoast.typepad.com/rightcoast>.

³ LAW PROF. BLOGS NETWORK (last visited Mar. 19, 2021), <http://www.lawprofessorblogs.com>.

On March 10, 2021, Smith reposted on his blog an excerpt from a *Wall Street Journal* article about the theory that COVID-19 originated in a lab in Wuhan, China.⁴ He then added his own commentary on the article, stating in full:

If you believe that the coronavirus did not escape from the lab in Wuhan, you have to at least consider that you are an idiot who is swallowing whole a lot of Chinese cock swaddle. At least Peter Daszak has good personal and financial reasons, not to mention reasons of career preservation, for advancing what he must know is a facially implausible thesis. But whatever. Go Science!⁵

On March 17, you sent an email to the USD Law community averring that you had received “formal complaints” relating to Smith’s “conduct” and that there will be “a process to review whether university or law school policies have been violated.”⁶ You also spoke with Smith by phone on March 17 and told him that he was being investigated for his blog post.

After speaking with you about his use of the term “Chinese cock swaddle,” Smith updated his blog, stating in full: “UPDATE: It appears that some people are interpreting my reference to ‘Chinese cock swaddle,’ as a reference to an ethnic group. That is a misinterpretation. To be clear, I was referring to the Chinese government”⁷

II. USD Law’s Investigation of Smith Violates the University’s Commitment to Academic Freedom

Smith’s post on his personal blog is an exercise of extramural expression, a right USD Law expressly provides to its faculty. Because it does not amount to harassment or other unprotected speech, USD’s investigation into Smith represents a breach of its commitment to its faculty members’ expressive rights.

A. *USD Law Promises Its Faculty Academic Freedom*

As USD Law is a private institution, the First Amendment does not compel it to grant faculty expressive freedoms. Nevertheless, USD Law has made clear commitments promising its faculty freedom of expression and academic freedom. These commitments represent not only a moral obligation, but a contractually-binding legal duty on the part of the college.

⁴ Holman W. Jenkins, Jr., *Wuhan Lab Theory a Dark Cloud on China*, WALL ST. J. (March 9, 2021), <https://www.wsj.com/articles/wuhan-lab-theory-a-dark-cloud-on-china-11615332235>.

⁵ Tom Smith, *Wuhan Lab Theory a Dark Cloud on China – WSJ*, RIGHT COAST (March 10, 2021), <https://rightcoast.typepad.com/rightcoast/2021/03/wuhan-lab-theory-a-dark-cloud-on-china-wsj.html>.

⁶ Email from Robert Schapiro, Dean, USD Law, to USD Law Community (Mar. 17, 2021, 2:47 PM) (on file with author).

⁷ *Supra* note 5.

USD’s policy manual adopts the American Association of University Professors’ 1940 Statement on Academic Freedom, including its declaration that when professors “speak or write as citizens, they should be free from [university] censorship or discipline.”⁸ USD also makes clear that “the University imposes no religious limitations on academic freedom.”⁹ Smith’s blog post falls squarely into the category of protected extramural expression, which cannot be punished based on USD’s promises that faculty will not be censored for speaking or writing as private citizens. Eroding Smith’s rights represents a threat to the rights of all students and faculty at USD Law.

B. USD Law’s Commitments to Academic Freedom Require that It Refrain from Penalizing Extramural Expression

USD’s promises to faculty form a legal obligation on the part of the university. The contractual relationship between a private educational institution and its faculty requires the institution to adhere to its commitments to free expression and academic freedom.¹⁰ These rights include the wide latitude given to faculty members to engage in extramural expression—that is, speech in their capacity as private citizens.

A decision from the Wisconsin Supreme Court is illustrative in explaining the contours of extramural freedom and their binding nature in the context of private institutions.¹¹ Marquette University, a private Catholic university, had adopted the 1940 AAUP Statement of Principles on Academic Freedom—the same statement adopted by USD.¹² A member of the faculty, aggrieved by a graduate student instructor’s exchange with a student about whether LGBTQ rights were an “appropriate” topic of class discussion, criticized the instructor on his personal blog, providing a link to the instructor’s contact information and assailing her attitude as “totalitarian.”¹³ The university punished the professor, citing the blog post as falling short of the university’s “standards of personal and professional excellence”¹⁴

The university’s commitment to academic freedom rendered the blog post “a contractually-disqualified basis for discipline.”¹⁵ Citing the AAUP’s *amicus curiae* brief,¹⁶ the court explained that “the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments.”¹⁷ The blog post, an “expression made in [the professor’s] personal, not

⁸ Academic Freedom, POLICY MANUAL, UNIV. OF SAN DIEGO (Mar. 3, 2011) (on file with author).

⁹ *Id.*

¹⁰ *See, e.g., McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, the post was “a contractually-disqualified basis for discipline”).

¹¹ *Id.*

¹² *Id.* at 730.

¹³ *Id.* at 713–14.

¹⁴ *Id.* at 714.

¹⁵ *Id.* at 737.

¹⁶ AAUP as Amicus Curiae Supporting Plaintiff–Appellant, *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis. 2018), available at https://www.aaup.org/sites/default/files/McAdams_Marquette_Feb2018.pdf.

¹⁷ *McAdams*, 914 N.W.2d at 730.

professorial, capacity,” fell into the “extramural” category.¹⁸ Such remarks are protected under a commitment to academic freedom unless the remark “clearly demonstrates the faculty member’s unfitness for his or her position” in light of their “entire record as a teacher and scholar.”¹⁹ This “stringent standard” is “[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member’s fitness for the position.”²⁰

Similarly, the United States Court of Appeals for the Ninth Circuit, applying these standards to a professor’s *on-campus* protests, explained that the 1940 AAUP Statement’s protection of extramural expression was “intended to assure a professor his full measure of [F]irst [A]mendment rights,” reasoning that a university’s interests in regulating faculty expression wane considerably outside of the classroom.²¹ Accordingly, there can be no doubt that USD Law’s adoption of this standard has the purpose of—and is understood as—establishing robust protections for its faculty members’ speech outside of the classroom, and Smith’s extramural expression is protected against institutional discipline or censorship unless it falls into an unprotected category of speech.

C. Smith’s Blog Post Is Protected Extramural Expression.

As evidenced by students submitting complaints, some who saw Smith’s blog post found it offensive. However, whether speech is protected is “a legal, not moral, analysis,”²² and Smith’s blog does not fall into an unprotected category of speech, as there is no exemption for speech on the basis that others find it disagreeable, offensive, or outrageous.

Expression may not be restricted merely because some or even many find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,²³ prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft,”²⁴ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,²⁵ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.²⁶ In ruling that the First Amendment protects protesters holding signs outside of soldiers’ funerals (including signs that read “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations”), the Court reiterated this

¹⁸ *Id.*

¹⁹ *Id.* at 731–32, citing AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).

²⁰ *Id.* at 732 (cleaned up).

²¹ *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975).

²² *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

²³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

²⁴ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

²⁶ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

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.”²⁷

Smith’s blog falls well within these protections, even if others find it “offensive, unpleasant, or even hateful.”²⁸ Even accepting his critics’ charge that the post may be read as a remark about Chinese people in general, the solitary extramural remark, taking place outside of the classroom and USD Law’s campus, does not itself amount to or evidence discriminatory conduct. No student or member of the university community is required to read Smith’s personal blog. Those who find the reference to “Chinese cock swaddle” vulgar or offensive are free to look away, just as the occupants of the Los Angeles Superior Court were free to avert their eyes from Paul Robert Cohen’s jacket and its colorful language.²⁹

If, instead, Smith’s post was—as his update affirms—intended as a criticism of the Chinese government’s response to the COVID-19 pandemic, USD’s response is all the more unfortunate and unacceptable, penalizing a professor on the pretense that his criticism of a foreign government is interchangeable with criticism of its constituents.

Whether Smith or his critics have the better argument is of no moment, as Smith’s post is—under any interpretation—firmly within the bounds of protected extramural expression guaranteed to him by USD Law.

III. USD Law Must Immediately Cease Its Investigation into Smith

USD makes laudable commitments to defend its faculty’s academic freedom. Those commitments require it to refrain from utilizing its disciplinary system as a means of addressing speech that others—whether within or outside of the USD Law community—find objectionable. Doing so will have an impermissible chilling effect, even if USD Law ultimately imposes no formal discipline.³⁰

The chilling effect created by the initiation of an investigation into Smith is not speculative. Multiple USD law professors contacted FIRE to bring this situation to our attention, sharing their concerns that the university’s response imperils the institution’s commitment to freedom of expression. One such professor specifically noted that USD’s investigation into Smith has created a chilling effect for a number of faculty. That is an unacceptable result at an institution that promises its faculty academic freedom rights.

²⁷ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

²⁸ *Id.*

²⁹ *Cohen*, 403 U.S. at 21.

³⁰ *See, e.g., Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (university’s investigation into a faculty member’s writings on race and intelligence violated the First Amendment).

Accordingly, we call on USD Law to immediately disband its investigation into Smith. We request receipt of a response to this letter no later than the close of business on Monday, March 29, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read "Sabrina C.", written in a cursive style.

Sabrina Conza
Program Analyst, Individual Rights Defense Program

Encl.

Authorization and Waiver for Release of Personal Information

I, Thomas A. Smith, do hereby authorize the University of San Diego (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

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Signature

3/22/2021

Date