UNIVERSITY of VIRGINIA | Office of University Counsel

September 29, 2020

James B. Murray, Jr.
Rector, Board of Visitors
NW Wing, The Rotunda
Charlottesville, VA 22904-4222

Dear Mr. Murray,

Over the past several weeks, a number of alumni have raised concerns about signs that a lawn resident has posted on her door criticizing the University. The student's speech has generated a great deal of controversy and calls for the University to remove the offensive signs. I write today to clarify the law that governs this issue, which makes clear that the lawn resident's speech is protected by the First Amendment and cannot be forcibly removed.

In a series of cases, the United States Supreme Court has repeatedly held that the First Amendment protects speech, even if offensive, vulgar, or objectionable to some listeners. Speech can be restrained in only limited circumstances -- when it is obscene, directly incites violence or is threatening to an identifiable person or group. Absent these circumstances, state agencies like the University cannot order speech removed.

The use of a profane word does not remove speech from the protection of the First Amendment. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court considered the appeal of a disorderly conduct conviction of a man who wore a jacket labeled with the words "Fuck the Draft" to a courthouse. The Court concluded that the First Amendment forbade application of the criminal statute to Cohen's jacket and stated squarely that the profanity of the slogan did not make it any less protected. Observing that "one man's vulgarity is another man's lyric," the Court said that the slogan at issue was not within some narrower category of unprotected speech, such as true threats, pornographic obscenity, or incitement. The Court rejected the argument that other people in the courthouse were subjected to this speech involuntarily, reasoning that a courthouse is a public space, and anyone offended "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." Thus, no special category applied, and the speech was immune from regulation.

The Court reached a similar result in *Texas v. Johnson*, 491 U.S. 397 (1989) when it struck down the criminal conviction of a man who burned the American flag at the 1984 Republican Convention. The Court found that flag burning is a form of expression protected by the First Amendment. It held that the act of flag burning could not be restrained by the state as a means to maintain order despite the fact that some who witnessed it would be offended. Writing for the Court, Justice Brennan indicated "if 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." Justice Scalia joined Justice Brennan in this result, demonstrating that adherence to the broad protection of the First Amendment transcends

Madison Hall | PO Box 400225 | Charlottesville, VA 22904-0225
P 434.924.3586 | F 434.982-3070 | universitycounsel.virginia.edu

ideological lines. While he did not write an opinion in *Johnson*, Justice Scalia said in a later interview "if I were king, I would not allow people to go around burning the American flag. However, we have a First Amendment, which says that the right of free speech shall not be abridged — and it is addressed in particular to speech critical of the government. That was the main kind of speech that tyrants would seek to suppress."

The broad protection of the First Amendment does not yield to considerations of aesthetics or decorum. As the Court observed in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) "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.'" The University is entitled to remove speech in impermissible places—such as graffiti, vandalism of other residents' doors, or signs posted in prohibited spaces—on content-neutral, time, place, and manner grounds. Regulation of speech for aesthetic purposes will be assessed for whether restrictions are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). If the aesthetic reason is grounded in the content of the speech, this application of the regulation is content-based and presumptively unconstitutional. See *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

The speech posted by our student on her lawn room door is akin to that protected in *Cohen, Johnson* and the other cases discussed above. While they may be profane and offensive, her words do not constitute a true threat, pornographic obscenity, incitement, defamation, or speech from any other unprotected category. The lawn is a public place and those who view these signs are not involuntarily submitted to their offensive character. While the speech may clash with the beauty of the lawn and violate an objective sense of decorum, its regulation would be content-based and unconstitutional. As a result, I believe that the lawn resident's speech is clearly protected by the First Amendment and cannot be restrained by the University.

Beyond the First Amendment, I do not believe the speech violates University policy or any provision of the housing contract signed by lawn residents. While Standard of Conduct ("SOC") 4 prohibits the intentional disruption of teaching, research, administration, disciplinary procedures or other university activities, the lawn room door does not disrupt a specific University activity, as it is omnipresent and visible to all passersby. SOC 8 prohibits disorderly conduct on University-owned property, though protected speech is specifically excluded from this provision. SOC 6 prohibits the violation of university policies concerning residence. The "housing addendum" signed by lawn residents includes a provision limiting the size of signs that may be posted in "living areas" of the lawn, including doors. However, the University has not enforced that size restriction and has historically allowed students to post all manner of signs on lawn room doors. An attempt to enforce the size limitation in the housing addendum with respect to current residents would constitute an impermissible content-based restriction, as it would be motivated by our desire to restrict this offensive speech. As indicated above, the motive for any time, place and manner restriction on speech will be assessed in evaluating consistency with the First Amendment. Given our historically permissive approach to signs on the lawn, application of the size limitation to this offensive speech would be unconstitutional.

Looking ahead, we could choose to enact a new policy banning all signs on lawn room doors. Enforcement of this new policy would be a permissible time, place, and manner restriction

on speech and clearly content neutral if applied prospectively. It would be justified as a protection of health and safety, both with respect to fire protection and the desire to prevent conflict stemming from controversial posters like those at issue here. A new policy banning signs would also maintain the historic character of the Lawn, consistent with its status as a UNESCO World Heritage Site. Students would have ample other opportunities to exercise free speech even if they could not post signs on their doors. Of course, a blanket rule against all posters would be overinclusive, as it would remove the ability of any lawn resident to use his or her prominent residence as a forum to promote events, highlight activities, or show support for particular perspectives or ideas.

Even if we did enact a policy that bans posters on the lawn, I do not believe the policy applied to this particular sign would pass constitutional muster. A reviewing court would look to the motive for the policy and likely conclude that this particular offensive sign was at least one substantial reason for the new policy. In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir.1983), The University of Minnesota's governing board restricted funding of a student newspaper that prompted outrage from alumni and donors by running an offensive article critical of the University. The court found that absent the newspaper column and subsequent outrage, the board resolution altering the funding of student newspapers would not have been passed. The court enjoined the university from going forward with the new policy, finding that the board resolution that impacted funding of student newspaper "would not have occurred absent the public hue and cry that the *Daily's* offensive contents provoked."

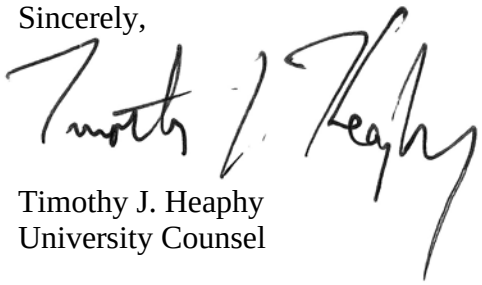
I have considered the feedback we have received from various alumni about possible legal remedies we might use to restrict the speech at issue. I do not believe anything posted by the lawn resident constitutes defamation, as the speech is not directed against an identifiable person. "To prevail in a defamation cause of action, a plaintiff must establish that the alleged defamatory statements published were 'of or concerning him.'" *Dean v. Dearing*, 263 Va. 485, 487 (2002). In *Dean*, a member of the Town of Elkton police force filed a defamation suit against Dearing, the mayor of Elkton, who had made several statements alleging corruption, dishonesty, and felonious conduct by the Elkton police department. The Supreme Court of Virginia rejected Dean's claim, holding that "an allegedly defamatory statement which imputes misconduct generally to a governmental group constitutes libel of government, for which there is no cause of action in American jurisprudence." As in *Dean*, the lawn resident's speech generally disparages police and is therefore not defamatory.

Similarly, I do not believe that the posting of signs by the resident constitutes "defacement" in violation of Va. Code § 18.2-138. That statute prohibits "damaging or defacing public buildings or property." The lawn resident has not damaged or defaced the property of the University. She has rather affixed paper signs to her lawn room door, signs which can presumably be removed without damaging University property. Moreover, any attempt to extend this statute to cover offensive signage would be a content-based selective application and hence unenforceable. Lawn residents frequently affix signs of various sizes to their door without consequence. An attempt to classify this sign as one which "defaces" state property would rest solely on its offensive nature, which implicates the First Amendment.

This authority informs my view that we are unable to order the removal of the lawn resident's signs, however offensive they may be to some who view them. The First Amendment's protection is a bedrock principle of American law and applies with particular relevance in a university community. In pursuing our academic mission, we facilitate hard conversations between people who disagree, sometimes strongly. We encourage critical thinking and honest assessment of history, including our own. We strive to create a learning environment in which diverse perspectives are expressed and real dialogue occurs. Tolerance for dissent is a hallmark of the American university, consistent with our aspiration to be both great and good.

Undoubtedly, this analysis will be unsatisfying to many who have urged us to take action and order the offensive signs removed. While we understand that desire, we must remain faithful to the clearly established protection of speech enshrined in our Constitution and repeatedly recognized by the Supreme Court. While this experience may lead to new policies that restrict the use of lawn room doors as a forum for speech, those policies will apply only to future lawn residents. Faithful adherence to the principle of freedom of speech is particularly important when it is difficult. In this case, our commitment to that important value overcomes our desire to limit criticism of the University, however profane it may be.

Sincerely,



Timothy J. Heaphy
University Counsel