March 13, 2012

Via facsimile and United States mail

Chancellor Birgeneau
University of California at Berkeley
200 California Hall # 1500
Berkeley, CA 94720-1500
Fax: 510 643 5499

Dear Chancellor Birgeneau,

The American Civil Liberties Union of Northern California writes in regard to the recently announced selective criminal prosecution of members of the UC Berkeley community over alleged conduct at the November 9, 2011 Occupy Cal protest. Thirty-nine people were arrested that day, but the District Attorney recently decided to proceed with prosecution of four of the 39, and also to charge at least another eight who were not arrested that day. What is extremely troubling about these developments is that the individuals singled out for criminal prosecution – out of the hundreds who were present that day – have been active leaders in student protests, have served as important witnesses in the University's own internal reviews of protest issues, and sought medical treatment at a University health facility for injuries at the hands of police. These criminal prosecutions are nothing short of chilling. They chill students and faculty in the exercise of their free speech rights. They chill potential witnesses from coming forward and assisting the University with this and future investigations of police misconduct. And they chill injured members of the Berkeley community from seeking medical treatment for physical injuries.

These prosecutions raise deeply troubling questions that demand answers. To restore confidence that the University is truly welcoming of free speech and protest on campus and that it played no role in encouraging or facilitating the selective criminal prosecution of activists on campus, the University must commit to full transparency over its handling of the November 9 Occupy Cal protest. We therefore ask that the University respond to our requests for Public Records that we submitted last fall, some of which remain unanswered, and the additional requests contained in this letter.

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Factual background

On November 9, 2011, students engaged in a campuswide day of action to protest student tuition fee increases and other critical issues of the day. Drawing connections to the larger Occupy Wall Street movement, the students erected tents on Sproul Plaza to "Occupy Cal." Two brutal skirmishes with the police followed, with police beating students with batons in the afternoon and later again in the evening. On November 14, 2011, you acknowledged that the "events … are unworthy of us as a university community," and that the best way to "move forward," was to grant amnesty to students from internal university disciplinary proceedings.[1]

Almost forty protesters were arrested that day. The District Attorney has recently decided to prosecute only four of the many protesters whom the police that day contended there was probable cause to believe had violated the law and who were therefore arrested. The District Attorney has also recently decided to prosecute another eight who were not arrested that day, and whom the police apparently did not contend there was probable cause to believe had violated the law.

Troublingly, several of the individuals who have been selected for prosecution, including several of those who were not arrested on November 9, are highly visible leaders and organizers of the student protest movement and/or suffered from injuries from being beaten by the police. Some have cooperated with the University in its own internal review processes, both the Police Review Board, which you tasked with conducting an investigation, and the Edley-Robinson task force, which President Yudof tasked with making systemwide policy recommendations on campus protest issues.

The criminal prosecutions infringe with free speech rights and undermine the integrity of the University's investigations and health care facilities.

Given these circumstances, the selective criminal prosecutions exert an undeniable chilling effect and demand answers about how these individuals were chosen, from among the hundreds present that day, for criminal prosecution.

First, singling out leaders of the protest movement for criminal prosecution undoubtedly chills free speech rights. The California Supreme Court has long made it clear that prosecutors cannot target individuals because of their political views or their membership in controversial organizations: "Just as discrimination on the basis of religion or race is forbidden by the

[1]Chancellor's message regarding last week's events on campus, November 14, 2011, available at http://newscenter.berkeley.edu/2011/11/14/chancellors-message-regarding-last-week%E2%80%99s-events-on-campus/

Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government." *Murgia v. Municipal Court*, 15 Cal.3d 286, 302-03 (1975) (citations omitted). In *Murgia*, the defendants argued that they were being prosecuted for a number of misdemeanor and felony offenses because they were members and supporters of the United Farm Workers. The Court held that, if true, this selective prosecution would violate the state and federal equal-protection clauses, even if a non-discriminatory prosecution would have been perfectly proper. *Id.* at 298-99, 301-02. The court has since made clear that a defendant need not show that the prosecutor intends to punish the defendants for their membership in the group; Rather, the purpose or intent that must be shown is simply intent to single out the group or a member of the group on the basis of that membership for prosecution that would not otherwise have taken place. *Baluyut v. Superior Court*, 12 Cal.4th 826, 835 (1996). In other words, "that the government selected the course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'" *Id.* (citing *Wayte v. United States*, 470 U.S. 598 (1985)).

There are over thirty individuals as to whom the police contended on November 9, 2011 there was probable cause to believe had violated the law, but whom the District Attorney has wisely not allocated resources to prosecuting. That being so, there is evidence that the current prosecution of student leaders would not otherwise have taken place. The criminal prosecution therefore infringes on the free speech rights of those charged, and chills other protesters in the exercise of their rights.

Equally troubling is the selective prosecution of individuals who were not arrested that day but who are notable for their visibility as organizers and protesters, their injuries at the hands of police on November 9, or both. Members of the University community will undoubtedly be chilled if their exercise of free speech rights is the perceived basis for prosecution.

Second, several of the individuals now being charged have spoken about their personal experiences about excessive police force and cooperated with the University's own internal bodies charged with reviewing the November 9 events. Information about "illegal conduct by public officials" lies "at the core of First Amendment protection." *Keyser v. Sacramento City Unified School Dist.*, 265 F.3d 741, 748 (9th Cir. 2001). Witnesses with important information about police misconduct need reassurance that they will not be singled out for prosecution and that any statements made to further an investigation about police misconduct will not be used against them. While the charging decision lies with an entity other than the University, criminal prosecution of witnesses who have been cooperating with the University interferes with the University's ability to carry out its own investigation. This is so because the University cannot conduct meaningful investigations if the very witnesses who are most likely to have information

that would shed light on police misconduct fear adverse consequences, albeit from another entity, for sharing that information. Few students participated in the recent Police Review Board hearings because of lack of confidence in the process. Should the criminal prosecutions proceed, confidence in the Police Review Board or other internal university investigations will only be further eroded.

Third, at least two of the individuals now being charged sought medical treatment for injuries from the police beatings at a university health facility. But because these individuals were not arrested on November 9, 2011, it is unclear how law enforcement identified them. We have learned, however, that reports of their medical visit were provided to UCPD. Further, many others who sought medical treatment for baton injuries incurred on November 9, but who have not yet been charged, were subsequently contacted by UCPD about their injuries. Even if there is no relationship between the provision of health information to UCPD and the ultimate decision to prosecute, many who sought medical treatment were deeply troubled that UCPD -- the alleged assailant -- was aware they had done so. While state law requires health care providers to report to law enforcement information about injuries resulting from "assaultive or abusive conduct," Penal Code. §11160(a)(2), special procedures are necessary where law enforcement is the assailant, so that a statute intended to protect victims of violence is not perversely used against them. Even if no abusive use of information reported to health care providers occurred here, the University must take affirmative steps to restore confidence in its medical center and to ensure that victims are not chilled from seeking medical treatment in the future.

Transparency

The University's choice to respond to the November 9 campus protest with baton-wielding police in riot gear has deeply shaken the community's confidence in the institution. The current criminal prosecutions serve only to exacerbate that dynamic by raising questions of whether the University singled out active leaders and requested that the District Attorney select them for prosecution, and whether the University, rather than taking steps to protect witnesses cooperating with its investigations or patients seeking medical treatment, instead exposed them or otherwise made them vulnerable to criminal prosecution.

In short, the public needs to understand the University's role, if any, in how those currently charged were actually selected for prosecution. To restore public confidence in the University and its handling of campus protest, full transparency is essential.

We therefore renew our Public Records Act request of November 29, 2011, to which three months later we have received only a partial response. And we also request the following records, pursuant to the California Public Records Act, Gov. Code §6250 *et seq.*, and the

California Constitution, Article I, Section 3(b), that would further the public's understanding of these events:

1) All communications between any employee of UC Berkeley, including UCPD, and any member of the Alameda County District Attorney's office regarding the November 9, 2011 protests at UC Berkeley.

2) All communications between the civilian administration of UC Berkeley and UCPD regarding potential criminal liability or criminal prosecution of individuals participating in the November 9, 2011 protests at UC Berkeley.

3) Any policies and procedures regarding the handling of reports of assaultive or abusive conduct received from health care providers pursuant to Penal Code §11160, when the alleged assailant is a law enforcement officer.

Thank you for your prompt attention to this matter.

Sincerely,

Linda Lye
Staff Attorney

cc: Liane Ko, Public Records Coordinator
(lianeko@berkeley.edu) (via electronic mail only)