

April 20, 2016

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URGENT

Sent via U.S. Mail and Electronic Mail (rwachter@uwsuper.edu)

Dear Chancellor Wachter:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by an "active investigation" currently being conducted by the University of Wisconsin – Superior (UWS) into UWS' student newspaper, the ***Promethean***, resulting from a grievance filed against the publication concerning its satirical April Fools' Day issue. This investigation is a chilling and unacceptable infringement upon the students' rights to free expression guaranteed by the First Amendment and an unacceptable suggestion to UWS students and faculty that protected speech may be subject to disciplinary action. UWS must immediately terminate the investigation, including a meeting with the ***Promethean's*** editor set for tomorrow afternoon, and reassure its students and faculty that they will not be subjected to investigations for protected speech.

The following is our understanding of the facts. Please inform us if you believe we are in error.

Each year, the *Promethean* (which was until recently known as *The Stinger*, and before that was known as the *Promethean*) publishes a satirical April Fools' issue. Although the *Promethean* is funded by student fees, the April Fools' edition is self-funded by the *Promethean* using ad revenue.

This year's April Fools' edition—a copy of which is attached—is identified as being published on "March 32, 2016," a date which does not exist. The masthead of this edition features scribbled-out mastheads of both the *Promethean*'s current title and its former *Stinger* title, poking fun at the paper's name changes. In lieu of those titles, the April Fools' edition purports to be published by *The Pessimist*, whose tagline is "More Truth Than Trump!", a reference to presidential candidate Donald Trump in advance of Wisconsin's presidential primary, held on April 5, 2016.

The content of the April Fools' issue is irreverent. Articles are ascribed to fake authors with names like "Tater Tot," "Carr Ramrod," and "Jake From State Farm." Front-page articles mock a student editor of the *Promethean*, and assert that Arnold Schwarzenegger will join the UWS faculty. Another article pillories people who lack "game" and offers mock, offensive "pick-up" lines to be used on women.

In another article, authored by Editor-in-Chief Marcus White and published under the fake byline of "Dirty Dan," a Jewish man finds himself at UWS' campus and, after being described by a litany of Jewish stereotypes, is told that few Jews remain in the UWS community. White is himself Jewish and uses the article to joke about the stereotypes he encounters about his own culture.

On April 1, the same day the April Foolt hT Q q 0.24 0 0 0.24 276.210T Q cm 21.44 cm BT 50 0 0 50 0 0

On April 7, Cheslock responded to White and Susan Stanich, the *Promethean's* advisor, urging White to reconsider and asking Stanich to meet with her to continue the dialogue.

On the same day, Stanich responded to Cheslock's email, noting that the principles of free speech protect the speech of both the *Promethean* students and Cheslock. In this email, Stanich suggested that the Gender Equity Resource Center could host a

a formal grievance filed against the student newspaper. The Dean of Student's Office is actively investigating the grievance and working with UW System Legal to ensure this issue is properly and adequately addressed. Regardless of the original intention of this edition of the student newspaper, UW-Superior will not tolerate any form of disrespect - not on April Fools Day or any other day.

In the comments, UWS elaborated on its position, noting that it "can't and won't censor [sic] the student newspaper" but "sure will let folks know that it does not represent the values of" UWS. The university further stated, "If you had seen the paper you'd know there were grammar mistakes, punctuation mistakes, quoting individuals they never spoke with, and complete unprofessionalism on many levels. . . . We encourage creativity, but when you start insulting religions, gender equity, getting into overly charged sexual innuendo where it is completely inappropriate, etc [sic] that is bad, unethical journalism. . . ."

The following evening, on April 15, the *Duluth News Tribune* published on its website a lengthy article concerning the *Promethean* controversy, including at least part of Cheslock's complaint to UWS.³ That same evening, Assistant Director of Student Involvement Allison Garver sent an email to White, noting that "an incident report has been filed with the Dean of Student's office in regards to The Promethean's April Fool's edition" and that Garver was working with Tammy Fanning "to investigate." Garver asked that White select one of four dates and times in order to hold a 45-60 minute "informal meeting . . . to discuss the concern and to gather information from your perspective, along with reviewing the process for handling such incidents."

White is set to meet with Garver at her request on April 21 at 3:00 p.m.

The *Promethean's* satirical April Fools' edition is fully protected under the First Amendment, and as such UWS must cease any investigation into its expression. Continuing the investigation and requiring the *Promethean's* members to attend meetings to answer for the newspaper's protected expression impermissibly chills the rights of free speech and press that UWS students enjoy.

It has long been settled law that the First Amendment is binding on public universities such as UWS. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (internal citation omitted); *see also Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) ("With respect

³ Lisa Kaczke, *UWS student paper's April Fools' Day issue draws backlash*, DULUTH NEWS TRIBUNE, Apr. 15, 2016, available at <http://www.duluthnewstribune.com/news/education/4011002-uws-student-papers-april-fools-day-issue-draws-backlash>.

to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *see also UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1168–81 (E.D. Wis. 1991) (striking down as overbroad and vague a speech code promulgated by the University of Wisconsin).

Although UWS has not provided a copy of the grievance to the *Promethean*, the *Duluth News Tribune* described its contents:

Debbie Cheslock . . . states in her grievance that the April 1 edition didn’t have a disclaimer that it was satire, included demeaning language and statements, and that the paper’s editorial board — in a subsequent email refusing to meet with her to discuss concerns — intimidated her in an attempt to take away her freedom of speech.

“The point is that even though there are freedoms for expression, there are also consequences for inappropriate expressions. There are real consequences for everything that we do, and it is unfortunate that the *Promethean*’s staff and faculty adviser chose a path of sexism, racism, anti-Semitism and other demeaning actions . . .,” Cheslock wrote in her grievance. “Offending people in protected classes in the name of satire is not free from consequences, nor should it ever be.”

Cheslock is free as a student to file such a grievance and issue these criticisms. However, any formal investigation conducted by UWS into the grievance’s allegations, and by extension the *Promethean*’s content, violates the publication’s constitutional rights.

Satire is unquestionably protected by the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most blatantly ridiculing, outlandishly offensive parody. In that instance, the First Amendment protected a mock-up advertisement purporting to interview the Reverend Jerry Falwell, who described losing his virginity to his own mother in an outhouse. Nor does a satire or parody piece need be explicitly labeled in order to be understood as satire or parody. In fact, a satirical piece would *lose* its value if it must be explicitly labeled as such. Having a “superficial degree of plausibility” is, of course, “the hallmark of satire.” *New Times, Inc. v. Isaacks*, 146 S.W.3d. 144, 160–61 (Tex. 2004) (in the context of a defamation claim, whether a publication would be taken as a serious expression of fact is not dependent upon the presence of a disclaimer, which is “one of many signals the reasonable reader may consider in evaluating a publication”).

Satire, of course, may be offensive and is often *intended* to offend. The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in

rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that “[Free speech] may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). Indeed, much protected expression—including parody and satire—exists precisely to challenge, to amuse, and even to offend, and such speech does not lose its First Amendment protections for doing so.

The final claim of the “formal grievance”—that the *Promethean* intimidated Cheslock via email—is perplexing. A review of the emails between the Cheslock and the *Promethean*’s editor and advisor reveals nothing more than polite disagreement. Indeed, Cheslock thanks the *Promethean*’s advisor and editors for being “willing to talk” and attending the forum she organized. Even had they refused to say anything more, a refusal to attend a meeting is not “intimidation” in any actionable sense.

UWS is free to criticize its students’ speech, as it has done repeatedly in a number of fora.⁴ However, by coupling its criticism of the *Promethean* with the announcement that UWS is “actively investigating” a “formal grievance” and proclaiming that it “will not tolerate any form of disrespect,” UWS has created a profound chilling effect on student speech. UWS cannot credibly call for open dialogue while asserting that there is a possibility UWS will punish the *Promethean*’s student writers and editors, who are deterred from saying anything further that might be used against them in that investigation.

Indeed, an investigation into protected speech may itself be an act that violates the First Amendment. In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like UWS, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

The United States Court of Appeals for the Seventh Circuit—the decisions of which are binding on UWS—has similarly noted that “an investigation conducted in retaliation for comments protected by the first amendment could be actionable....” *Rakovich v. Wade*, 850 F.2d 1180, 1189

and Ninth Circuits have reached similar conclusions. In *Levin v. Harleston*, the Second Circuit upheld a trial court's finding that a university president's creation of a committee to investigate protected speech by a professor unconstitutionally chilled

be resumed. FIRE is committed to utilizing all resources at our disposal to see this matter through to a just conclusion.

We appreciate your attention to our concerns and request a response to this letter no later than April 25, 2016.

Sincerely,



Adam Steinbaugh
Program Officer, Individual Rights Defense Program