

To: Indiana University Board of Trustees

From: Lauren Robel, Val Nolan Professor of Law Emerita

Re: History of Assembly Ground Policies

Date: May 11, 2024

As you evaluate the claims about the legality of the actions taken against the protestors in Dunn Meadow in connection with the filed lawsuit, I write to bring to your attention the history of the policies governing the use of that Assembly Ground that might be relevant to those claims. I have included links to all supporting documents. This history may bear on your deliberations about pending lawsuits.

#### **A. The 1969 Trustee Policy**

In 1969, at the recommendation of a committee that included noted civil liberties scholar and law professor Ralph Fuchs, a distinguished group of your predecessors that included a large number of Indiana lawyer luminaries (among them Bob Lucas, Carl Gray, and federal judge Jesse Eschbach, for whom I clerked) adopted the [following policy](#) as part of a student conduct code:

RESOLVED by the Board of Trustees of Indiana University, under the authority conferred by the General Assembly of the State of Indiana, in compliance with the mandate of the General Assembly in Chapter 273, and in compliance with Chapter 444, both enacted in the 96th Session of the Indiana General Assembly in 1969, the following rules and regulations are enacted:

#### **Section 3.5 Policies: Free Speech**

(a) Indiana University considers freedom of inquiry and discussion essential to a student's educational development. Thus, the University recognizes the right of all students to engage in discussion, to exchange thought and opinion, and to speak, write, or print freely on any subject, in accordance with the guarantees of our Federal and State Constitutions. This broad principle is a cornerstone of education in a democracy.

(b) For their programs student groups on the campus may freely select persons they wish to invite as guest speakers or performers. There are no restrictions on the point of view expressed by speakers other than those imposed by national or state law. The invitation to an outside speaker does not imply approval or sponsorship of his views by the University nor by the group inviting him.

#### **Section 4.1 Policies; Assembly Ground**

(a) The Board of Trustees has designated an area on Dunn Meadow immediately north of the Memorial Union as the Indiana University Assembly Ground. Here, members of the University community may express themselves freely on all subjects, within the limits of applicable laws and regulations, **with or without advance notice**. It is expected that all persons will respect the rights of free speech and assembly that are enhanced by this

action, and will maintain courtesy and good order during such speaking and assembly as may take place. (*emphasis added*)

(b) Gatherings on campus **elsewhere than on the Assembly Ground** will not be permitted to disturb classes or interfere with traffic. Reservations for University facilities are made on a first-come, first-served basis and are subject to the Facilities Use policies specified in Section 3.6. The use of the streets of Bloomington for parades or demonstrations is subject to the ordinances of the city. (*emphasis added*)

As far as I have been able to discover, this Trustee policy has never been changed by your board.

## **B. The 1989 Bloomington Faculty Council Report**

In spring semester 1986, protestors erected a shantytown on Dunn Meadow to protest apartheid in South Africa and to request that the trustees and the foundation disinvest in that country. It remained until the end of the fall semester when the protestors dismantled it voluntarily. What [followed is described](#)<sup>1</sup> by Andrew Potts, a lawyer in Washington D.C. who was a student government vice president during 1988-1989, and three other student government leaders from the period who worked on the Assembly Ground Advisory Committee:

These experiences prompted then Dean of Students Michael Gordon (the first African American in a position of leadership at IUB) to empanel an Assembly Ground Advisory Committee that year to develop a set of recommendations “to guide IU in interpreting the use of Dunn Meadow as an area of protest.” . . . .

In 1987, the Committee produced Dunn Meadow guidelines that introduced a new pre-approval requirement for the use of tents and uncarried signs in overnight Dunn Meadow protests. It became clear that the campus was not in consensus over this idea. When the Assembly Ground faced its next major protest event, the Rape Crisis Center Shanty erected in 1988, IUSA (now called IUSG) took the position that the time was not right to apply the new guidelines, and Dean of Students Michael Gordon agreed.

The Rape Crisis Shanty remained, and the Assembly Ground Advisory Committee went back to work, this time with law professor Pat Baude as chair. The committee was aided by Dr. Richard McKaig, the widely respected head of IUB’s Division of Student Affairs.

Professor Baude’s committee completed its work in the summer of 1989, with its [final report presented to the Bloomington Faculty Council](#) (BFC) on October 17 and assigned the number BL-ACA-I18. The Committee again recommended that leaving an uncarried sign, symbol or structure on the Assembly Ground between 11:00 p.m. and 6:00 a.m. would require advance notice and permission. Otherwise, as before,

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<sup>1</sup> While I quote extensively from this document, I urge you to read it in its entirety. I am confident that those who are contemplating actions against the university have this document. And I have permission from its authors to share it.

structures might be used in the Assembly Ground, day or night, to express any point of view on any subject, with or without advance notice.<sup>2</sup>

The recommendation remained controversial because it impinged on a key feature that gives the Dunn Meadow Assembly Ground its unique power: the promise that members of the University community may express themselves freely there at any time on all subjects without seeking permission. In response, the Assembly Ground Committee highlighted the complexities of overnight dwelling as a form of protest and made clear that advance permission would be granted “automatically,” subject only to arrangements regarding sanitation, safety, etc. **The record made clear that in deciding whether to grant a permit or not, the one thing that may never be considered is the point of view or the subject matter of the demonstration. (emphasis added)**

These former student leaders continue:

It is true that Section 2(C) of the 1989 Report suggests the creation of a committee to oversee the implementation of its provisions, to give advice on changes of policy, and to review denials of permission. Ironically, this provision was added late in the process at the behest of IUSA to assure decisions taken in connection with the new policy included faculty and student input. As both the Report and the minutes of the 17 October 1989 BFC meeting make clear, the committee was conceived as a standing committee that always exists, with the default membership being the IUSG president, the BFC President pro tem, and a representative from the Dean of Students office. Because vandalism and other emergency situations had arisen at prior shantytowns, it was agreed that quick decisions about encampments might sometimes be needed. The Committee’s membership was kept small so that it could work fast if immediate action were needed. The inclusion of student and faculty members was designed to assure that even in “free speech” emergencies – indeed, especially in emergencies –decisions would be taken in the best spirit of shared and inclusive governance and academic freedom.

Importantly, the Committee recommended that no physical force be used to enforce these new rules. As the former student leaders’ report relates:

Section 2(D) of the 1989 Report contains what we colloquially called the “no bulldozer” clause. It reflects a hard-fought compromise. Even into 1988, IUSA opposed a preapproval requirement for structures at overnight assemblies as an unacceptable breach of the promise the Trustees made in 1969 to the IU Community. Instead, we countered with a proposal that signs and tents left unattended for more than 72 hours could be considered abandoned and removed. In the end, IUSA accepted the overnight permission rule, but in exchange, as the Report makes clear and as Bloomington Chancellor Kenneth R.R. Gros Louis and Chair Baude confirmed to the BFC, the “university committed itself not to use

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<sup>2</sup> The webpage of the IU Office of the Vice Provost for Faculty and Academic Affairs seems to present the 1989 Report as if it were the 1969 Trustee Resolution. <https://vpfaa.indiana.edu/policies/bl-aca-i18-use-assembly-ground/index.html>.

physical force” to enforce the policy but instead to adjudicate any alleged violations through an injunction proceeding in the courts. The administration acknowledged that adjudication might make enforcement harder for the university but, they said, it was necessary to show the seriousness of IU’s commitment to free speech.

Chair Pat Baude put it this way when [ACA-BL-118 was presented in October 1989](#): “We thought this was important because students, faculty and staff all expressed lingering doubts about the First Amendment legality of this procedure. We thought it important to ensure that a court would pass upon these questions.”

Finally, the Committee waited until there was no pending demonstration in the Meadow to bring its report to the BFC to ensure that it would not be associated with any potential viewpoint discrimination. As Chancellor Gros Louis noted, “First of all, if you wonder why this comes now, the Assembly Ground Committee has been functioning for several years. We did not want to have the description that [Professor Baude] has just described written and discussed at a time when there was a controversial demonstration in Dunn Meadow. Therefore, in past occasions when there has been this document, or a form of this document available for review or discussion, it seemed not the appropriate time to bring it forward because it would appear to be (and that was not the intent) directed against the controversial demonstration. At the moment, there is no controversial demonstration there. And that is why it comes at this time.”

Chancellor Gros Louis continued:

“I welcome this document in this form or whatever form they decide to modify it, because indeed as [Professor Baude] alluded to, when the South African shanties were there, there was considerable pressure from inside and outside the university for the campus administration to take it down. There was no way that I was going to take it down! But the Agenda Committee then was aware, as was Michael Gordon, that there were a lot of individuals-and again I emphasize inside as well as outside the university-who believed that the administration should take it down. So I welcome the first principle statement in particular.”

What was that “first principle statement”? The report states as its first principle:

The Trustees of Indiana University have designated the area immediately north of the Indiana Memorial Union as an assembly ground, establishing this area as a public forum for expression on all subjects. We support this decision by the Trustees and believe it serves the University well. Universities in our civilization are places where dissenting and controversial views can be aired and discussed. This exchange of views is not merely something to be tolerated; it is a source of diversity and strength for our society as a whole. Of course this right of expression is not a license to violate the law or to interfere with the rights of others to express themselves. Of course when a demonstration becomes violent or represses the rights of others, it has no place on a university campus. But the mere fact that some find a demonstration distasteful is no more reason to ban it than to ban an idea the listener finds distasteful. We have reviewed the history of demonstrations in the Assembly Ground. Many of us as individuals disagree with the points of view which have been expressed there. Many of us who agree with the substantive views expressed in individual

demonstrations have found the form of their expression sometimes distasteful, or worse. Taken as a whole, however, this history shows us a lively and vigorous commitment to the exploration of matters of public concern: the vigor of that commitment is to us one of the measures of greatness in a university.

When Professor Baude, who taught constitutional law at Indiana University for four decades, introduced this report, he noted for the Council: “The only significant point is that we wanted to make a case and to equip the administration to state that free speech is not something we TOLERATE at the university; it is something we CHERISH at the university; what happens in Dunn Meadow is not happening because of a weak-willed administration; it is happening because this is a great university, and these things happen there. That, we see, is the basic principle: not toleration but support of free speech.” (*emphasis in original*)

Finally, it is not clear what the ultimate status of the 1989 Report is. It was presented at the October 17, 1989, BFC meeting as an information item, and a “gloss” on the 1969 trustee policy. While it was discussed approvingly, no vote was asked for or taken at that meeting. A search of all BFC meetings during the 1989-1990 academic year finds no other reference to the report. While the Report is labeled on the Vice Provost for Faculty and Academic Affairs web site with a number that is typically used for BFC policy, there does not appear to have been official action to ratify or adopt the report. After discussing whether such action was necessary, the consensus of the faculty council and Chancellor Gros Louis was that it was not; rather, they concluded that Dean of Students Gordon should include it in the publication, “Ins and Outs,” which was given to all incoming students.

As provost, I found it important to have an informed understanding of the policies I was required to enforce. As someone who teaches constitutional law, I was impressed that people I know to have had a deep understanding of First Amendment law and principles, such as Professors Fuchs and Baude and Judge Eschbach, were involved in both the 1969 and the 1989 actions detailed above. The minutes of the 1989 faculty meeting demonstrate the care with which the legal issues involved in the report were discussed.

In light of decisions you will have to make with respect to the pending lawsuit from the ACLU, and others that I suspect are being contemplated or are pending from faculty and students, I write to ensure that you have direct access to this information. I will leave conclusions about the relevance of these documents to the university’s decisions involving the Gaza protestors to your general counsel, who is copied on this email, as is the BFC faculty president, in the spirit of transparency. You have my permission to share it with others as is useful.

Cc: Anthony Prather, IU General Counsel; Colin Johnson, President, Bloomington Faculty Council