

**Connecticut  
State  
University**

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See 89-156  
90-37 95-8

BR#92-45

P.O. Box 2008, New Britain, Connecticut 06050  
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**RESOLUTION**

amending

**GUIDELINES FOR STUDENT RIGHTS  
AND RESPONSIBILITIES AND JUDICIAL PROCEDURES  
in  
CONNECTICUT STATE UNIVERSITY**

April 3, 1992

**WHEREAS:** The Board of Trustees of the Connecticut State University has adopted Guidelines for Student Rights and Responsibilities and Judicial Procedures which include a uniform list of student offenses for application on all four institutions of the Connecticut State University system, and

**WHEREAS:** Advice has been received from Student Affairs personnel within the Connecticut State University system suggesting the need for amendment of the list of offenses, and

**WHEREAS:** Advice has also been received from the Attorney General of Connecticut recommending changes to the wording of certain offenses, therefore be it

**RESOLVED:** That the offense of "sexual assault" be added to the uniform list of offenses and that it be expressed as:

"Sexual assault--any unwanted physical contact of a sexual nature."

and be it

**RESOLVED:** That the current offense number 3, involving "offensive and disorderly conduct" be amended as follows:

"Offensive or disorderly conduct which causes interference, annoyance, or alarm or recklessly creates a risk thereof. This offense does not apply to speech or other forms of constitutionally protected expression."

and be it

**RESOLVED:** That the current offense number 18, involving conduct or expression deemed to be obscene, be amended as follows:

"Lewd or obscene conduct or obscene expression. That which is obscene shall be as defined under Connecticut General Statute Section 53a-193."

A Certified True Copy

*Dallas K. Beal*  
Dallas K. Beal  
President



An Equal  
Opportunity  
Employer

MEMORANDUM

TO: Dallas K. Beal, President  
Connecticut State University  
P. O. Box 2008  
New Britain, CT 06050

RECEIVED

JUL 12 1991

FROM: Bernard F. McGovern, Jr.  
Assistant Attorney General  
John R. Whelan  
Assistant Attorney General  
110 Sherman Street  
Hartford, CT 06105

STATE U

RE: Conn. State University Student Rights and  
Responsibilities Code

DATE: July 10, 1991

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In your letter of June 3, 1991 you asked us to review various offenses in the CSU Student Rights and Responsibilities Code, namely subsections 3, 18, 26 and 27 as well as a proposed subsection on sexual assault. Your request was prompted by recent correspondence involving Assistant Attorney General Whelan, President Feldman and Attorney Martin Margulies of the CCLU. With the able assistance of summer law intern Michael Bennet we have reviewed the specified subsections and make the following observations.

I. § 2.1A(3):

Current Provision: Offensive or disorderly conduct which causes interference, or alarm, or recklessly creates a risk thereof.

Suggested Revision: Offensive or disorderly conduct which causes interference, or alarm, or recklessly creates a risk thereof. This section does not apply to constitutionally protected expression.

The concern with the current wording of § 2.1A(3) is that analogous criminal statutes have been found overbroad with respect to speech. See, e.g., State v. Anonymous, 34 Conn. Supp. 689 (1978), State v. Hoffman, 228 Kan. 186; State v. Harrington, 67 Or. App. 608, review den. 297 Or. 547. In cases involving verbal confrontations, state courts, including Connecticut's, have limited such statutes to apply only to fighting words.

State v. Anonymous, supra at 695. This interpretation, in Mr. Margulies' opinion, would make either this section or the fighting words subsection of CSU's code of conduct redundant.

Section 2.1A(3)'s probable application, however, is not limited to speech. The analogous state statute, § 53a-182, has a number of clauses, in addition to the one directed at "offensive or disorderly conduct," that proscribe various other behaviors including, for example, fighting, violent or threatening behavior, unreasonable noise, and obstruction of traffic. Similarly, in subsections other than § 2.1A(3), CSU lists numerous actions as violations of its code. These include, inter alia, actual or threatened physical assault, disruption of campus activities, interferences with entry into or exit from buildings, forcible entry into buildings, and violation of dormitory rules. Indeed, the other subsections reflect the Connecticut criminal statute in its entirety with the ironic exception of its "excessive noise" provision. So, one might read the CSU's prohibition of offensive or disorderly conduct to apply, for example, to excessive noise. In other words, it applies to disorderly conduct, absent fighting words, not otherwise specifically prohibited by the code.

Mr. Margulies' charge that the section is either redundant or overbroad is correct, but only with respect to speech. Since there has been litigation in this area, it would be prudent for the CSU to state explicitly that the section is not aimed at constitutionality protected expression. In fact, § 2.1A(3) is not aimed at any articulate expression except excessive noise because CSU already prohibits fighting words and obscene expression.

In its application of § 2.1A(3), CSU should make clear that conduct means conduct, not speech, and that the section will be employed consistent with this interpretation.

## II. § 2.1A(18):

Current Provision: Lewd, obscene, indecent conduct or expression.

Suggested Revision: Lewd or obscene conduct or obscene expression. For the purposes of this section the term "obscene" shall have the same meaning as is provided for that term in Conn. Gen. Stat. § 53a-193(a) as that section of the general statute may be revised, amended or replaced.

The current wording of § 2.1A(18) is problematic in two respects. First, as Mr. Marjulies accurately points out in his letter, lewd or indecent expression only loses the protection of the First Amendment if it is obscene. Second, the United States Supreme Court has held on a number of occasions that obscenity statutes must define, to some extent, what counts as obscene.

1. Lewd or indecent expression: There is no clear definition for which behavior or expression is lewd or indecent. In fact, "lewd" is rarely, if ever, used in the context of expression. In most states' statutes, it refers only to conduct. Lewd and obscene are used, as a definitional matter, interchangeably. See 53 C.J.S. Lewdness, § 3 (Common law offense of lewdness consists of commission of open and public acts of indecenty.) (emphasis added). There is no indication that the statutorily formulations of the two terms have distinguished them.

Since lewd and indecent are interchangeable, it would seem at least efficient for the University to drop one or the other from this section, and, since lewd, as a practical matter, captures the idea better, it should be retained.

Finally, in the context of the Supreme Court's obscenity decisions, "lewd expression" is a meaningless, constitutional concept. The word "lewd" should be used only in the subsection to apply to behavior (e.g., indecent exposure).

## 2. Defining "obscenity:"

In a series of decisions in 1973, the United States Supreme Court changed dramatically its obscenity doctrine. See e.g., Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) (Miller I); Paris Adult Theatre I v. Slaton, 413 U.S. 48, 93 S.Ct. 2698 (1973). The Court refined its three-pronged obscenity test and simultaneously held that "state statutes designed to regulate materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or proscribe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or construed." Miller I, 413 U.S. at 24-25, 93 S.Ct. at 2614. The Court went on to present some examples of permissible statutes, versions of which have been adopted by many states. Id. at 25, 93 S.Ct. at 2615.

Connecticut's state obscenity statutes, Conn. Gen. Stat. §§ 53a-193(a) and 53a-194, have been judicially upheld on the basis

of the Miller I standard. State v. Magee, 32 Conn. Sup. 639 (1976). The Magee court observed: "[E]ven without the statutory definition of

'obscenity' contained in § 53-197(a), the use of that word in § 53a-194 would be sufficiently precise. Long before Miller I, 'obscenity' had become a word of art [in Connecticut] carrying a restricted meaning. State v. Andrews, 150 Conn. 92. It has been held that prior judicial construction of the term "obscenity" which has sufficiently confined its general impact will qualify a statute under the test of Miller I, although the legislature may leave the word wholly undefined. Hamling v. United States, 418 U.S. 87, 113." Id. at 646.

Even if Connecticut's statute were to lack a definition of obscenity, it would probably pass constitutional muster. The same cannot be said with absolute certainty of CSU's subsection, which has not had the benefit of specific prior judicial construction. In short, CSU should consider defining, in some fashion, its own use of the word 'obscenity'.

The easiest means of doing this would be to add language which explicitly states that CSU accepts the state criminal code's current and future definitions of obscenity. Alternatively, if CSU wishes to implement either a more or a less stringent standard, it must develop its own definition of what is obscene. "[T]he language [must] convey [a] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Hamling v. United States, 448 U.S. 87, 111, 94 S.Ct. 2887, 2904 (1974), quoting United States v. Petrillo, 332 U.S. 1. The inclusion of a sentence incorporating the state statute would likely be sufficient "warning" to students and successfully withstand a challenge for vagueness. The state statute defining obscenity, Conn. Gen. Stat. § 53a-193, is attached for your review.

### III. § 2.1A(26) - Sexual Harassment

This section needs no changes. It is virtually identical to the 1980 EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11. These guidelines implement Title VII of the 1964 Civil Rights Act, which prohibits among other things sex discrimination in employment. They have been upheld by the

United States Supreme Court in Meritor Savings Bank v. Vinson,  
477 U.S. 57, 106 S.Ct. 2397 (1986).

#### IV. Sexual Assault (Proposed Subsection)

Current Provision: "Any unwanted physical contact of a sexual nature."

If there is a problem with the subsection, it is only in the lack of a definition of "sexual nature." CSU might want to consider narrowing it in some fashion, but, on the other hand, there might be even more compelling reasons for leaving it very broad.

By way of comparison, the Connecticut General Statutes define sexual assault in the fourth degree as when "[a] person subjects another person to sexual contact without such other person's consent." Conn. Gen. Stat. § 53a-73a(2). "Sexual contact" is defined as:

any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person, or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor for the purpose of degrading or humiliating such person. Intimate parts are specified in the statute. Conn. Gen. Stat. § 53a-65(8).

7 The question is whether CSU would want its subsection concerning sexual assault to apply to situations which do not involve the common understanding of such assault, at least as it is reflected in the state statute. One example might be the massaging of another's body parts, not generally considered as intimate, which, nonetheless, could conceivably result in the sexual degradation or humiliation of another individual.

If CSU wants to incorporate such actions, it should consider making more explicit its definition of "sexual nature."

#### V. § 2.1A(27) - Fighting Words

This section complies with constitutional requirements. The only potential problems will be in the area of enforcement, i.e.,

sanctions under this section should be applied only as a result of speech which is "inherently likely to provoke an immediate violent reaction" from an "ordinary person."

  
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Bernard F. McGovern, Jr.  
Assistant Attorney General

  
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John R. Whelan  
Assistant Attorney General

BFM:JRW:sad

**Sec. 53a-193. Definitions.** The following definitions are applicable to sections 53a-193 to 53a-196a, inclusive and section 53a-196c.

(a) Any material or performance is "obscene" if, (1) taken as a whole, it predominantly appeals to the prurient interest, (2) it depicts or describes in a patently offensive way a prohibited sexual act, and (3) taken as a whole, it lacks serious literary, artistic, educational,

political or scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for some other specially susceptible audience. Whether a material is obscene shall be judged by ordinary adults applying contemporary community standards. In applying contemporary community standards, the state of Connecticut is deemed to be the community.

(b) Material or a performance is "obscene as to minors" if it depicts a prohibited sexual act and, taken as a whole, it is harmful to minors. For purposes of this subsection: (1) "Minor" means any person less than seventeen years old as used in section 53a-196 and less than sixteen years old as used in sections 53a-196a, 53a-196b and 53a-196c and (2) "harmful to minors" means that quality of any description or representation, in whatever form, of a prohibited sexual act, when (A) it predominantly appeals to the prurient, shameful or morbid interest of minors, (B) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (C) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value for minors.

(c) "Prohibited sexual act" means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse.

(d) "Nude performance" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state in any play, motion picture, dance or other exhibition performed before an audience.

(e) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast.

(f) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(g) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(h) "Masturbation" means the real or simulated touching, rubbing or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breast, either by manual manipulation or with an artificial instrument.

(i) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

(j) "Material" means anything tangible which is capable of being used or adapted to arouse prurient, shameful or morbid interest, whether through the medium of reading, observation, sound or in any other manner. Undeveloped photographs, molds, printing plates, and the like, may be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(k) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(l) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, advertise, produce, direct or participate in.

(m) "Child pornography" means any material, involving a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act.

January 10, 1992

To: Members, Student Advisory Board

Fr: Thomas A. Porter  
CSU Provost

Re: Changes in Uniform List of Offenses in  
CSU Student Rights and Responsibility Document

I am proposing amendments to two existing offenses in our Uniform List of Student Offenses and also proposing to add a new offense.

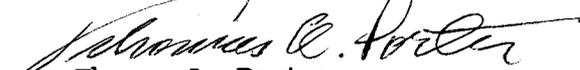
The new offense is "Sexual Assault." As you know, we now have the offense of "Sexual Harassment" in our uniform list and no change is proposed in that offense. However, I am advised by the Deans of Students that there is also a need for a "Sexual Assault" offense for situations in which there has been unwanted physical contact. If you have questions about this offense, you may wish to discuss them with the Dean of Students on your campus.

The other two changes are technical amendments which have been suggested by the Attorney General's Office to bring our "disorderly conduct" offense and our "obscenity" offense into compliance with Constitutional requirements. There was a complaint by the Connecticut Civil Liberties Union regarding these two offenses as currently stated on our uniform list. The proposed changes correct the deficiencies pointed out by the CCLU.

I have included the Attorney-General's letter for your information.

You are also most welcome to direct questions to me or to Mrs. Tresselt regarding these changes. You can reach either of us at 827-7700. I inadvertently took these changes to the Trustees' Planning Committee before having consulted the SAB. This was an error on my part, and I am sorry. We will not take the changes to the full Board of Trustees until you have had an opportunity to comment.

If you want to discuss these changes at a full meeting of the SAB rather than just respond on the telephone, we can postpone taking this to the Board until after the next SAB meeting. Please let Mrs. Tresselt or me know your thinking.

  
Thomas A. Porter

cc: Deans of Student