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Via US Mail

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General Counsel Charles F. Robinson
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Office of the General Counsel
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Dear Dean Edley and General Counsel Robinson,

The American Civil Liberties Union of Northern California writes in response to your request for our input into the University of California's system-wide review of its protocols for handling protests on campus.

Protests hold a central place in our democracy, and that is nowhere more the case than at public universities, institutions ostensibly dedicated to the robust exchange of ideas. Protests are not a threat to the University of California that must necessarily be policed. They are central to its lifeblood. We believe that the University's failure to appreciate this principle led to its unlawful and misguided handling of student protests at UC Berkeley and UC Davis in November 2011, in particular, by preventing the University from objectively assessing the "risk" presented by the protests, and instead leading it to overreact based on speculative concerns of harm. While we applaud your goal of drafting best practices for the University, the best policies on paper are meaningless if they do not also represent the institution's practice. We therefore also urge you to take on the additional, and essential, task of ensuring that both the University's policies and practices live up to its values as a public university dedicated to the free exchange of ideas.

Protests are an asset, not a threat to the University

The University dispatched police in riot gear to break up assemblies of students engaged in peaceful protest at UC Berkeley on November 9, 2011 and at UC Davis on November 18, 2011. The University handled the students' peaceful protest as a threat to be eradicated, and not a form of debate and dialogue to be respected and fostered. This response was unlawful and misguided.

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Legal framework. Two aspects of the protest and University's response are particularly noteworthy. First, the students were engaged in *peaceful* protest. But the University preemptively sought to terminate the protest *before* anything remotely approaching violence or a clear and present danger of imminent violence occurred. Indeed, the University marshaled police forces before violations of university conduct regulations occurred or the University's stated fears materialized.¹

Second, the University chose to implement its decision to terminate the students' protests with police clad in riot gear, who quickly used batons, pepper spray, and other force on students who were merely linking arms with each other and posing no threat of harm. The "emergency" precipitating this response were tents on a lawn.

"[E]njoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation." *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996). As the California Supreme Court explained in reversing convictions of college campus protesters for disturbing the peace and participating in an unlawful assembly, "[t]he right to assemble peaceably, like freedom of speech, is guaranteed by the First Amendment." *In re Brown*, 9 Cal.3d 612, 623 (1973). Thus, an assembly can only be declared unlawful when it is "violent or ... pose[s] a clear and present danger of imminent violence." *Id.*; see also *Jones v. Parmley*, 465 F.3d 46, 56-57 (2d Cir. 2006) ("government officials may stop or disperse public demonstrations or protests" only "where 'clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears'" (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940))).

Moreover, the Fourth Amendment prohibits the use of excessive force, even on those who may have engaged in illegal conduct. When force is used against protesters or others exercising their First Amendment rights, this prohibition "must be applied with scrupulous exactitude." *Lamb v. City of Decatur*, 947 F.Supp.1261, 1263 (C.D. Ill. 1996) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)). The primary factors to consider in determining whether the force used was reasonable or excessive are: "whether the suspect poses an immediate threat to the safety of the officers or others," "the severity of the crime at issue" and "whether he is actively resisting arrest or attempting to evade arrest by flight." *Glenn v. Washington County*, ___ F.3d ___, 2011 WL 6760348 * 6 (9th Cir. Dec. 27, 2011). Even when there is a need for some force, it is "least justified against nonviolent misdemeanants who do not flee or actively resist arrest." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008).

The law governing the use of batons and pepper spray is not in doubt. It is clearly unconstitutional to use pepper spray on nonviolent protesters who are linking arms. See

¹ UC Berkeley's regulations prohibit "camp[ing] or lodg[ing] on University property other than in authorized facilities." Berkeley Campus Regulations Implementing University Policies ¶321(n). They do not prohibit the erection of symbolic structures. At the time police moved in on students on November 9, 2011, students had only pitched tents on Sproul Plaza hours before; no one had actually spent the night in any tents and cannot reasonably have been accused of violating campus prohibitions against "camping" or "lodging." Similarly, UC Davis Chancellor Katehi invoked "health and safety" concerns and ordered the removal of the tents on November 18, 2011, after students had spent only a single night in tents in the Quad. While long-term encampments might conceivably raise public health issues if, for example, sanitation is not adequately addressed, such dangers would not have materialized after a single night.

Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002). Even when protesters use special equipment to mechanically lock themselves together, they are not engaged in “active resistance.” *Id.* Similarly, “a baton is a deadly weapon that can cause deep bruising as well as blood clots capable of precipitating deadly strokes, and ... should therefore be used ‘only as a response to aggressive or combative acts.’” *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011).

The use of excessive force on peaceful protesters also violates the First Amendment because it interferes with the right to protest.² Indeed, there could be no more effective a means of silencing protest than to break it up with excessive force.

In short, the University violated the students First and Fourth Amendment rights when it broke up the protests preemptively, restraining speech and assembly before any harm had materialized and on protesters who posed no immediate threat. While the timing of the University’s response was problematic, so too was its dramatically disproportionate reaction to the potential rule violation at issue. The University was seeking to enforce a rule against camping. The “danger” was tents on a quad, not arson. To be sure, protest falls along a spectrum: from protected speech, to conduct that may constitutionally be punished, to conduct that justifies the use of force. But the University erred gravely by failing to understand the difference between these categories when it dispatched police wielding batons and pepper spray to terminate large assemblies of students, some of whom had erected tents as part of a symbolic protest, even though the assemblies were not violent and posed no clear and present danger of imminent violence.

Recommendations

We understand that your review is intended to be forward-looking. But we are concerned that the University viewed the November 2011 protests through the wrong frame. In particular, it treated them like a threat that had to be dealt with by police in riot gear, rather than objectively assessing the situation, recognizing the protests were peaceful, and calibrating its response to any conduct violations actually at issue.³ Your recommendations should reframe the University’s approach to protests, but to devise effective recommendations, you must understand why the University came to view protests as a threat.

² See, e.g., *Keating v. City of Miami*, 598 F.3d 753, 767 (11th Cir. 2010) (officers “violated [Plaintiffs’] clearly established First Amendment rights ... by directing and failing to stop subordinate officers to use less-than-lethal weapons to disperse a crowd of peaceful demonstrators”); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1292 (10th Cir. 2008) (affirming district court’s “determination that [defendant] violated plaintiffs’ First Amendment rights, when he authorized the use of [excessive] force to break up the protest”); *Jones v. Parmley*, 465 F.3d 46, 53, 60 (2d Cir. 2006) (affirming denial of qualified immunity on First Amendment claim, where law enforcement responded to protest with excessive force); *Houser v. Hill*, 278 F.Supp. 920, 926 (D. Ala. 1968) (finding police to have “unlawfully interfer[ed], through the use of force and intimidation, with the peaceful and lawful assemblies of Negro citizens”); *Cottonreader v. Johnson*, 252 F.Supp. 492, 496, 497 (D. Ala. 1966) (“using unnecessary and excessive force” against African Americans picketing against Jim Crow laws “interfere[d] with ... the right to assemble peacefully ... and to petition for redress of grievances”); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969) (reversing dismissal of suit seeking injunction against police department’s use of force against news photographers), *overruled on other grounds*, *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973).

³ If the University has additional information that informed its determination that the tents posed a significant safety threat, it should disclose that information.

Protests make a vital contribution to any community of ideas, especially a public university. This principle must animate the University's policies. Also necessary are concrete steps to ensure that new policies are actually implemented and practiced. This requires leadership, accountability, and transparency.

A. Policy

1. Adopt policies that support and encourage robust debate and peaceful protest

As a leading public university and home of the Free Speech Movement, it is incumbent upon the University of California to celebrate and nurture a culture of debate and protest. "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180-81 (1972) (internal quotation marks, citation omitted).

The University must adopt free speech policies that support and encourage protest. It would be a mistake if the only policies pertaining to protest are those of the UC Police Department. The University should therefore adopt policies that:

- govern both the police and civilian administration;
- embrace protests as a vital form of debate that is essential to a community of ideas and consistent with the values of a public university;
- recognize that the University's role is not to censor or discourage speech and expressive activity, but to support and encourage students who seek to exercise their right to speak, protest, and assemble;
- treat state and federal constitutional protections for speech and assembly as the floor and not the ceiling for student, faculty, and staff speech rights;
- prohibit intelligence gathering by UCPD or other arms of the University about free speech activity unless there is an articulable criminal predicate for the gathering of information;⁴
- recognize that most protests do not pose any threat to public safety that requires a police response;
- commit to the principle that the University will intervene to terminate students protests only when specific criteria have been met;
- articulate clear criteria, at least as protective as the state and federal constitutions, for the unique and unusual circumstances when the University will intervene to terminate student protests;
- clarify that merely technical violations of University policies, without more, do not warrant University intervention;

⁴ See *White v. Davis*, 13 Cal.3d 757 (1975); Criminal Intelligence Systems: A California Perspective, California Department of Justice, Division of Law Enforcement at 16-17 (September 2003) (available at http://www.aclunc.org/library/documents/criminal_intelligence_systems_a_california_perspective.shtml); San Francisco Police Department General Order 8.10 (available at http://www.aclunc.org/issues/government_surveillance/asset_upload_file832_10599.pdf).

- require reliance on reliable, concrete information in assessing whether a particular protest actually represents a threat warranting University intervention, and adopt protocols that ensure that responses to protests are not shaped by fears about protests that are unsupported by actual facts;
- for those cases that satisfy the specified criteria for intervention,
 - identify a menu of different methods for intervening, including options that do not involve the use of police, such as mediation;
 - commit to using the least intrusive, least forceful means necessary for intervening and require any methods used to be commensurate to the harm at issue;
 - recognize that intervention through the least forceful means necessary may be tedious and time-consuming and that the selection of methods should not be driven exclusively by what will achieve immediate results;
- designate specific decisionmakers who will decide whether a particular protest satisfies the articulated criteria for intervention and who will select the method(s) for intervening, with an emphasis on civilian decisionmaking;
- require, within 3 days of any decision to terminate a protest, the decisionmakers to explain in a written report, that shall be available to the public, the specific criteria and information that led to the decision and the reasons why the method(s) of intervening were selected.

2. Adopt crowd control and use of force policies that embrace the police department's duty to protect and respect the right to protest, to emphasize the minimum use of force, and to provide officers with specific guidance on the types of force that cannot be used

The existing University-wide Police Policies and Administrative Procedures (“UPPAP”) fail to provide sufficient guidance on the use of force and do not address unique free speech or crowd control issues.⁵ While at least some campuses, like UC Berkeley, have adopted both use-of-force and crowd-control policies, these policies too provide insufficient guidance on the use of force and suffer from the more fundamental defect that they fail to emphasize the minimum use of force. In many instances, the policies are drafted to emphasize the range of an officer’s discretion and authority to use force. While officers clearly need to understand their discretion and authority, such policies can be misconstrued as an invitation to use force.⁶ In other instances, the policies articulate standards that are simply wrong.⁷

⁵ This discussion assumes that the University is not considering abolishing, as some critics have called for, the University of California Police Department.

⁶ UC Berkeley’s Crowd Management Policy (December 2000) for example states: “The decision to use force and the force operations that may be applied in response to [crowd control] incidents range from law enforcement presence to deadly force. Peace officers need not use the least intrusive option, but only that force which is reasonable under the totality of the circumstances. UCPD utilizes pain compliance techniques to elicit a compliance response if necessary when making arrests.” Crowd Management Policy at 9. Troublingly, this language conveys to officers that deadly force *can* be used in crowd control situations, that officers need not use the least intrusive measure, and provides *no* guidance about when deadly force should not be used.

⁷ UC Berkeley’s Crowd Management Policy and Berkeley UCPD General Order F-6 authorize the use of “less lethal” impact weapons “to move, separate, or disperse people, or to deny them access to an area or structure.” Crowd Management Policy at 9; Berkeley UCPD General Order F-6 at III-10-a. Impact weapons such as so-called “beanbags” should *never* be used for crowd dispersal or fired indiscriminately at crowds. As the Ninth Circuit has explained, “[a]

Policies should therefore be drafted to include specific prohibitions on when force (including certain types of weapons) *cannot* be used, to emphasize that force (especially certain types of weapons, like batons) should only be used in the unusual circumstances when specified criteria have been satisfied, and to consider the elimination of certain weapons from UCPD's arsenal entirely.

Even the Oakland Police Department has policies on paper that are significantly better than those of the University of California. While the University, given its unique educational mission, should adopt policies that are far more protective than local police departments of students' rights to free speech and to be free from excessive force, the University of California could benefit significantly by looking to the written policies of both the Oakland and San Francisco Police Departments.⁸

University-wide police policies on crowd control and use of force should apply to all campuses and should:

- reflect the principle, consistent with general university-wide policies, that protests are not always a threat, and that one of the duties of the police department, like the University's civilian administration, is to ensure that protesters have the right to exercise their free speech rights;
- articulate clear criteria, at least as protective as the state and federal constitutions, for the unique and unusual circumstances when assemblies may lawfully be dispersed;
- require reliance on the minimal use of force;
- articulate specific protocols to ensure officers will use the minimum force necessary:
 - identify a range of tactics for responding;
 - require officers to engage in strategies for de-escalation and to avoid tactics and conduct that are likely to escalate tensions or confrontation;⁹
 - permit escalation to more forceful tactics when less intrusive alternatives have failed or there is a specific articulable basis to believe that they will not succeed.
- provide officers with specific guidelines about when force should *not* be used, rather than simply articulating general standards of "reasonableness";

beanbag shotgun is 'a twelve-gauge shotgun loaded with ... 'beanbag' round[s],' which consist of "lead shot contained in a cloth sack.' ... [A] bean bag gun is considered a 'less-lethal' weapon, as opposed to a non-lethal weapon, because the bean bags can cause serious injury or death" "if they hit a relatively sensitive area of the body, such as [the] eyes, throat, temple or groin." ... "[T]he euphemism 'beanbag' 'grossly underrates the dangerousness of this projectile,' which 'can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet.'" *Glenn v. Washington County*, _F.3d_, 2011 WL 6760348 * 5 (9th Cir. 2011).

⁸ We include these as an Appendix to this letter.

⁹ Deploying police fully-clad in riot gear when students are assembling peacefully, for example, serves to inflame rather than de-escalate. This principle is acknowledged in UC Berkeley's Crowd Management Policy (December 2000) at 9 ("The commander should consider the message h/she wants to send to the crowd and what appearance is appropriate; wearing helmets with batons out conveys a significantly different message than not having helmets visible and batons holstered."). As discussed below, written policies are the first step. The University must also take affirmative measures to ensure that policy and practice do not diverge.

- those guidelines should distinguish between the types of threats a suspect may present, in particular, the difference between threats to persons and threats to property as well as the difference between different types of threats to property (arson v. chalking);
- those guidelines should make clear that certain types of weapons can only be used when specified criteria are met;
- review all weapons in UCPD's arsenal and consider whether any weapons should be eliminated;
- emphasize that crowds are heterogeneous, and adopt protocols to ensure that officers may not indiscriminately use force on members of a crowd simply because others may present a safety risk;
- ensure that officer identification is plainly visible on the exterior of all uniforms, including riot gear;¹⁰
- grant media and legal observers access to observe police actions from a reasonable distance, even after dispersal orders have been given;
- adopt protocols to ensure that officers adhere to the spirit and letter of cite and release booking requirements.¹¹

3. Adopt policies regarding mutual aid agencies

The incidents at UC Berkeley also show the need to have policies and protocols to ensure that outside mutual aid agencies comply with University policies and that students have mechanisms for redress when they do not. Existing University-wide Police Policies and Administrative Procedures only address mutual aid requests to other UC police departments, not requests to non-UC police departments. Outside law enforcement agencies may not be sufficiently sensitized to the unique concerns of a university setting.

The University should adopt policies that:

- articulate criteria for deciding when mutual aid from an outside law enforcement agency is to be called, with an emphasis on the minimal police intervention necessary;
- designate specific decisionmakers who will decide whether a particular protest satisfies the articulated criteria for calling in mutual aid, with an emphasis on civilian decisionmaking;
- require, within 3 days of any decision to terminate a protest, the decisionmakers to explain in a written report, that shall be available to the public, the specific criteria and information that led to the decision to call in mutual aid;

¹⁰ See Penal Code § 830.10.

¹¹ Penal Code §853.6 requires misdemeanor arrestees to be cited and released unless specified statutory exemptions apply. On November 9, 2011, a number of protesters arrested by UC Berkeley's Police Department were cited but *not* released and, contrary to Penal Code §853.6, held at the Berkeley City jail. The Berkeley Police Department informed the ACLU of Northern California that it had been instructed by UCPD not to release the protesters. That instruction by UCPD was unconstitutional. See *Collins v. Jordan*, 110 F.3d 1363, 1375-76 (9th Cir. 1996) (affirming denial of qualified immunity where mayor ordered misdemeanor arrestees from protest to be detained). After numerous calls to UCPD, the protesters were eventually released.

- adopt protocols to ensure that outside mutual aid agencies are trained in UC crowd control and use of force policies, comply with those policies, and held accountable when they do not;
- adopt protocols to ensure students have channels of redress when outside mutual aid agencies called in by UC violate UC crowd control or use of force policies, including allowing civil and administrative complaints against UC for any such violations.

C. Implementation

The best policies on paper are meaningless if they do not reflect the institution's practice. The Oakland Police Department, with a exemplary crowd control policy, but under federal court monitoring 9 years after an initial 5-year negotiated settlement agreement, provides a cautionary tale. *See Delphine Allen, et al., v. City of Oakland, et al.*, United States District Court, Northern District of California, Case No. C00-4599 TEH. Ensuring that University policies are actually implemented is no small undertaking, and the recommendations below are by no means exclusive.

1. Adopt strategies for ensuring that policies are actually implemented and practiced

The University must commit to implementing pro-active measures that will ensure that all levels of the University – ranging from line police officers to University leadership – understand and actually act consistently with University policies on free speech. Meaningful and on-going training, for *all* University employees, is of course essential, particularly in topics such as the differences between protected speech and unprotected conduct, between non-violent civil disobedience and safety threats.

In addition, evaluations of employees, promotional assessments, and hiring tests for new employees could integrate instruments designed to assess the extent to which employees comprehend the values and directives of University free speech policies. These suggestions are not intended to be exclusive and we urge you to adopt other, additional measures.

2. Adopt benchmarks for measuring progress toward implementation

The University should establish benchmarks for measuring progress toward implementation of its policies.

D. Re-build trust

The University must take affirmative and aggressive steps to re-build trust within the University community. This must, at a minimum but not exclusively, include measures to ensure accountability and transparency, and to gain an understanding of the root causes of the University's response to the November 2011 protests.

1. Adopt protocols to ensure accountability, including independent oversight and review

As discussed above, free speech on campus is not solely a police matter. The University must build in mechanisms to ensure that speech is protected and respected and that when speech-protective policies are violated, those at fault, whether police or civilian, are identified and held accountable. Accountability does not mean solely that individual instances of excessive force are investigated and, if warranted, the individuals who exerted or authorized the force disciplined. Accountability means that, except in true emergencies that pose an immediate threat to public safety, civilian university staff and administration are involved in decisions about whether to take police action against demonstrations that may violate university policies or laws; it also means that whenever speech rights are violated, the University automatically undertakes a systemic inquiry to understand what went wrong at every stage leading up to, for example, the discharge of a weapon on a protester, and how the University's processes can be improved. The point is not simply discipline, but also prevention.

It is essential that these oversight and review mechanisms extend to the civilian portions of the University involved and that they be truly independent. For example, they must be structured to ensure that those who made decisions are not subsequently called upon to review their own decisions. This is necessary to avoid a conflicts of interest or the appearance of impropriety.

Effective civilian review of police misconduct is also a component but we cannot sufficiently emphasize that it is only one component of meaningful accountability. Civilian review of police misconduct should be instituted systemwide. Police review systems generally speaking comes in three varieties: the initial investigation and "appellate" review of police misconduct is performed by the police; the initial investigation is performed by police and the appellate review is civilian; the initial investigation and appellate review are performed by civilians. Campuses like Berkeley have some form of civilian review, but only the weaker kind, not the more effective form of civilian review, with both investigation and review performed by civilians. This latter type of civilian review is necessary to avoid the conflict of interest or appearance of impropriety discussed above. To ensure that civilian review is effective, the University should, among other things:

- institute full civilian review at each campus (not simply civilian review of police review);
- grant the Review Board the power to investigate incidents and issue findings on complaints;
- require police to cooperate with the Review Board's investigation as a condition of employment;
- ensure the Review Board is representative of diverse segments of the University community;
- empower the Review Board not only to investigate individuals complaints but also undertake broader systemic investigations and hold hearings;
- ensure funding for independent staff to investigate;
- require publication of periodic statistics, and institute early warning systems to flag officers who are the subject of repeated complaints;
- establish reasonable time limits for filing a complaint. While ideally information should be gathered when it is fresh, short complaint-filing periods of only 30 days (as is the case at Berkeley, for example) serve no purpose other than to limit the public's ability to file

complaints. In some instances, the individuals with the most salient information about police misconduct may have been arrested and criminal charges may be pending. Such individuals should not have to file a complaint and speak to an investigator while charges are still pending.

2. Adopt protocols to ensure and advocate for greater transparency

The University must also ensure and advocate for greater transparency. The review mechanisms discussed above should be public. While current California law limits the information that may be disclosed about peace officer disciplinary proceedings, *see Copley Press, Inc. v. Superior Court*, 39 Cal.4th 1272 (2006), the University of California should lobby for a legislative change, and no similar limitations exist as to review of civilian portions of the University.

3. Understand the root causes of the University's mishandling of the November 2011 protests

Finally, we recognize that your review is intended to be prospective, but it is essential to understand why the University mishandled the November 2011 protests, in order to make recommendations that are meaningfully designed to avoid a repetition of mistakes, and to re-build trust with the campus community.

* * *

Thank you for soliciting our views. We look forward to the opportunity to provide further input after you release your report.

Sincerely,



Linda Lye
Staff Attorney

cc: Rebecca Silbert (via email: rsilbert@law.berkeley.edu)