

IN RE EMORY STUDENTS FOR JUSTICE IN PALESTINE

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-16-1

February 10, 2016

Executive Summary

The Emory University Standing Committee for Open Expression (“the Committee”) exists to promote and protect the rights to open expression, dissent and protest among Emory community members. As arbiter of Emory’s Open Expression Policy, the Committee investigated a series of events that allegedly violated the open expression rights of a student organization and its members.

Here are the facts as understood by the Committee: On February 22, 2015, after securing space in front of the Dobbs University Center, Emory Students for Justice in Palestine (ESJP) erected a temporary wall display that expressed political views on the Israeli-Palestinian conflict. In response to the ESJP’s expression, at least two Emory community members vandalized the display on at least two occasions during the succeeding 48 hours.

It appears that the vandals were motivated by political animus. These acts infringed upon the open expression rights of ESJP and its members while hindering legitimate speech and debate among the broader Emory community.

No extenuating circumstances justified this vandalism. While Emory affirms the values of diversity, inclusion and community, these values may not be used to justify the suppression of speech based on its expressive content. The rights of Emory community members to dissent are made clear in the Open Expression Policy: “The University is fundamentally committed to open inquiry, open expression, and the vigorous discussion and debate upon which the advancement of its multifaceted mission depends. Civility and mutual respect are core values in our community, and we ask all members of the Community to weigh these carefully when exercising their fundamental right to open expression.” The vandalism to the ESJP display was a violation of this policy.

The main harm was not to papers and panels, but to Community members’ open expression, dissent, and protest, and the values embodied in Emory’s Open Expression Policy. While the monetary cost of property damage was slight and no one suffered bodily harm, the Committee recommends that responsible authorities within the Emory community consider these incidents with utmost seriousness. We cannot abide these or similar acts, motivated by disagreement over the content of protected speech, which have a chilling effect on the future expression of known victims and beyond.

While this incident came to the Committee’s attention through a formal complaint, disciplinary authorities should inform the Committee when an incident may implicate open expression. Both the victims and accused perpetrators of wrongdoing should be educated on the rights and obligations afforded to all members of the Emory community by the Open Expression Policy. Ultimately, the Emory community should be made more aware of the Open Expression Policy through adequately resourced, university-wide education events and furnished with contact information to reach the Committee for Open Expression.

I. INTRODUCTION

A. The Committee for Open Expression

The Emory University Senate created the Standing Committee for Open Expression (“Committee”) on October 29, 2013, together with a community-wide Respect for Open Expression Policy¹ (“Policy”). This fundamental policy “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.” Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”² The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”³

Thus, the Committee serves as “a working group of [Emory University] community members—faculty, staff, and students—who seek to *promote* and *protect* the rights and responsibilities of community members related to issues and controversies involving speech, debate, open expression, protest, and other related matters.”⁴ The Committee “exists to help support and promote Dissent and Protest.”⁵

B. Emory’s Open Expression Policy and the First Amendment

The First Amendment to the U.S. Constitution states: “Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble” Because Emory is a private institution, the First Amendment does not bind the University of its own force. However, the University has committed itself to First Amendment values by adopting the Policy.

As noted above, the Policy’s introductory language “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.” More explicitly, the Policy states:

Emory University respects the Constitutional rights of free speech and assembly. As such, the only responsibilities outlined in this section that limit the free exercise thereof have been done in a way to ensure maximum open expression and narrowly tailoring exceptions to specific safety or community concerns.⁶

¹ The Policy is available at <http://policies.emory.edu/8.14>. The Policy was published on November 5, 2013. The University Senate approved changes in February 2015; revised versions were published on March 2 and November 18, 2015.

² Policy 8.14.1.

³ Policy 8.14.2.

⁴ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁵ Policy 8.14.5.4.

⁶ Policy 8.14.5.

Not only does the opening language of this paragraph explicitly reference the specific rights of free speech and assembly enumerated in the First Amendment; the second sentence also uses terms found in multiple U.S. Supreme Court opinions related to the First Amendment.⁷ Thus, while the authority to interpret the Policy rests with the Committee,⁸ judicial interpretations of the First Amendment in the context of cases supporting the rights of individuals at *public* universities are persuasive authority as to the Policy’s meaning.

C. Emory’s Affirmative Support for Protest and Dissent

In some ways, the Policy provides broader support for open expression than the First Amendment compels at public universities. The First Amendment protects individuals only against “state action,” meaning the action of a narrow class of individuals, namely those whose conduct is attributable to the government; these include public university employees. Individual students, however, would not violate the First Amendment if they took violent action targeting others’ speech. By contrast, Emory’s Policy also protects individuals against the actions of private parties—it binds all “members of the Community,” including (as in this very case) students.⁹

Moreover, unlike the First Amendment, some provisions of the Policy commit the University to take affirmative steps to encourage protest and dissent. For instance, while some locations are off-limits to protest—such as “[p]rivate offices,”¹⁰ “[c]lassrooms . . . in which classes . . . are being held or are scheduled to be held,”¹¹ and “[h]ospitals”¹²—the Policy provides that “if the focus of the Dissent or Protest includes one of these areas, there is an affirmative support to ensure protests occur in places like the outdoor spaces in front of the buildings or common gathering places close to these locations.”¹³ Similarly, while the First Amendment would allow certain spaces to be available by reservation only, the Policy recognizes “that sometimes impromptu Dissent and Protest” are “pivotal to achieve the principles of this Policy,” and accordingly provides that “[n]ot

⁷ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 423 (1974) (“open expression”); *Al Star v. Preller*, 419 U.S. 956, 956 (1974) (Douglas, J., dissenting) (same); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 375 (1997) (concern that certain restrictions be “narrowly tailored” to compelling governmental interests, which can include safety).

⁸ Policy 8.14.3.2 (“The Committee shall provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it. This advice and counsel includes . . . [r]egular review of this Policy [and] its applicability”); *id.* 8.14.5.1 (“Any member of the Community who is in doubt as to the propriety of planned conduct may seek guidance from the Committee on Open Expression in advance of the Event.”); *id.* 8.14.5.4 (“[T]he Committee for Open Expression should be consulted whenever possible before making a determination that members of the Community are indeed violating the principles of this Policy.”); *id.* 8.14.7.1(f) (same); *id.* 8.14.7.2(b) (same); *id.* 8.14.7.2(c) (“In carrying out [the Dean of Campus Life’s] responsibility for safeguarding the right of open expression, the [Dean] shall obtain the advice and recommendation of the Committee for Open Expression whenever feasible.”).

⁹ Policy 8.14.2.

¹⁰ Policy 8.14.5.6(a).

¹¹ Policy 8.14.5.6(c).

¹² Policy 8.14.5.6(e).

¹³ Policy 8.14.5.6.

having a reservation is not sufficient reason for terminating any Protest unless the impromptu Protest unreasonably interferes with prior scheduled Meetings, Events, or essential operations of the University.”¹⁴

II. THE COMPLAINT FROM EMORY STUDENTS FOR JUSTICE IN PALESTINE

A. The CFOE’s Role

The Committee “has responsibility for all issues and controversies involving various forms of expression, including but not limited to speech, debate, Protest, Dissent, and other related matters.”¹⁵ The Committee has authority to “provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it. This advice and counsel includes . . . [i]nvestigating alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters, between all members of the Community.”¹⁶ The Committee “may submit recommendations to the University Senate, the President, the [Dean of Campus Life], or any other appropriate person or governing body for review.”¹⁷ (Emory community members who believe their open expression rights have been infringed are encouraged to contact the Committee for Open Expression at openexpression@emory.edu.¹⁸)

Pursuant to this grant of authority, we have before us a complaint by the organization Emory Students for Justice in Palestine (ESJP). The facts, as alleged by ESJP, have been cross-checked where possible with reports in the *Emory Wheel*, the police report, and other sources.¹⁹

B. Description of the Incidents

On Sunday, February 22, 2015, various student members of ESJP, including its then-interim president Jonathan Hussung, built an 8 ft. × 8 ft. wall made of panels held inside a wooden frame. The wall was built and placed on the Dobbs University Center Terraces, in a location that ESJP had reserved through the ordinary Student Life channels. The wall stated, in large letters, “ISRAEL IS AN APARTHIED [sic] STATE” and “FREE PALESTINE”; posters, with other printed text on similar subject matter, including contact information for the group and information about the group’s

¹⁴ Policy 8.14.5.7; see also Policy 8.14.5.3 (“It is the policy of the University to protect voluntary assembly and to make its facilities available for assembly. . . . [I]t is the responsibility of administrators of space on campus to ensure policies and procedures promote open expression.”).

¹⁵ Policy 8.14.3.1.

¹⁶ Policy 8.14.3.2. Policy 8.14.2 defines what individuals are “considered members of the Community.” As discussed below, we assume for purposes of this opinion that this incident involves Community members.

¹⁷ Policy 8.14.4.4.

¹⁸ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

¹⁹ However, our report of the facts should not be interpreted as factual findings for purposes of any possible future disciplinary hearings or for any other purpose. In the event that we are mistaken about any of the facts, our conclusions here should be interpreted as being statements about how the Policy would apply if our view of the facts were correct.

upcoming events, were also attached to the wall.²⁰ The persons left the area when they finished erecting the wall around 7 p.m. When they returned after 10:30 p.m., the panels had been ripped out of the wall, leaving only the frame.²¹

On Monday, various ESJP members stapled pieces of paper with printed messages to the remaining wall frame.²² The papers explained what had happened the previous day, condemned the incident, and repeated the group's messages about Israel-Palestine issues. These papers were put up by various ESJP members at various times throughout the morning. Around noon, Hussung returned to the DUC Terraces area near the wall. There, Hussung saw a person near the wall shout "Fuck you and your fucking wall" and tear down some of the attached papers.²³ Hussung approached the person and told him to stop. The person started cursing at Hussung and walked away. Hussung followed him, filming him with his cellphone camera and asking him his name. The person shouted "Eat shit, motherfucker" at Hussung. He also shouted "Am Yisrael chai" ("The nation of Israel lives").

A bystander recovered the original wall panels and posters, which had been discarded, and returned them to ESJP. The panels were unusable; the posters were reusable, though some had suffered damage. After ESJP members obtained new panels and reassembled the wall, it remained up—in similar form to the original wall, together with the remaining papers that had been stapled to the frame on Monday—through the weekend.²⁴

C. Aftermath of the Incidents

ESJP members timely contacted the Emory Police Department and other bodies. It is the understanding of this Committee that one student took responsibility for the Sunday incident and that the person involved in the Monday incident was identified as a student, that the first student participated in a restorative justice proceeding while the second student became subject to a Conduct Code proceeding, and that both of those proceedings have now concluded. The perpetrators of the alleged acts were thus Community members within the meaning of the Policy. This opinion assumes that both incidents were motivated by the content of ESJP's expression—probably a reasonable enough assumption at least as to the Monday incident, given the words used by that incident's alleged perpetrator.

²⁰ See Exhibit A (showing the display before the first vandalism incident).

²¹ See Exhibit B (showing the display after the first vandalism incident). Hussung told the Emory Police Department that someone had seen the display intact at about 9:30 p.m.

²² See Exhibit C (showing the display before the second vandalism incident).

²³ See Exhibit D (showing the display after the second vandalism incident).

²⁴ See Lydia O'Neal, Student Israeli Apartheid Wall Torn Down, EPD Investigates, The Emory Wheel, Feb. 24, 2015, <http://emorywheel.com/esjp-wall-torn-down-epd-investigates/> (showing the reconstructed wall).

III. VIOLATIONS OF THE OPEN EXPRESSION POLICY

A. ESJP's Display Was an Exercise of Its Open Expression Rights

These allegations describe numerous violations of the letter and spirit of Emory's Respect for Open Expression Policy and other Emory policies.

By erecting the wall, ESJP exercised its right to open expression by engaging in speech and debate. The destruction of the wall on Sunday and the removal of the papers on Monday hindered that open expression and stifled that vigorous debate.

Moreover, as noted above, all "members of the Community" are bound by the Policy; given the facts presented, it should thus be apparent that these perpetrators violated the Policy and ESJP's and its members' rights under the Policy.

B. Direct Violations of the Open Expression Policy

Having made these general observations, we now examine specific provisions of the Policy that are directly applicable here.

1. Defacing Displays

The Policy specifically provides, in the context of "nonpersonal Protests such as . . . signs[] and displays," that "a member of the Community who defaces the open expression of others will be held in violation of this policy."²⁵

2. Unreasonably Infringing on Open Expression Rights of Others

"Community members, in the course of their actions, violate this Policy if they . . . [u]nreasonably infringe on the rights of other Community members to engage in open expression, Protest, and Dissent."²⁶ Forcible removal or destruction of speech is an inherently unreasonable infringement of the speaker's right to open expression, unless it fits within one of the Policy's narrow exceptions—which this speech does not. (Possible exceptions are discussed below. Even if speech falls within one of the Policy's exceptions, that does not automatically make it reasonable for a third party, rather than Emory University itself, to take action against that speech.)

3. Substantially Impeding Open Expression Rights of Others

Community members violate the Policy if they "[c]reate undue hardship that substantially impedes a Community member's right to open expression."²⁷ The actions alleged here created an undue hardship for ESJP and its members, in that ESJP and its

²⁵ Policy 8.14.5.8.

²⁶ Policy 8.14.5.4 & .4(a).

²⁷ Policy 8.14.5.4(c).

members were put to the choice of either abandoning their speech or purchasing new materials and spending their time rebuilding the wall.

Moreover, while vigorous debate and counter-speech do not impede one's right to open expression (and, indeed, are encouraged by the Policy), property damage motivated by the expressive content of the speech inherently creates an undue hardship that impedes this right. These harmful actions place the victims—and this community—in reasonable fear of future violence for their property and themselves, which likely chills future expression by the victims and others.²⁸

C. Violations of Other Policies and the Spirit of the Open Expression Policy

The foregoing discussion establishes that the alleged facts describe direct violations of the Policy itself. In addition, the Policy lists circumstances in which “Community members, in the course of their actions, violate *other policies* of the University . . . and are no longer operating *within the spirit* of Open Expression at Emory.”²⁹

Community members violate other Emory policies and do not operate within the spirit of the Open Expression Policy if they “violate any federal, state, local or other applicable law” (including “defacing of public and/or private property”),³⁰ “interfere unreasonably with the activities or rights of other persons,”³¹ “cause injury to persons or property or threaten to cause such injury,”³² or “use or threaten violence or force.”³³ Destruction of property, which is both criminal and tortious under Georgia law,³⁴ obviously falls within each of these categories.

IV. EXCEPTIONS TO THE OPEN EXPRESSION POLICY

A. Valuing Diversity, Inclusion, and Community

To be sure, the Respect for Open Expression Policy, in addition to affirming the values of open expression and dissent, also acknowledges “the challenges of the creative tensions associated with courageous inquiry in an ever changing community.”³⁵ The

²⁸ Like “[u]nreasonabl[e],” “undue” takes its meaning in part from the Policy’s exceptions, which are discussed below. But, as above, even if speech falls within an exception in the Policy, third parties’ unilateral action against that speech can still qualify as an “undue hardship” to the speaker.

²⁹ Policy 8.14.5.5 (emphasis added).

³⁰ Policy 8.14.5.5(a).

³¹ Policy 8.14.5.5(b).

³² Policy 8.14.5.5(f).

³³ Policy 8.14.5.5(g).

³⁴ See Ga. Code Ann. § 16-7-21(a), (d) (defining the misdemeanor of “criminal trespass,” when a person “intentionally damages any property of another without consent of that other person and the damage thereto is \$500.00 or less or knowingly and maliciously interferes with the possession or use of the property of another person without consent of that person”); id. § 51-10-3 (“Any unlawful abuse of or damage done to the personal property of another constitutes a trespass for which damages may be recovered.”).

³⁵ Policy 8.14.1.

Policy also states that “Emory University also affirms values of diversity, inclusion, and community.”³⁶ But these values cannot support suppression of speech based on its expressive content, whether by a University official or anyone else.³⁷

The very paragraph that begins with affirming “diversity, inclusion, and community” ends with a statement that “[c]ivility and respect are core values in our community, and we ask all members of the Community to weigh these carefully when exercising their fundamental right to open expression.”

The hierarchy is clear: “open expression” is a “fundamental right,” while “[c]ivility and respect” are merely to be “weigh[ed] . . . carefully.” Assuming for the sake of argument that some content on the Wall violated the values of civility, respect, diversity, inclusion, or community—for instance, because of some viewers’ subjective feelings of offense—none of this would trump Community members’ “fundamental right to open expression,” including their “rights . . . to assemble and demonstrate peaceably.”³⁸

B. Limits on Open Expression

The Policy is clear on which considerations *may* trump the speakers’ right to expression, but no such considerations are relevant to this case.

1. Dissent May Not Be Disruptive

“The University promotes simultaneous, but not disruptive, Dissent. . . . A dissenter must not substantially interfere with the speaker’s ability to communicate or the audience’s ability to hear, see, or question the speaker.”³⁹ The student organization here was not dissenting disruptively—indeed, there was no “speaker” with whose speech ESJP could have interfered, as its wall was a stand-alone display, and in any event controversial content cannot be “disruptive” within the meaning of the Policy. On the contrary, those who vandalized the Wall were the ones engaging in “disruptive[] Dissent” and “substantially interfer[ing]” with the student organization’s ability to communicate.

2. Dissent Must Be in an Acceptable Location

As noted above, the Policy lists locations that are generally not available for dissent or protest, such as “[p]rivate offices,”⁴⁰ “[c]lassrooms . . . in which classes . . . are being held or are scheduled to be held,”⁴¹ and “[h]ospitals.”⁴² The Wall was not established in

³⁶ Id.

³⁷ As noted above, even if expression is unprotected by the Policy, third parties may not have the same right to suppress the speech as do University officials. But because we find that the expression in this case was fully protected by the Policy, we do not need to reach this issue.

³⁸ Policy 8.14.1.

³⁹ Policy 8.14.5.2.

⁴⁰ Policy 8.14.5.6(a).

⁴¹ Policy 8.14.5.6(c).

one of these forbidden locations. Rather, the location was an area explicitly reserved for that purpose through the usual channels.

3. Expression May Not Cause Injury or Property Damage

The Policy “affirms the rights of others to pursue their normal activities and to be protected from physical, mental, or emotional injury or property damage.”⁴³ The only party subject to “property damage” in this case was the ESJP. Protecting ESJP’s property against damage motivated by disagreement with its expressive content is core to the Respect for Open Expression Policy.

The expressive content of the ESJP wall may well have affected the perpetrators mentally or emotionally; but in the context of “nonpersonal Protests such as flyers, signs, displays, etc.”, the Policy expressly provides that “[n]o nonpersonal Protests should be denied because of the content of the flyer, sign, or display within the limits of the law.”⁴⁴ The University has thus disabled itself from denying permission to display such content on flyers, signs, and displays: controversial content is expressly *protected* under the Policy. If a Community member’s offense at or discomfort with certain expressive content were considered mental or emotional injury, open expression on any controversial topic would be subject to restriction, in direct contradiction to the purpose of the Policy.

4. Dissent May Not Cause Harassment

Finally, the Policy states that Community members “violate other policies of the University . . . and are no longer operating within the spirit of Open Expression at Emory if . . . [t]hey cause harassment.”⁴⁵ The term “harassment” is not defined in the Policy, nor (as far as we can tell) is it explicitly defined anywhere else in Emory’s policies. Fortunately, the term (or a similar term) is defined in several provisions of Georgia law to refer to various one-on-one communications,⁴⁶ and in other places in Georgia law the term is used in a context that is clearly limited to one-on-one communications.⁴⁷ We use these legal definitions to clarify the exception in the Policy.

⁴² Policy 8.14.5.6(e).

⁴³ Policy 8.14.1.

⁴⁴ Policy 8.14.5.8.

⁴⁵ Policy 8.14.5.5 & .5(h).

⁴⁶ See Ga. Code Ann. § 16-5-90(a)(1) (defining “harassing and intimidating” to include the element “directed at a specific person”); id. § 16-11-39.1(a) (defining the “offense of harassing communications”); id. § 16-11-107.1 (defining “[h]arass” in the context of the crime of harassing an assistance dog); id. § 17-17-16 (“‘Harassment’ means a course of conduct directed at a specific person that causes substantial emotional distress in such person,” in the context of victim or witness harassment). The Georgia Supreme Court recently reaffirmed that Ga. Code Ann. § 16-5-90 is limited to one-on-one communications, in *Chan v. Ellis*, 770 S.E.2d 851, 854 (Ga. 2015).

⁴⁷ See, e.g., Ga. Code Ann. § 9-15-14(b) (referring to lawsuits that were “interposed for delay or harassment” of the opposing party); id. § 16-5-94 (authorizing protective orders that “[o]rder a party to refrain from harassing or interfering with the other”); id. § 46-5-21 (banning certain forms of harassment, all of which are directed at specific persons).

Expression directed at the world at large, as the displays in this case, cannot be harassing as understood in Georgia law or in the Policy.

For the sake of completeness, we address whether ESJP’s expression could count as “discriminatory harassment” within the meaning of another Emory policy, the Equal Opportunity and Discriminatory Harassment Policy (EODHP). The EODHP uses the term “discriminatory harassment” instead of “harassment,” and divides it into discriminatory harassment “of a sexual nature” and (as relevant here) “of a non-sexual nature.”⁴⁸

Expression on subjects of social and political interest cannot be “discriminatory harassment.” This is because discriminatory harassment requires—at a minimum⁴⁹—that the conduct “denigrate[] or show[] hostility or aversion to *an individual or group*” on the basis of various characteristics; *and* that the denigration, hostility, or aversion be “gratuitous[]”; *and* that the conduct “serve no scholarly purpose appropriate to the academic context.”⁵⁰ The expression here showed aversion to a country on the basis of its policies, not to people. In light of the Open Expression Policy’s clear statement that—

Emory University is committed to an environment where the open expression of ideas and open, vigorous debate and speech are valued, promoted, and encouraged. As a community of scholars, we affirm these freedoms of thought, inquiry, speech, and assembly.⁵¹

—and the Senate’s affirmation that the Open Expression Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law,”⁵² it is apparent that expression on social or political topics cannot be said to be “gratuitous[],” nor that it “serve[s] no scholarly purpose appropriate to the academic context.” The Policy explicitly extends its full protection to impromptu, Emory Community-initiated expression and identifies the entire Emory community as “a community of scholars”; nowhere does the Policy suggest that its protections extend only to classroom activity, formal teaching, commentary by experts with doctorates, peer-reviewed publications, or academic research in a narrow sense.

⁴⁸ Policy 1.3.2.B, available at <http://policies.emory.edu/1.3>. The EODHP does not formally *define* non-sexual “discriminatory harassment” but gives several categories that the term “includes” or “may include.” To avoid reading the EODHP to chill an indeterminate amount of expression, and in light of the values of the Open Expression Policy, we interpret the list of categories that the term “discriminatory harassment” “includes” or “may include” to be exhaustive.

⁴⁹ Discriminatory harassment under the EODHP involves more elements, such as pervasiveness and effects, but these are not relevant here.

⁵⁰ Policy 1.3.2.B (emphasis added).

⁵¹ Policy 8.14.1.

⁵² Policy 8.14.2.

V. CONCLUSIONS AND RECOMMENDATIONS

Based on our understanding of the facts, the Committee concludes that the perpetrators here committed numerous violations of Emory’s Respect for Open Expression Policy and other Emory policies, under sections 8.14.5.4, 8.14.5.5, and 8.14.5.8.

The subject matter involved in these incidents plays no role in the Committee’s conclusions. The campus organization Hillel reportedly erected a “Truth Wall” on McDonough Field in response to ESJP’s “Apartheid Wall.”⁵³ Both displays are entitled to the same protection under the Policy. The Policy’s protections and the rights of open expression at Emory apply equally whether the expression is pro- or anti-Israel, pro- or anti-abortion, pro- or anti-gay marriage. To distinguish between different subject matters or viewpoints would in itself violate the presumptions of content- and viewpoint-neutrality protected in First Amendment law⁵⁴ and in the Policy.⁵⁵

Though no persons were harmed during these incidents and the monetary cost of the property damage was slight,⁵⁶ the Committee recommends that the responsible bodies within Emory University take these incidents seriously. Violence is an unreasonable response to speech, especially in a university setting. Property damage puts victims and others in reasonable fear of future harm to their property and persons. Damage motivated by disagreement over the content of speech has a chilling effect on the victims’ and others’ future expression.

The main harm was not to papers and panels, but to Community members’ open expression, dissent, and protest, and the values embodied in the Emory Respect for Open Expression Policy, which the University Senate has declared “paramount to all other policies.”⁵⁷

The Committee therefore has the following recommendations:

1. Because the disciplinary and restorative justice proceedings stemming from these incidents have concluded, the Committee has no recommendations as to what sanctions are appropriate. (However, as discussed below, the Committee

⁵³ See O’Neal, *supra* note 24.

⁵⁴ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015).

⁵⁵ The Policy does not distinguish between different subject matters or viewpoints. Moreover, some aspects of the Policy expressly establish a policy of content-neutrality. See Policy 8.14.5.3 (“Reservations shall not be denied to any member of the Community based on content of the Meeting, Event, or Dissent unless such content would otherwise violate the responsibilities set forth in 8.14.5.5 of this Policy.”); *id.* 8.14.5.7 (“No group or organization should be denied use of a space on campus because of the content of the Meeting, Event, or Protest, unless such content would otherwise violate the responsibilities set forth in 8.14.5.5 of this Policy.”); *id.* 8.14.5.8 (“No nonpersonal Protests should be denied because of the content of the flyer, sign, or display within the limits of the law.”). The only exceptions in section 8.14.5.5 that appear to relate to the content of the expression are subsections 8.14.5.5(f)–(h), which bar threats of “injury to persons or property,” threats or encouragement of “violence or force,” or “harassment.”

⁵⁶ Hussung estimated to the Emory Police Department that the display cost about \$100 to make.

⁵⁷ Policy 8.14.2.

- hopes to be able to weigh in more quickly on future incidents.) However, we recommend that all parties concerned be aware of the importance of the values of open expression and civil discourse at Emory and the extent to which the perpetrators of these incidents violated those values.
2. Because one of the Committee's functions is to interpret the Open Expression Policy, and because future disciplinary proceedings may at times implicate open expression values, it is necessary for the Committee to be involved in such proceedings at an early stage. (For instance, in some future proceeding, the Committee may take the view that some conduct is protected under the Policy, which would make disciplinary sanctions for that conduct inappropriate; and in some other future proceeding, the Committee may take the view that some conduct violates the Policy and might thus recommend stronger sanctions than would otherwise be imposed.) Therefore, we recommend that disciplinary authorities let the Committee know whenever an incident potentially implicates open expression values, whether or not there is a defendant in such a disciplinary proceeding who has explicitly raised an open expression defense.
 3. The relevant disciplinary authorities and the Emory Police Department should encourage individuals who feel that their open expression rights have been violated to contact the Committee.
 4. The Emory community should become more familiar with the Open Expression policy through university-wide education events. The Committee therefore recommends that the University make funding available for such events.

Composition of the Committee for Open Expression:

Max Blachman, graduate student, Goizueta Business School
Christy Bradley, Campus Life
Connor Crum, Constitutional Council (ex officio, non-voting)
Joshua Davila, student, Emory College
Sara Edwards, graduate student, Laney Graduate School
Dawn Francis-Chewning, staff, Libraries & Information Technology
Scott Kugle, faculty, Emory College
Maria Lameiras, staff, Communications & Public Affairs
Erica Lee, faculty, School of Medicine (chair)
Christina Marcus, graduate student, Candler School of Theology
Lydia O'Neal, student, Emory College
Holloway Sparks, faculty, Emory College
Alexander "Sasha" Volokh, faculty, School of Law

Exhibit A: The display before the first vandalism incident



Exhibit B: The display after the first vandalism incident



Exhibit C: The display before the second vandalism incident

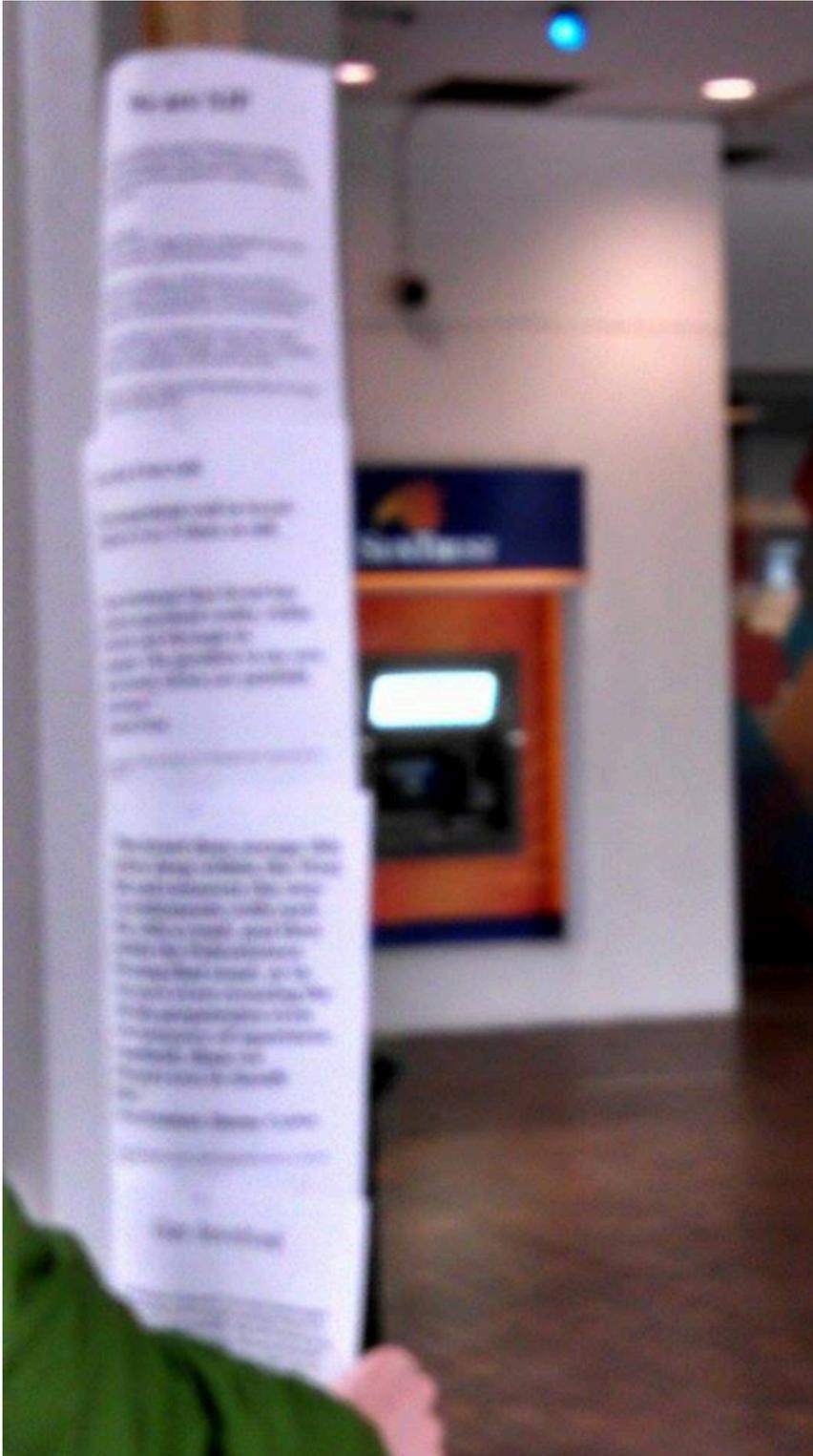


Exhibit D: The display after the second vandalism incident

