FIRE
Foundation for Individual Rights in Education

July 27, 2021

James E. Ryan
Office of the President
University of Virginia
Post Office Box 400224
Charlottesville, Virginia 22904-4224

*Sent via U.S. Mail and Electronic Mail (president@virginia.edu)*

Dear President Ryan:

FIRE[1] appreciates that the University of Virginia ("UVA") is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, concerned about UVA's departure from its commitment to First Amendment rights by its imposition of sanctions on student Morgan Bettinger for a remark that the university's independent investigation found was not threatening.

While students may have been offended by Bettinger's remark, it does not amount to an unprotected "true threat" and therefore remains protected by the First Amendment, which bars UVA—including its student conduct board—from punishing protected expression. Thus, UVA must expunge the University Judiciary Committee's conviction and sanctions of Bettinger from her record and implement a policy to ensure that future students are not punished for protected expression by a university-sanctioned student-run committee.

## I. Bettinger's Remark About Protesters Leads to Sanctions, Despite Equal Opportunity Office's Finding

The following is our understanding of the pertinent facts. Please find enclosed an executed privacy waiver authorizing you to share any additional information about this matter.

On July 17, 2020, Morgan Bettinger—then an undergraduate student at UVA—was driving home from work and found the street blocked by protesters.[2]

[1] As you will recall from prior correspondence, 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.

[2] James A. Bacon, *Another Free Speech Fiasco at UVa*, BACON'S REBELLION, July 19, 2021, https://www.baconsrebellion.com/wp/another-free-speech-fiasco-at-uva; *see also*, Deanna See, *Black*

Bettinger stopped her vehicle and spoke with the driver of a city garbage truck, which was blocking the road. The University Judiciary Committee panel found that Bettinger told the truck driver: "it's a good thing that you are here because, otherwise, these people would have been speed bumps."[3] Two protesters overheard Bettinger's remark and told others about the remark.[4] A UVA student who was at the protest posted on Twitter a video depicting Bettinger in her car on the phone, slowly reversing as demonstrators follow her and stand in front of and around the vehicle, repeatedly asking: "Was that a threat?"[5]

UVA received numerous "angry messages demanding action against" Bettinger.[6] The student who tweeted about the remark and filed charges against Bettinger with the University Judiciary Committee and UVA's Office of Equal Opportunity and Civil Rights.[7]

### *A. Equal Opportunity Office Clears Bettinger*

UVA's Office of Equal Opportunity and Civil Rights conducted an investigation into whether Bettinger threatened the protesters. According to EOCR, a "reasonable person" in the same circumstances as the complainant would not view Bettinger's comment, which was directed to the city garbage truck driver, to be "sufficiently severe to create a hostile environment," as the "comment was not clearly threatening on its face."[8] Thus, the office cleared Bettinger of charges, determining that her speech was neither harassment nor a threat.[9]

### *B. UJC Finds Bettinger Responsible and Imposes Sanctions*

The Dean of Students Office conducted a separate investigation into Bettinger's remark and concluded that Bettinger was not an ongoing threat, but still referred charges for "threatening the protesters" to the University Judiciary Committee.[10] The student who tweeted about Bettinger's remark also submitted a complaint to the UJC.[11] The University Judiciary Committee is "the student-run judiciary body of the University of Virginia and is authorized to investigate and adjudicate alleged violations of the University's Standards of Conduct."[12]

A UJC panel of five undergraduate students found Bettinger responsible and imposed sanctions, which consisted of 50 hours of community service at an approved social justice organization, three hours of remedial education on police-community relations with a specified professor, and an apology letter to the student who criticized Bettinger on Twitter.

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*Women Matter Noise Demonstration Livestream*, WUVA NEWS, July 17, 2020, https://wuvanews.com/black-women-matter-noise-demonstration-livestream.

[3] Bacon, *supra* note 2.

[4] *Id.*

[5] Zyahna bryant. (@ZyahnaB), TWITTER (July 17, 2020, 8:13 PM), https://twitter.com/ZyahnaB/status/1284280171466559501.

[6] Bacon, *supra* note 2.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *The University Judiciary Committee*, UNIV. OF VA., https://ujc.virginia.edu/ (last visited July 21, 2021).

The UJC also expelled Bettinger, a sanction held in abeyance on the condition that Bettinger have no further violations of the standards of conduct.

The UJC panel's findings said:[13]

> We the judges of this trial panel find that your actions on July 17th were shameful and put members of the community at risk. You yourself acknowledged saying "it's a good thing you are here because, otherwise, these people would have been speed bumps." Given the tragic events of August 12 and the context in which you uttered these words, you disregarded Charlottesville's violent history. A history you should have been cognizant of as a UVA student and resident of Charlottesville. During these proceedings you have shown no understanding of the risk this statement posed.

When Bettinger appealed the decision to the Judicial Review Board, it held that JRB could not review the findings, as her appeal goes "to the sufficiency of the evidence, where we have no authority to tread."[14]

Bettinger completed the sanctions imposed on her in order to obtain her degree, but her student conduct record remains marred as a result of UVA's refusal to grant her appeal.

## II. The First Amendment Bars UVA from Punishing Bettinger for the Remark

It is well-established that the First Amendment does not make a categorical exception for hateful expression, and equally well-established that it constrains public universities in penalizing student expression. While some students may have found Bettinger's speech deeply offensive, the speech does not fall into any exception to the First Amendment.

### *A. The First Amendment Applies to UVA as a Public University*

It has long been settled law that the First Amendment is binding on public universities like UVA.[15] Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,[16] recognition and funding of student organizations,[17] interactions with

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[13] Bacon, *supra* note 2.

[14] *Id.*

[15] *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).

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

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

student journalists,[18] conduct of police officers,[19] and maintenance of policies implicating student and faculty expression[20]—must be consistent with the First Amendment.

### *B. Bettinger's Remark Was Not an Unprotected 'True Threat'*

Bettinger's remark does not fall into any of the "historic and traditional categories" of unprotected speech,[21] including true threats. The UJC panel's imposition of sanctions is inconsistent with UVA's EOCR investigation, which concluded that Bettinger's remark was not a threat.

The EOCR's finding is correct. Bettinger's remark does not amount to an unprotected true threat, which 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."[22] The "true threats" exception to the First Amendment does not include speech which amounts to rhetorical hyperbole, the mere endorsement of violence,[23] or the assertion of the "moral propriety or even moral necessity for a resort to force or violence."[24] At worst, Bettinger's comment offered contempt for the demonstrators' avenue of protest or their message, making a hyperbolic argument that their conduct or views *should* subject them to violence. While many would (and did) object to that rhetoric, the First Amendment protects the "freedom to speak foolishly and without moderation."[25]

More importantly, the remark was *not* a statement of intent to commit *future* violence, as evident from its use of the past tense ("would have been speed bumps") and its conditional nature ("it's a good thing that you are here because, otherwise. . . ."). As the United States Supreme Court explained in the seminal *Watts v. United States*, the "conditional nature" of a remark, where it is "a kind of very crude offensive method of stating a political" viewpoint, renders it "political hyperbole," not a "true threat."[26] This, the Court explained, is because the "language of the political arena . . . is often vituperative, abusive, and inexact."[27] Presenting a hypothetical situation which has not occurred and saying that harm *should* have happened is, at most, the endorsement of violence, not the *threat* of violence. It therefore remains protected by the First Amendment.

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[18] *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).

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

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

[21] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (*quoting*, in part, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)).

[22] *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[23] *Watts v. United States*, 394 U.S. 705, 708 (1969).

[24] *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

[25] *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

[26] *Watts*, 394 U.S. at 708 (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

[27] *Id.*

### *C. The First Amendment protects subjectively offensive expression.*

Bettinger's remark may have been offensive to the student who complained as well as to the students on UJC. However, whether speech is protected by the First Amendment is "a legal, not moral, analysis."[28]

The fact that Bettinger made her comments in Charlottesville, where a counter-protester was run over by a protester at the "Unite the Right" rally, does not change the analysis. The UJC said that Bettinger posed a "risk" because she "disregarded Charlottesville's violent history" in making her statement.[29] However, speech remains protected even when it deeply offends those to whom it is directed.

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,[30] punish the wearing of a jacket emblazoned with the words "Fuck the Draft,"[31] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[32] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[33] In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers' funerals, 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."[34]

This principle applies with particular strength to universities, dedicated to open debate and discussion. Take, for example, a student newspaper's front-page uses of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[35] These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were "offensive and sophomoric" skits depicting women and minorities in derogatory stereotypes,[36] "racially-charged emails" to a college listserv,[37] and student organizations that the public viewed as "shocking and offensive."[38] Yet, "the mere

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

[29] Bacon, *supra* note 2.

[30] *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").

[31] *Cohen v. California*, 403 U.S. 15, 25 (1971).

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

[33] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[34] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[35] *Papish*, 410 U.S. at 667–68.

[36] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

[37] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First 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.").

[38] *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[39]

### *D. The Judicial Review Board Had Jurisdiction to Overturn the UJC's Sanctions*

The Judicial Review Board's refusal to overturn the UJC's imposition of sanctions, premised on the notion that the finding was a question of the "sufficiency of the evidence," cannot justify UVA's ratification of a departure from its obligations under the First Amendment. While deference to the factual determinations of subordinate boards is an important function of appellate processes, the Judicial Review Board could reverse the finding of law (that the words amounted to a true threat) without disturbing the finding of fact (that Bettinger said the words at issue). As a result, the Judicial Review Board had the authority to overturn the imposition of sanctions on the basis that they were "unduly harsh, clearly excessive, or grossly inappropriate"[40] because *any* punishment of protected expression is inappropriate.

## III. Conclusion

Bettinger's comment is clearly protected, as UVA's EOCR correctly concluded. This principle does not shield the speaker from every consequence of his or her expression—including criticism by students, faculty, the broader community, or the university itself. Criticism is a form of "more speech," the remedy to offensive expression that the First Amendment prefers to censorship.[41] However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them.

We request receipt of a response to this letter no later than the close of business on Tuesday, August 10, 2021, confirming that UVA will expunge Bettinger's conviction and sanctions from her file and will implement a policy to prevent students from being punished by the UJC or any other governing body at UVA for their constitutionally-protected expression.

Sincerely,

Sabrina Conza
Program Analyst, Individual Rights Defense Program

Encl.

[39] *Papish*, 410 U.S. at 670.

[40] UNIV. OF VA., UNIV. JUDICIAL REVIEW BD. PROCEDURES FOR APPEALS § II(A)(3) (effective Nov. 21, 2016), *available at* https://ujc.virginia.edu/sites/g/files/jsddwu271/files/2021-04/JRB-Procedures-11.21.16.pdf.

[41] *Whitney v. California*, 274 U.S. 357, 377 (1927).

# Authorization and Waiver for Release of Personal Information

I, Morgan A. Bettinger, born on [redacted], do hereby authorize The University of Virginia (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

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:
[redacted]
EA57F2A7633848A...

Student's Signature

7/27/2021

Date