

Dean Schapiro and University Leadership,

We write in response to a demand letter from the Student Bar Association President and President-elect calling for Professor Tom Smith's termination. We acknowledge the well-meant thoughts of our colleagues, but respectfully and vehemently disagree with their conclusions. We urge you to consider the following perspectives, as the SBA's opinions and demands do not represent those of the entire law student population.

First, terminating a professor for what he posts on a personal blog has profound freedom of speech implications. The undeniable chilling effect on faculty and students alike would be reminiscent of autocratic regimes that feign free speech and punish dissent. Ideological dissent has always been part of American academic freedom, and our Constitutional principles protect the offensive as well as the acceptable. Dismissing Professor Smith sends a clear message to faculty and students – get in line, don't speak your mind, and if *anyone* is ever offended by *anything* you say, regardless of your intent or the plain meaning of your words, you're gone. This cannot be right.

Regarding Professor Smith's blog post, some have said that "the impact outweighs the intent." We believe that is an outrageous standard to impart to legal scholars and authors, especially when the reader's subjective interpretation deviates so far from words' plain meaning. We do not suggest that emotional injury cannot be a byproduct of free speech – in fact, it almost always is. But the right to speak freely on contentious issues far outweighs the reader's desire not to be offended. If the test for censure and censorship becomes what the *mere effect is on the reader*, then every person who uses the English language takes their reader as they find them. The USD School of Law would be open to innumerable formal complaints from any student injured by faculty who disagree with their viewpoints. The absurdity of such a proposition is self-evident, especially in a culturally pluralistic society like the United States, where the probability that a professor can speak freely on controversial issues of international concern without risking offense to any student is virtually zero. There is not, and should not be, a thin-skulled reader rule – especially when communications on a personal blog, far from the classroom, are discoverable only after considerable effort and searching on behalf of the reader.

Second, for a University that declares to "uphold the highest standards of intellectual inquiry and academic freedom,"¹ the administration's knee-jerk reaction creates serious due process concerns. We hypothesize that the administration often unknowingly hears only the most vociferous and outspoken student groups at the expense of the quiet and deliberative. However, just because a movement is loud and grows louder does *not* mean that it is right.² A poor performing live band does not sound better when the volume is turned up – it's still bad music. The proponents of termination rely heavily on emotional arguments that incite followership based purely on subjective injury. And as noted below, when viewed objectively and rationally, their reasoning beyond the single injury issue is largely conjectural and illogical.

It is our opinion that in the face of intense social pressure, the Dean prematurely authored an email to law students and faculty wherein he may have unconsciously overpromised APALSA

¹ Univ. of San Diego School of Law, *Mission and Core Values*, <https://catalogs.sandiego.edu/graduate/about-university-san-diego/mission-core-values/>.

² See, e.g., Jan. 6, 2021 Capitol Riots.

and the SBA to the detriment of perceived fairness and free speech.³ Professor Smith was effectively pronounced guilty, and then told that an investigation would begin to determine his guilt. The conclusory nature of Dean Schapiro's email was reflected in the SBA and APALSA's first demand titled "Investigation + Termination of Professor Thomas Smith," indicating the latter is independent of the former's findings.⁴ This is ironically reminiscent of censorship under the autocratic regime that Professor Smith criticized. While we respect the administration's motives for swift justice, we respectfully suggest that they were perhaps *too* swift and more aggressive than necessary at the time, perhaps emboldening the resolve of those forceful voices now calling for dismissal.⁵

Third, we believe the proponent's claim that the blog post was racially disparaging towards API minorities is meritless. No reasonable reader could interpret the blog post as suggested by those calling for Professor Smith's termination. The subjects of the sentence that Professor Smith refers to ("you"), as an "idiot who is swallowing a whole lot of Chinese cock swaddle," are those who believe that the Chinese regime had nothing to do with COVID-19. He is insulting those who blindly dismiss the Wuhan lab theory, not a race. Attacking ideas and challenging beliefs is precisely what law professors do on their blogs. It is also what lawyers do in the courtroom. As for the term "Chinese cock swaddle," Professor Smith's March 12 correction, the context of the WSJ article⁶, and the Chinese Communist Party's documented history of impeding international efforts demonstrate he was referring to the Chinese government, not the Chinese race.⁷

In the absence of racially discriminatory intent against API persons as subjects or objects of the sentence, proponents then argue, without evidence, that Professor Smith's statements against the Chinese government promote racial discrimination by furthering an existing false narrative about COVID-19's origins.

Nonetheless, it is an undisputed fact that SARS-CoV-2 originated in Wuhan, China. Whether the virus originated at a local wet market or in the Wuhan Center for Virology, however, is a widely debated topic still under investigation.⁸ The SBA (and the Dean) concede that the exact origins of COVID-19 are still subject to widespread speculation. Thus, the necessary axiom of the

³ *Academic Freedom Alliance Stands with USD Law Professor in China Controversy*, Mar. 22, 2021, available at <https://academicfreedom.org/academic-freedom-alliance-stands-with-usd-law-professor-in-china-controversy>.

⁴ USD APALSA, Instagram, posted March 19, 2021, <https://www.instagram.com/p/CMnJuEfHtbG/>.

⁵ William A. Jacobson, *U. San Diego Law Prof. Thomas Smith Harshly Criticized Chinese Gov't, Now Faces False Claims Of Ethnic Bias (Update)*, Mar., 20, 2021, <https://legalinsurrection.com/2021/03/u-san-diego-law-prof-thomas-smith-harshly-criticized-chinese-govt-now-faces-false-claims-of-ethnic-bias/>.

⁶ The article's title references "China," the quote refers to the Chinese government four times ("China's full cooperation," "China's manhandling of the delegation," "China's Covid rigor," and "China was seeking"), Tom Smith, *Wuhan Lab Theory A Dark Cloud on China - WSJ*, THE RIGHT COAST Mar. 10, 2021, <https://rightcoast.typepad.com/rightcoast/2021/03/wuhan-lab-theory-a-dark-cloud-on-china-wsj.html>.

⁷ Helen Regan, *WHO Team Blocked from Entering China to study origins of coronavirus*, CNN, Jan. 6, 2021, <https://www.cnn.com/2021/01/05/china/china-blocks-who-team-coronavirus-intl-hnk/index.html>; *Covid: WHO team Investigating Virus Origins Denied Entry into China*, BBC NEWS, Jan. 6, 2021, <https://www.bbc.com/news/world-asia-china-55555466>; *On the Ground in Wuhuan, Signs of China Stalling Probe of Coronavirus Origins*, Wall Street Journal, May 12, 2020, <https://www.wsj.com/articles/china-stalls-global-search-for-coronavirus-origins-wuhan-markets-investigation-11589300842>.

⁸ Madeline Hoeckli, *Global Group of Scientists Calls For Fresh Investigation Into Origins of SARS-CoV2 Virus*, Mar. 5, 2021, <https://healthpolicy-watch.news/china-defends-investigation-into-coronavirus-origin-amid-calls-for-a-renewed-global-probe/>.

proponent's claim that COVID-19 did *not* originate in a Wuhan lab has no more merit than Professor Smith's conclusory claim that it did.

Professor Smith conveyed his opinion on an ongoing issue – that the Chinese government had something to do with it. Whether some students take offense to this opinion is irrelevant as to whether he has the right to share it. Deliberately misinterpreting Professor Smith's words, belligerently connecting him to the 4,000 violent crimes committed against Asian Americans, and then publicly demanding his firing are *not* commendable and fail to make our campus more inclusive. Contrary to the claim that he furthers an injurious narrative, the SBA provides not a single shred of evidence suggesting that his blog causes an increase in racial violence or discrimination.

Let us be clear: we do not deny the increase in violence against Asian populations since the beginning of COVID-19. While the evidence has yet to prove whether racially motivated crimes against Asian Americans are growing faster than violent crime generally, we recognize the unjust, immoral atrocities committed against Asian minorities, noted by the SBA, APALSA, and others, and we sympathize with those grieving populations. Nonetheless, Tom Smith did not disparage or discriminate against API minorities; he did not encourage or incite violence against API ethnic groups. He stated an opinion about the credibility and veracity of an autocratic, authoritarian, communist regime known to bend and even hide the truth when necessary to save face. And more importantly: he criticized *the idea* that you can take what *that regime* says at face value. That is not racist; that is an opinion protected under academic freedom and the First Amendment.

Finally, we acknowledge that the use of a very odd term, “cock swaddle,” may have been a poor choice of words given the way Urban Dictionary defines that term. Despite the historical inaccuracies of today's vernacular, the term has been understood to mean: “Baloney,” “Bull----,” “Codswallop,” “Poppycock,” “Crock,” “Twaddle,” or “Nonsense.” Regardless, the use of this term as the object of the sentence in which it appears, is clearly intended to insult the Chinese Communist Party and the holder of positive ideas about the Chinese Communist Party. Those calling for Professor Smith's removal overtax the elasticity of reason to conclude that his post has a racially discriminatory effect.

USD Law's leadership cannot allow its student body to manufacture outrage from whole cloth, weaponize recent attacks on a specific marginalized group (which are committed by all races for various reasons), and cancel a professor that holds opinions that they find offensive – all in the name of creating “Changemakers.”⁹ In sum, terminating Professor Smith would be a “shameful and performative”¹⁰ injustice that damages the “integrity of our institution”¹¹ and sets a remarkably dangerous precedent for free expression for the University of San Diego School of Law.

Respectfully submitted for your consideration,

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⁹ SBA's Demand Letter, Mar. 19, 2021.

¹⁰ *Id.*

¹¹ *Id.*

¹² The opinions contained herein are expressed in personal capacities and as officers of the USD student chapter of the Federalist Society. They in no way reflect the opinions of the authors' employers.