FIRE

Foundation for Individual Rights in Education

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June 17, 2011

President Richard C. Levin
Yale University
President's Office
P.O. Box 208229
New Haven, Connecticut 06520

Sent via U.S. Mail and Facsimile (203-432-7105)

Dear President Levin:

Once again, thank you for your January 14, 2010, reply to FIRE's concerns about Yale's commitment to freedom of expression. Unfortunately, I write today with renewed concern. We sympathize with Yale's need to address the threat to federal funding posed by a complaint filed regarding, among other matters, the university's response to a satirical student chant directed at no one in particular. Freedom of expression, however, is Yale's "paramount obligation"; accordingly, the chant in question is protected against official punishment. Please give us the opportunity to persuade you to reverse the punishment of this protected speech and, if necessary, to stand firm against federal pressure to punish protected expression at Yale.

Since 1975, the university community has relied on the Report of the Committee on Freedom of Expression at Yale, known as the Woodward Report, which describes the university's "overriding commitment to free expression":

> The conclusions we draw, then, are these: even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression. This obligation can and should be enforced by appropriate formal sanctions. If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.

The Woodward Report acknowledges that

> [w]ithout sacrificing its central purpose, [a university] cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these

> are important values; other institutions may properly assign them the highest, and not merely a subordinate priority; and a good university will seek and may in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.

Yet, in 2011, Yale's Executive Committee determined that the satirical public chant "No means yes, yes means anal [sex]" must be punished. The Executive Committee found that the expression "had threatened and intimidated others, in violation of the Undergraduate Regulations of Yale College as they pertain to 'harassment, coercion or intimidation' and 'imperiling the integrity and values of the University community.'"

Yale had publicly condemned the speech, the students involved had profusely apologized, and their fraternity's overseers had suspended their pledge activities (unlike Yale's, the objects of Delta Kappa Epsilon International include "the Maintenance of Gentlemanly Dignity, Self-Respect, and Morality in All Circumstances"). These responses should have been enough to address the speech while adhering to the principle of freedom of expression. As Justice Louis Brandeis famously observed, the "fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927).

Yale's decision, however, was inconsistent with its promises in force for more than 35 years and with your own statement to FIRE just 18 months ago:

> Dean Mary Miller and I agree with you that it is not the role of the Dean or any other University official to suppress the speech of any student or student organization. […] Dean Miller and I stand by the University's commitment to free expression, and we would not want to give any students the impression that the content of their speech is subject to censorship.

It strains all credulity to believe that a line of blindfolded students truly harassed, coerced, or intimidated Yale's extremely successful and empowered women by means of a satirical public chant. Moreover, far from imperiling the integrity and values of the entire Yale community, this chant is clearly protected expression of the transgressive sort that Yale should allow, for it is the kind of expression that leads the community to rethink and, perhaps, reassert more surely the more widely accepted view that "no means no." As John Stuart Mill argued in *On Liberty*, when a community ceases to question its most sacred values, it begins to hold them like thoughtless superstitions and thus loses the understanding of and motivation behind its convictions.

The appellate court's argument in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386, 389–90, 392 (4th Cir. 1993) is both instructive and morally compelling. In that case, the United States Court of Appeals for the Fourth Circuit upheld the district court's decision that a fraternity's "ugly woman contest," which used offensive gender and racial imagery, was protected expression:

> From the mature advantage of looking back, it is obvious that the performance […] was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the Fraternity recognized as much. The answer to the question of whether the First Amendment protects the Fraternity's crude attempt at entertainment, however, is all the more difficult because of its obvious sophomoric nature. […] Even crude street skits come within the First Amendment's reach.

The court explained:

> [T]he University's Vice-President, Earl Ingram, stated that the message conveyed by the Fraternity's conduct—that racial and sexual themes should be treated lightly—was completely antithetical to the University's mission of promoting diversity and providing an educational environment free from racism and sexism. Dean Bumgarner, in his affidavit, stated that the University
>
> > does not and cannot condone this type of on-campus behavior which […] creates a hostile and distracting learning environment. […]
>
> Importantly, the affidavits establish that the punishment was meted out to the Fraternity because its boorish message had interfered with the described University mission. It is manifest from these circumstances that the University officials thought the Fraternity intended to convey a message. The Fraternity members' apology and post-conduct contriteness suggest that they held the same view. To be sure, no evidence suggests that the Fraternity advocated segregation or inferior social status for women. What is evident is that the Fraternity's purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University's concerns, in the Fraternity's view, should be treated humorously. From the Fraternity's conduct and the circumstances surrounding it, we have no difficulty in concluding that it intended to convey a message.
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> […] [T]here was a great likelihood that at least some of the audience viewing the skit would understand the Fraternity's message of satire and humor. […] What the Fraternity did not anticipate was the reaction to their crude humor by other students on campus and University officials who opposed the racist and sexist implications of the Fraternity's skit.

I must add that the speech in question here is arguably less offensive than that ruled constitutionally protected in *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988), concerning a satirical depiction of the Reverend Jerry Falwell relating a story of losing his virginity "during a drunken incestuous rendezvous with his mother in an outhouse." The Supreme Court's decision was unanimous.

Moreover, with the benefit of long experience as a citizen and a judge, Justice John Marshall Harlan II wrote in *Cohen v. California*, 403 U.S. 15 (1971) that "one man's vulgarity is another's lyric." If the words of that Princetonian do not sufficiently reinforce Yale's promises of free expression, perhaps those of Justice William O. Douglas, former Yale Law School professor, will:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949) (citations omitted).

Such opinions were reinforced again in 1985, when the United States Court of Appeals for the Seventh Circuit found Indianapolis' anti-"pornography" ordinance unconstitutional. Frank H. Easterbrook, now that court's Chief Judge, wrote the court's opinion, which was summarily affirmed by the Supreme Court and is particularly instructive:

> Bald or subtle, an idea is as powerful as the audience allows it to be. […] Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful. […]
>
> Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that […] simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not. […]
>
> Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer

> leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

American Booksellers v. Hudnut, 771 F.2d 323, 327–29 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

A similar double standard is operating in the present case. The annual "Sex Week at Yale" (SWAY) is

> a campus-wide interdisciplinary sex education program designed to pique students' interest and spark dialogue through creative, interactive, and innovative programming. SWAY is at the cutting-edge of college-aged Sex Education. We aim to push students to think about sex, love, intimacy, and relationships in ways they never have before […]. [http://www.sexweekatyale.com/about/]

It appears that this entirely student-run program meets no official opposition from Yale.

Furthermore, Yale has its own precedent in such cases. In 1986, Yale's Executive Committee punished student Wayne Dick for "harassment" and "intimidation" due to his satirical expression about Yale's Gay and Lesbian Awareness Days. Soon after, in his inaugural address, President Benno Schmidt alluded to the controversy and stated: "There is no speech so horrendous in content that it does not in principle serve our purposes." President Schmidt encouraged Dick to ask for a rehearing before the Executive Committee, and that rehearing ultimately reversed the findings and punishment. Schmidt then reportedly stated that it was an asset of Yale's that it had the "capacity to change its mind" about such decisions.

FIRE requests that you follow President Schmidt's example. Please do not abandon Yale's tradition of freedom of expression such that speech is more restricted at Yale than at every public college in the United States—including Gateway Community College in New Haven, which understands the principles involved:

> [C]olleges and universities have traditionally been at the cutting edge of protection of our most cherished freedoms, most notably freedom of speech and non-violent action, which protect even unpopular or divisive ideas and perspectives.

Yale's integrity and values are imperiled when the Executive Committee decides, against Yale's own promises, that Yale will officially punish those who voice speech that is fully protected in society at large. Yale should not violate its promises via an ad hoc speech code; Yale's punishment, a clear departure from past practice, represents a grave and direct threat to free speech at the university.

The courts remain open to Yale to defend itself should the Department of Education's Office for Civil Rights unconstitutionally demand that Yale punish protected expression such as the fraternity chant. The principles at stake go far beyond this particular chant; pressuring universities to punish what would be protected speech in the larger society is a deeply troubling

development for our nation. Such pressure exceeds the rightful powers of the government, and universities such as Yale should consider challenging this overreach of power in the courts. FIRE would support Yale were it to take such a courageous and principled step. Universities must be free to declare that free speech is their "paramount obligation"—and to live by that declaration.

FIRE requests a response by July 8, 2011.

Sincerely,

Adam Kissel
Vice President of Programs

cc:
Fellows of the Yale Corporation
Mary Miller, Yale College Dean
W. Marichal Gentry, Associate Dean of Yale College, Dean of Student Affairs, and Dean of Freshman Affairs
Yale Daily News
Harvey Silverglate
Nat Hentoff