

# Daily Journal

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MONDAY, JULY 6, 2015

PERSPECTIVE

## Microaggressions and the First Amendment

By Arthur Willner

Imagine my surprise to find, several days ago, that some of the most basic themes and values I was taught over 50 years ago in elementary school civics classes (not to mention by my parents) are now regarded by the University of California as racist microaggressions that must be identified and purged from classroom instruction. A “microaggression” is said to be a form of unintended discrimination through the casual use of seemingly benign language that nonetheless causes hurt to listeners who happen to be members of marginalized groups.

The issues involving the UC have received widespread attention and in most cases disbelief throughout the media, including in such typically left-leaning newspapers as the L.A. Times and Denver Post. Much of the focus, however, has been directed to the validity of the substance of the microaggressions. But there is very real danger that the UC’s actions present to the First Amendment and classroom academic freedom.

The issue arose in the context of Faculty Leadership Seminars organized by the UC Office of the President, the overall purpose of which was to “support faculty diversity and enhance department and campus climate toward inclusive excellence.” The seminars’ goals included helping faculty leaders to “get a better understanding of” and “recognizing and interrupting/addressing microaggressions when they occur.”

The seminars included a PowerPoint presentation titled “Tool: Recognizing Microaggressions and the Messages They Send,” setting forth the many examples of microaggressions that the UC believes requires avoidance, such as: “Where are you from or where were you born,” which we are told suggests to the listener that he is not a true American; or “America is a melting pot,” which is purportedly an instruction to assimilate into the dominant culture; or “America is the land of opportunity,” which insultingly suggests that there is an even playing field for success; or “I believe the most qualified person should get the job,” which is

said to send the message that people of color are given unfair benefits because of their race.

The existence and content of these seminars, which were held during the 2014/2015 academic year at nine of the 10 UC campuses, flew below the radar until a professor tipped off a website known as The College Fix. Once the news spread, the UC administration launched into damage control with a university spokeswoman reaffirming UC’s commitment to academic freedom, and denying that the university was censoring classroom discussions or prohibiting faculty from making the statements listed as microaggressions. She pointed out that deans and department heads were invited, but not required, to attend the seminars, which were simply offered “to make people aware of how their words or actions may be interpreted when used in certain contexts.”

It is difficult to reconcile the UC’s “nothing to see here” response with the elaborate PowerPoint, which contained an extensive list of purported microaggressions expressly correlated to particular oppressed groups and the coded “message” that each such comment sends. Thus, on the one hand, the UC espouses support of academic freedom and free and open classroom discussion, while at the same time training its faculty leaders on the language that must be avoided. When taken in context with the UC Academic Personnel Manual, which repeatedly emphasizes the goal of advancing diversity and methodologies for instructing underrepresented groups, one wonders what the average UC instructor is to make of all this.

Some instructors will presumably continue teaching as they always have, while others will self-censor in order to avoid offending students who have been taught to be on the lookout for any offense. Instructors will inevitably ask themselves: What are the chances that I will get into trouble if a student takes offense over a purported microaggression that is uttered during the free exchange of ideas during a classroom discussion? The answer, regrettably, is: far greater than you might think.

Once represented a tenured instruc-



The New York Times

Students on the UCLA campus in Los Angeles.

tor of emergency medical technology who has been employed for over 20 years. The class prepares students for the national exam to become EMTs. To illustrate points, the instructor uses “real life” examples of emergency calls he has handled. He relates the offensive and sometimes racially charged language he has heard used by patients, family members and bystanders at a given incident. He does not believe that sugarcoating his description of an emergency call accurately or effectively conveys the scene. Upon overhearing the language he was using when accurately recounting the emergency calls, a department head determined it to be shocking and culturally insensitive. No student in the class had complained, yet he was given a negative evaluation and disciplined.

It has been settled law for decades that First Amendment protections extend to public colleges and protect a teacher’s classroom speech. Academic freedom “is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In 2013, the 9th U.S. Circuit Court of Appeals held in *Demers v. Austin*, 729 F.3d 1011, that a public college teacher’s academic speech is protected by the First Amendment using the analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), i.e., (1) whether the speech involved matters of public concern, and (2) whether the employee’s interest in speaking outweighed the government’s interest in regulating it.

My client ultimately won his Section 1983 claim, with the court ruling as a matter of law that his speech indisputably involved matters of public concern

since it related directly to the training of emergency medical personnel, and that his interest in training future EMTs to perform safely and effectively when responding to emergency calls in the community overrides the school’s interest in regulating his speech. It is said in situations such as these, “the process is the punishment.” Although my client was fortunate to have the determination and resources to vindicate himself, he should not have been placed in that position in the first place. Yet the department head, out of concern that one day some as-yet unknown student might take offense, chose instead to suppress my client’s protected speech.

UC instructors are faced with conflicting signals from an administration that proclaims its commitment to academic freedom while simultaneously trying, through seminars about microaggressions, to placate students who are convinced that they are entitled to a classroom experience free of discomfort or offense. At best, the faculty will be left confused over whether or where to draw a line in classroom discussions. At worst, the instructor will decide it is not worth the trouble and will simply self-censor. Ultimately, the students will pay the price through the lectures they will never hear, the ideas that will never be exchanged, and an overall less vibrant classroom experience. The UC should use this embarrassing episode as an opportunity to publicly and unequivocally recommitting itself to free expression in the classroom.

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