

Mitchell's Musings 10-5-15: A Tolerable Solution

Daniel J.B. Mitchell

Universities have been trying to reconcile notions of academic freedom with various versions of speech codes, meant essentially to protect students from statements varying from deliberately aggressive and intolerant to so-called “microaggressions,” statements not meant to be intolerant that might nonetheless be offensive to somebody. Often these attempts at non-offensiveness degenerate into ludicrous examples that are widely mocked, particularly in conservative media, but also in mainstream outlets.¹ Closely related are efforts to place “trigger warnings” into course syllabi, warning students that some reading material might be offensive.

Grafted on to this ongoing brouhaha in recent months was an effort by the Regents of the University of California (UC) to deal with complaints of anti-Semitic behavior related to criticisms of Israel, particularly as it is linked to the “BDS” (Boycott, Divest, Sanction) movement. Various student groups at UC campuses and a union representing UC teaching assistants adopted BDS-related resolutions.² Jewish student groups complained of incidents of intimidation ranging from anti-Semitic graffiti to asking a Jewish student who was up for a student government office whether she could be unbiased due to her religion. There was a counter-push to have the Regents adopt the “State Department” definition of anti-Semitism which connects the concept to an excessive concentration on Israel to the exclusion of other nations.³

At one point on an NPR broadcast, UC president Janet Napolitano indicated she favored the definition personally.⁴ The UC Regents – who meet every two months – originally put the issue on their July 2015 agenda but then deferred the matter to their September meeting. Somehow, in the interval between these two meetings, university administrators took up the issue – anti-Semitism – and produced a general resolution against intolerance which did not deal specifically with anti-Semitism and was essentially feel-good Pablum.⁵ Meanwhile, the California state legislature came out with a resolution condemning anti-Semitism (but not using the State Department definition).⁶

¹<http://www.scpr.org/programs/airtalk/2015/06/24/43412/microaggressions-should-they-be-censored-on-colleg/> and <http://www.latimes.com/opinion/editorials/la-ed-microaggression-what-not-to-say-at-uc-20150624-story.html>.

²In this musing, we don't take up the issue of financial divestment from the UC portfolio (including the pension plan). However, the university issued a statement in 2010 setting extremely stringent conditions for divestment from a particular country: http://issuu.com/danieljbmitchell/docs/israel_divestment_2010. It might be noted that calls for BDS as it relates to UC often point to UC's actions regarding South Africa during the era of apartheid. There was financial divestment in that case, in part owing to a deal between then-Governor George Deukmejian and state assembly leader Willie Brown. (Both were *ex officio* UC regents. In addition, the governor – who initially opposed divestment - needed the cooperation of Brown on state budget matters.) But there was never an *academic* boycott of South Africa in that period. There was no regental ban on South African faculty, etc. I can recall visitors from South Africa coming to UCLA; the library continued to subscribe to South African academic journals, etc. Indeed, it would be hard to imagine American academic heart surgeons, for example, ignoring the early transplant work that took place in South Africa starting in the 1960s:

<http://www.nytimes.com/2001/09/03/world/christiaan-barnard-78-surgeon-for-first-heart-transplant-dies.html>.

³<http://www.state.gov/j/drl/rls/fs/2010/122352.htm>.

⁴<http://hereandnow.wbur.org/2015/05/21/janet-napolitano-anti-semitism-definition>.

⁵<http://regents.universityofcalifornia.edu/regmeet/sept15/e4.pdf>.

⁶https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201120120HR35.

At the September 2015 Regents meeting, various Regents condemned the Pablum resolution, essentially for saying nothing and omitting anti-Semitism as a specific topic. The Regents sent the university administration back to the drawing board to come up with something more specific – although it appeared from the discussion that the State Department definition was not what was wanted because of the potential conflict with academic freedom. Regent John Pérez, a former legislative leader, noted in particular that when he asked to speak to Jewish groups on one unnamed UC campus, he was told that he would have to “balance” such a discussion with a discussion with other groups. But he encountered no such balancing requests when he asked to speak with other students.⁷ In any event, no time table was specified for a new resolution to be drawn up. What the Regents will eventually do is uncertain.

Although Jewish groups took the Regents’ action as a victory – since it rejected the Pablum approach and pushed for something more specific to their complaints – the State Department wording was off the table. Even if the Regents had adopted the State Department definition, it was not clear what such an adoption would have accomplished. Any group that made statements that fit the definition could have disputed allegations that it was anti-Semitic. It could simply have argued that the definition was incorrect, whatever the Regents might have thought or said. And no particular penalty was entailed.

So – is there any solution to reconciling the conflict between free speech/academic freedom with voicing a view that might be viewed (or even defined) as anti-Semitic? The problem lies in trying to define a motivation or thought process for a specific behavior or statement. Clearly, physical intimidation, property damage, and the like are illegal and violate various university standards of behavior. But when it comes to pure speech and advocacy, the motivational approach runs into a dead end. It’s hard to prove what someone was really thinking or what really motivated a statement when the individual could deny it.

There is, however, an alternative that avoids assessing motivation and thought. The alternative is to focus on behaviors, not thoughts or motivations. Such an alternative focus won’t solve all problems in this area of controversy, but it will help. The B in BDS stands for a boycott based on national origin – Israeli in this case. And the simple fact is that when it comes to anything to do with employment (hiring, evaluation, selection for a promotion or a particular role, etc.) or admissions to university programs, such a boycott would be illegal. It is banned by federal laws – such as the Civil Rights Act of 1964 – related state-level laws, and university policy. Of course, anyone is free to advocate repealing or changing such laws and policy. But absent such repeal or change, the laws and policy are what they are.

It really doesn’t matter what nationality is the target, so trying to prove an anti-Semitic motivation is not involved in the behavioral approach. A boycott related to employment or admissions would be illegal whether it involved the Israeli-Palestinian conflict, or Japanese whaling practices, or China’s policy toward Tibet, or Russia’s policy toward Ukraine, or Turkish denial of the Armenian genocide, or women’s

⁷You can hear excerpts from the Regents’ session at <https://www.youtube.com/watch?v=WUC07I-CikM>. It might be noted that the Regents themselves have engaged in such “balancing.” A student regent is selected each year for a one-year term. Usually, recommendations as to who would be the student regent come from student government. In one year, the name chosen was a Muslim woman who favored BDS: <https://www.youtube.com/watch?v=3LxXT8ocax4>. The next year, the regents somehow selected – among all possible candidates – a pro-Israel Jewish student: <https://www.youtube.com/watch?v=5I-e3rRDZxE>. The balancing approach seems to exist at the campus level, too. For example, UCLA has a Center for Near East Studies which has elicited complaints of being anti-Israel: <http://www.international.ucla.edu/cnes/>. But UCLA also has a Nazarian Center for Israel Studies which goes in the opposite direction: <http://www.international.ucla.edu/israel/home>.

rights in Saudi Arabia. If UC or any other university were to engage in a boycott aimed at Israelis, Japanese, Chinese, Turks, or Saudis, it could be sued. If agents of UC or any other university who have major roles in employment or admissions decisions were to advocate such boycotts (say, deans, department chairs, heads of research units, etc.), they could expose their university employer to damages.

While faculty have a right as individuals to espouse whatever causes they like, there is no right to be selected for key managerial and administrative roles. Anyone appointed to such roles is expected to carry out university policy and legal duties appropriately. Universities as employers can pick managers and administrators who are most likely to carry out university policy appropriately (and to avoid actions and statements that have the potential to expose their employer to legal liability). Indeed, in a more general context, employers typically screen potential candidates for managerial and administrative roles through interviews, examination of credentials and past employment records, etc., in the hopes of finding individuals who will likely best do the expected job. Someone who publically opposes university policy and federal and state legal requirements would not seem to be a suitable candidate.

What about student groups that favor boycotts based on national origin? The problem here is that such groups are seen externally as having an official status within the university. It might be best to make it clear that such groups are independent entities and that they speak and act for themselves only. As such, the Regents might want to reconsider policies that mandate student fees to support such student groups or provide some kind of readily available opt-out arrangements for those students who don't support the political positions of these groups. Absent such distancing, the public perceptions that there is an official status and that student groups do speak for the university have some grounding in fact.

And what about labor unions such as the TA union mentioned above? Under California labor law as it applies to the public sector, and to higher education in particular, UC must recognize and bargain in good faith with unions that attain a majority vote in a bargaining unit.⁸ Typically, however, union contracts include language more or less taken from federal and state laws that forbid discrimination including national origin discrimination. Such clauses can be made more specific to representation of members of the bargaining unit who fall into the national-origin category that the union wants to boycott. Unions advocating national origin boycotts should at a minimum have such non-discrimination clauses in their contracts and employers can insist on insertion of such provisions in the contract. There are also various opt-out arrangements in place under federal and state law for those in the bargaining unit who do not support the political positions of the union.

In short, a refocus of the debate away from thought and motivation (anti-Semitism) and toward behavior (advocacy of boycotts and the legal problems that such advocacy entails) would be a better outcome than continued debate along the lines of what has so far occurred at the UC Regents. Clearly, however, all controversy will not vanish if the behavioral approach is adopted. Nonetheless, UC is the largest public university system in the U.S. If it moves toward a focus on boycott behavior, other universities – public and private - are likely to follow.

⁸The relevant statute is similar to federal labor law. See <http://www.perb.ca.gov/laws/heera.aspx>.