



Foundation for Individual Rights in Education

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June 10, 2009

Chancellor Henry T. Yang
University of California–Santa Barbara
Office of the Chancellor
5221 Cheadle Hall
Santa Barbara, California 93106

Sent via U.S. Mail and Facsimile (805-893-8717)

Dear Chancellor Yang:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, academic freedom, due process, legal equality, freedom of association, religious liberty, and freedom of speech on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about the threat to academic freedom, freedom of speech, and due process posed by the months-long investigation of professor William Robinson, who e-mailed plainly relevant material to his sociology class. That University of California–Santa Barbara (UCSB) has chosen to sustain the investigation on the pretext of possible violations of “professional standards” or “the duties of professional care” is a serious threat to the rights of every faculty member at UCSB. Faculty members report that a chilling effect is being felt across the campus, and every day that the investigation continues deepens the violation of their academic freedom and constitutional rights. I urge you to protect UCSB from further embarrassment and restore freedom of expression to your campus by immediately calling an end to the investigation.

Statement of Facts

This is our understanding of the facts; please inform us if you believe we are in error.

On January 19, 2009, UCSB Professor William Robinson e-mailed the students in his upper-division Sociology of Globalization course, Soc 130SG. The course listing in the *UCSB 2008–2009 General Catalog* for Soc 130SG describes the course as an “[i]ntroduction to the sociological study of globalization,” exploring “principal theories and debates in globalization studies, with a focus on economic, political, and cultural transnational processes, gender/race/class and globalization,

transnational social movements, and local-global linkages.” In the January 19 e-mail, which he also sent on the same day to his department’s “socforum” listserv, Robinson used the occasion of Martin Luther King Day to make an argument that “Nazi atrocities against the Jews” are parallel to “Israeli atrocities against the Palestinians.” He included a copy of an article by Judith Stone making the same argument (available at <http://www.ireport.com/docs/DOC-180804>) as well as an e-mail on the topic that had been sent to him by Juan Carlos Monedero (available at http://mail.pegada.net/pipermail/ilp_pegada.net/2009-January/000025.html). Making the same argument primarily through “parallel images of Nazis and Israelis,” Monedero’s e-mail juxtaposed photographs that progressed from topics such as “building walls & fences to keep people in prisons” to photographs of adults and children who had been killed, burned, or dismembered.

Soon after receiving Robinson’s e-mail, one of the students in Soc 130SG replied by e-mail, asking him if the e-mail constituted “some assignment” or was “just information that you put out there for us [the class].” In reply, Robinson stated that the material was “just for your interest.” This student and a second student then chose to drop the course and communicate informal complaints to the UCSB administration in early February. The students also turned to the Anti-Defamation League, which began to contact Robinson and UCSB officials soon after, condemning Robinson’s e-mail to his class and alleging that Robinson had violated the Faculty Code of Conduct.

After receiving the students’ informal complaint(s), Martin Scharlemann, Charges Officer for UCSB’s Academic Senate, summoned Robinson on February 12 to meet with him and Stephanie Smagala, another Charges Officer. They met on February 17. At that meeting, Robinson made clear that “the topic of the Israeli-Palestine conflict” was fully relevant to Soc 130SG.

This response did not end the investigation, however. The two students submitted formal complaints on February 19, alleging various breaches of UCSB’s Faculty Code of Conduct. On March 9, Robinson wrote Scharlemann about his ongoing investigation and his failure to reject the complaints as without merit:

The most appropriate—indeed, the only appropriate—course of action for you to proceed with at this time is to immediately dismiss these allegations[,] and in the name of academic freedom this is what I call on you to do. Should this charges process go any further I would consider it a grave and an ominous threat to academic freedom on this campus and in the University of California, with potentially chilling effects not only on said academic freedom but as well on the ability of the university community to engage in open debate and exchange of ideas of contemporary matters free from intimidation and the threat of sanctions.

Robinson’s advice and warning went unheeded. On March 25, Scharlemann decided to move the investigation forward for further investigation by an ad hoc Charges Committee. As Robinson notes in an April 3 letter, Scharlemann had made matters worse by failing to specify the actual charges that were the basis of the investigation. The charges finally came via an April 5 e-mail from Scharlemann, which provided “a summary of the allegations”:

- * You, as professor of an academic course, sent to each student enrolled in that course a highly partisan email accompanied by lurid photographs.
- * The email was unexpected and without educational context.
- * You offered no explanation of how the material related to the content of the course.
- * You offered no avenue to discuss, nor encouraged any response, to the opinions and photographs included in the email.
- * You directly told a student who inquired that the email was not connected to the course.
- * As a result, two enrolled students were too distraught to continue with the course.
- * The constellation of allegations listed above, if substantially true, may violate the Faculty Code of Conduct.

In the (“not exhaustive”) list of examples included with that Faculty Code of Conduct, the most proximate are part II, A. 1. b and A. 4.

Section II.A.1.b of the Faculty Code of Conduct is an example of “[f]ailure to meet the responsibilities of instruction”—namely, “significant intrusion of material unrelated to the course.” Section II.A.4 prohibits “[u]se of the position or powers of a faculty member to coerce the judgment or conscience of a student or to cause harm to a student for arbitrary or personal reasons.”

Robinson wrote you and Academic Senate Chair Joel Michaelson on April 15, again pointing out UCSB’s “legal and ethical responsibility ... to immediately suspend these charges proceedings.” In response, on April 16 you acknowledged your role “as the final decision-maker” but argued that you may not step in “when a charges process is underway.” In addition, you directed Executive Vice Chancellor Gene Lucas to respond substantively, and in an April 18 letter he stated that Robinson remained under investigation for violating either “professional standards” or “the duties of professional care set forth in the Faculty Code of Conduct.”

The Investigation Plainly Violates Professor Robinson’s Academic Freedom and Freedom of Speech

As a public university, UCSB is both legally and morally bound by the First Amendment’s and the California Constitution’s guarantees of freedom of expression and academic freedom. The Supreme Court has held that academic freedom is a “special concern of the First Amendment” and that “[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). Conducting intrusive investigations into clearly protected academic speech is unconstitutional because it affords the most active complainers, no matter how irrational or unreasonable, an effective veto over any expression on campus with which they do not agree. Giving professors a reason to believe that they will be investigated and possibly punished simply for expressing controversial views cannot help but have a destructive and unconstitutional “chilling effect” on campus discourse.

We trust that you understand that the First Amendment’s protections fully extend to public universities like UCSB. See, e.g., *Keyishian*, 605–06 (“[W]e have recognized that the university

is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[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'"); *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities").

The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find "controversial" or "offensive." The Supreme Court stated in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Similarly, the Court wrote in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that "the mere 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.'" No public university may retaliate against a professor because others on campus, including the professor's own students, felt offended by fully protected speech. Even if a student is so sensitive that he or she becomes "too distraught to continue with the course" when encountering such materials, this idiosyncratic response in no way diminishes the professor's rights.

In addition, UCSB's Faculty Code of Conduct expressly protects faculty members' constitutional right to freedom of expression. Under "Professional Rights of Faculty," the code asserts that among the rights of faculty are "conditions hospitable to [the] pursuits [of teaching, learning, research, and public service]," which are "a major responsibility of the administration ... to protect and encourage." These rights include "free inquiry, and exchange of ideas," "the right to present controversial material relevant to a course of instruction," and "enjoyment of constitutionally protected freedom of expression."

In the present case, Scharlemann's summary of allegations makes a mockery of the First Amendment, the canons of academic freedom, and the provisions of the Faculty Code of Conduct that give the university administration a major responsibility to protect faculty rights. First of all, "a highly partisan e-mail" is precisely the kind of speech that the First Amendment was designed to protect. That the photographs are "lurid" does not reduce their protection, especially when presented in the context of a relevant argument in an "upper-division" course for adult university students.

Second, that professors send "unexpected" e-mails to their classes is, as every professor and student knows, part of the normal communication of professors with students. Having signed up for a course is more than enough warning that a student should expect to receive e-mails from the professor.

Third, professors do not need to provide explicit “educational context” for their e-mails when the subject matter of the e-mail so clearly touches on subjects at issue in the course. Nor need a professor offer an explicit “explanation of how the material relate[s] to the content of the course.” Nor need a professor explicitly offer an “avenue to discuss” such materials, nor need a professor “encourage[] any response” to such material. Indeed, as in this case, professors are well within their free speech and academic freedom rights to alert their students to relevant material that they might find “just for [their] interest.” Simply sending such material is, in itself, part of the good-faith education of students by the professor.

Fourth, it is plainly wrong to take Robinson’s reply to a student that the material was “just for your interest” as some kind of admission that the e-mail was “not connected to the course,” as Scharlemann alleges. The student asked only whether the e-mail was an “assignment” or “just information that you put out there for us,” and Robinson merely replied that the e-mail was potentially interesting. There is no question, as Robinson and others have pointed out, that the topic of Robinson’s e-mail was entirely relevant to Soc 130SG, for the sustained, well-known, international involvement and interest in the Israeli-Palestinian conflict certainly qualifies under several heads of the Soc 130SG course description.

Furthermore, faculty members should expect the educational right to introduce material that is related to the content or themes of a course through current events. That Robinson chose, on Martin Luther King Day, to make an additional argument regarding Martin Luther King’s possible perspective on ethnic and racial conflicts in the Middle East ought to be taken as a good-faith effort to make his e-mail still more relevant to the education of his students regarding themes they may have been pondering that day.

The “Professional Standards” Pretext Is Unacceptable in This Case

Not only does the investigation of Robinson’s e-mail violate his freedom of speech and academic freedom, but this violation has been redefined inaptly as an investigation into Robinson’s exemplification of “professional standards” or “the duties of professional care.” To use such a pretext for punishing speech that is fully within the bounds of academic freedom is a serious threat to the rights of every faculty member at UCSB.

Robinson’s e-mail is not a “significant intrusion.” A single e-mail, even if it is unrelated to the course, does not intrude into a single minute of class time. It is never a “significant” intrusion even of the student’s own time. It is even less an intrusion when the professor explicitly disclaims that the e-mail constitutes assigned reading, related or not.

Robinson’s e-mail is not “unrelated.” When, as in this case, the material is relevant to the course, it is not an intrusion in any way at all; quite the opposite, it is a contribution to the course and at the heart of what academic freedom protects.

Robinson’s e-mail does not “coerce.” Adult university students, especially in an upper-division course, must be expected to be able to confront materials with which they strongly disagree and

must be able to view materials that might be highly upsetting, without thereby becoming coerced in their judgment or conscience or feeling actionable “harm.”

Although no professional experience is required to judge Robinson’s e-mail as entirely within the bounds of professional conduct of a university professor, let me note here that I have taught sociological theory, freshman humanities, and other topics to University of Chicago undergraduates. I have worked for senior sociologists at Harvard University and the University of Chicago. I see no reason whatsoever for a tenured sociologist at UCSB to be prevented from providing materials to his class on a topic that he finds relevant and regarding an argument that he finds significant.

Immediate Dismissal of Such Cases Is Required

When a case such as this one involves the clear violation of a faculty member’s rights, when the faculty member, as in this case, has signaled that he has engaged a lawyer to help him defend his rights, and when the university is in imminent danger of facing a losing lawsuit, you have not only the authority but also the moral and legal responsibility to step in. Every day that the investigation continues is a deeper violation of academic freedom and freedom of speech and a more thorough chilling of faculty speech at UCSB.

In particular, as Geoffrey Raymond, Director of Undergraduate Studies in UCSB’s Department of Sociology pointed out in an April 22 letter to Vickie Scott, Chair of the Academic Senate’s Committee on Faculty Welfare and Academic Freedom:

[F]aculty in the Department of Sociology tell me that they feel that they are concerned about teaching courses on sexuality, global conflict, race, or any number of potentially sensitive matters because of the fear that they will be hauled in front of the Charges Officer should they offend a student.

Moreover, materials regarding cases referred to a Charges Committee, as in this case, are kept on file for one year.

The investigation of protected speech is a violation of the rights of the person investigated. *Swezy v. New Hampshire*, 354 U.S. 234, 245, 248 (1957). Thus, merely waiting for the “process” of the investigation to run its course does not absolve you or UCSB of its moral and legal responsibility to immediately cease the investigation.

Students regularly drop or choose not to take courses, as in the present case. Permitting subsequent complaints from these students to become the basis of sustained investigations of professors’ course materials not merely is a violation of the faculty members’ academic freedom and freedom of speech, but also effectively establishes a policy of holding UCSB’s faculty hostage to the political sensibilities of its students.

The Case Has Raised Serious Due Process Concerns

This case also introduces serious due process concerns besides the obvious point that significant outside pressure has been brought to bear on UCSB because of the content of the professor's protected speech. First of all, Robinson was not given any statement of the charges against him until April 5. Although Robinson took several opportunities to respond to the students' informal and formal complaints before that time, it was not until April 5 that he knew definitively what allegations he was facing.

Second, the identity of the complainant(s) in this case has been put in question because of the inconsistent list of charges between the formal student complaints and Scharlemann's statement of charges. It appears that Scharlemann is now the formal complainant and that the two students may or may not be required to appear as witnesses. If so, it seems that Scharlemann is now both the author and the initial judge of his own complaint.

Moreover, a central principle of due process is the right of the accused to face and question his accusers. If a hearing, against all common sense and against Robinson's rights, is permitted to proceed, Robinson might not have any opportunity to confront his initial accusers, even though "coerc[ing] ... the judgment or conscience of a student" is one of the allegations. To make matters worse, the right to question *any* witnesses is not afforded to *any* faculty member in a hearing before a Charges Committee ("Policies and Rules for Hearing before Charges Committees," item 7).

I further encourage you to read carefully the entire letter from Raymond described above as well as his April 4 letter to the Academic Senate's Committee on Committees (see <http://sb4af.wordpress.com/robinson-case>), as well as the motions passed by the Academic Senate on June 4, regarding additional due process concerns.

Robinson also aptly quotes several relevant statements from the American Association of University Professors regarding academic freedom. While AAUP statements are not necessarily binding on UCSB, they carry significant moral force in cases like this one, when significant outside political pressure comes to bear on a professor's class expression.

Conclusion

Professor William Robinson cannot legally be investigated or punished by UCSB and deprived of his rights. The current charges against Robinson are a pretext for violating his rights by other means. FIRE urges you to immediately cease investigating Robinson's e-mail, ensure that any record of this matter be expunged from the administrative record, and announce to the UCSB campus that it will never investigate a professor's protected expression. As University of Alaska President Mark Hamilton wrote in a similar case:

[R]esponses to complaints or demands for action regarding constitutionally guaranteed freedoms of speech CANNOT BE QUALIFIED. Attempts to assuage anger or to demonstrate concern by qualifying our support for free speech serve to

cloud what must be a clear message. Noting that, for example, “The University supports the right to free speech, but we intend to check into this matter,” or “The University supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances,” is unacceptable. There is nothing to “check into,” nothing “to investigate.”

We have enclosed a waiver from Professor Robinson which authorizes you to fully discuss his case with us.

We urge UCSB to show the courage necessary to admit its error. Please spare the university the deep embarrassment of fighting against the Bill of Rights and the California Constitution, by which it is legally and morally bound. While we hope this situation can be resolved amicably and swiftly, we are committed to using all of our resources to see this situation through to a just and moral conclusion. Because of the chilling effect on faculty speech that increases every day without a resolution of this issue, we request a timely response to this letter by 5:00 p.m. EST on June 24, 2009.

Sincerely,



Adam Kissel

Director, Individual Rights Defense Program

cc:

Gene Lucas, Executive Vice Chancellor, UCSB

Joel Michaelsen, Divisional Chair, Academic Senate, UCSB

Martin G. Scharlemann, Charges Officer, Academic Senate, UCSB

Stephanie Smagala, Charges Officer, Academic Senate, UCSB

Melvin L. Oliver, SAGE Sara Miller McCune Dean of Social Sciences, UCSB

Verta Taylor, Chair, Department of Sociology, UCSB

Yousef Baker, Coordinator, Committee to Defend Academic Freedom at UCSB

Encl.