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THE FIRE QUARTERLY

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Victory for Due Process: Student Punished for Alleged Sexual Assault Cleared by University of North Dakota; Accuser Still Wanted for Lying to Police



Caleb Warner

A student convicted of sexual assault and banned from campus by a University of North Dakota (UND) tribunal has been cleared to return to school. After a year and a half, UND officials determined that the university's finding of guilt against student Caleb Warner was "not substantiated" in the face of the evidence. That same evidence led North Dakota law enforcement to charge Warner's accuser in 2010 with making a false report to law enforcement—a charge for which she is still wanted by the police. UND finally reexamined Warner's case only after the university's behavior was exposed by FIRE, to which Warner had turned for help.

"Using a shamefully low standard of evidence, the University of North Dakota branded Caleb Warner a criminal. Meanwhile, based on the very same evidence, law enforcement officials charged Warner's accuser with lying to them and issued a warrant for her arrest," said FIRE President Greg Lukianoff. "Cases like this vividly demonstrate the need for due process and fair procedure on campus, as well as a renewed recognition that fundamental rights are important for both victims and the accused."

The incident that led to Warner's punishment took place on the night of December 13, 2009. Sometime before February 9, 2010, Warner's accuser reported an allegation of sexual assault to the university and the Grand Forks Police Department. UND held a hearing for Warner on February 11, 2010, and informed him on February 16 that he had been found guilty of "Violations of Criminal or Civil Laws, Sexual Assault, and Interference [with members of the university community]." He was banned from campus and suspended from the university for three years.

In finding Warner guilty, UND used the weak "preponderance of the evidence" standard (50.01% certainty) to determine guilt or innocence—the very same standard recently imposed upon every federally funded college in the country under an April 2011 regulation from the federal Department of Education's Office for Civil Rights.

UND's reliance on the preponderance of the evidence standard lowered the accuracy of the proceedings so much that the police and the university arrived at very different results. Using what the university later insisted was the very same evidence, UND's campus tribunal convicted Warner of sexual assault, while the Grand Forks Police Department determined that Warner's accuser had lied about what had happened.

In fact, on May 13, 2010, the Grand Forks County District Court formally charged Warner's accuser with "False information or report to law enforcement officers or security officials," a Class A misdemeanor, and issued a warrant for her arrest on May 17, 2010. To date, Warner's accuser has failed to appear to answer the charges against her.

"When you only have to be 50.01% sure about the evidence, it's easy to make a mistake or to let bias, conscious or otherwise, determine the outcome—

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From the President

Greg Lukianoff

This past year undoubtedly represented a new level of achievement for FIRE and the cause of liberty on campus. Not only did FIRE secure more victories than ever, helping ensure that justice did in fact have a defender and free expression an advocate, but we also succeeded in bringing liberty to thousands more students by adding Arizona State University and James Madison University to our list of "green light" schools. Each of our various programs has expanded, and as a result, we've welcomed more students into our Campus Freedom Network, enlisted more concerned citizens through our Public Awareness Program, and put more schools on notice through our extensive legal efforts. It has truly been a remarkable year, marked by a record number of campus speeches by staff, exceptional social media exposure, and continuing media success in outlets like *The Washington Post*, *Wall Street Journal*, and *USA Today College*.

These achievements are noteworthy, but as we enter 2012, FIRE has cause for even greater vigor. This year will be our most important yet, as the growing threats posed to individual rights on campus present us with an opportunity to engage in new initiatives aimed at truly changing the culture of our colleges and universities.

This is a fight for which we are more than prepared. In 2012, FIRE will unveil a number of new projects to guarantee that our voice will be heard. First, in an increasingly smartphone-centered world, FIRE is excited to announce that we have developed a new iPhone/iPad application designed to make fighting for liberty on campus simple and accessible to all. The "app" will provide yet another platform from which FIRE can advocate for freedom, giving students and everyday individuals the power to document abuses and defend rights. In addition, we will be reinvigorating our video program by welcoming a new Sweidy Stata Video Fellow to produce high-definition videos that have the potential to reach an even broader audience with news of our outrageous cases and compelling mission.

Furthermore, FIRE has launched a new Public Policy Innovation Project to battle the new dangers posed by proposed federal regulation designed to combat bullying and the new guidance for sexual misconduct cases released by the Department of Education's Office for Civil Rights in April. With increased capacity and a new legislative focus, we will be able to actively monitor and counter the threats to individual liberty coming out of Washington.

Perhaps most importantly, I am excited to be publishing my first book, currently titled *Unlearning Liberty,* this year. The book addresses the state of free speech on campus, arguing that decades of censorship have devalued our higher education system and harmed us all well beyond the physical limits of campus. In fact, *Unlearning Liberty* demonstrates that the negative lessons students are learning about living in a free society are wreaking havoc on our democracy as a whole. The book will serve as both a wake-up call and a call to arms, and it will be the focus of an aggressive public awareness campaign about the crisis on campus. The book and the attention we hope it will generate represent an opportunity to rebalance the debate in freedom's favor, transitioning FIRE onto a new stage and broadening our efforts to restore freedom of speech, freedom of conscience, and due process at our colleges and universities.

None of these achievements would be possible without your continued support. Our accomplishments in 2011 and the milestones to come in 2012 are truly a testament to the generosity and commitment of our friends and allies, and we are eternally grateful. As we move forward, I look forward to growing together with you and celebrating our continued successes in the new year.



Student Banned from Campus after Protesting College's Deal with Debit Card Company on Facebook



A North Carolina college student was pulled out of his classroom in October and banned from campus after he complained on Facebook about his school's aggressive marketing of a debit card company to its students. After officials at Catawba Valley Community College (CVCC) punished him for a satirical Facebook post deemed "contrary to the best interest of the CVCC community," Marc Bechtol came to FIRE for help.

"Catawba Valley Community College violated the First Amendment by responding to obviously hyperbolic criticism with swift and severe punishment," FIRE President Greg Lukianoff said. "Marc Bechtol simply had to be allowed to return to class."

On June 20, 2011, CVCC, a college in Hickory, announced that "all curriculum students will receive a CVCC branded Debit Mastercard" in partnership with a financial services company named Higher One. The debit card doubles as a student ID, rendering its use essential. In order to activate his card this fall, Bechtol reportedly had to verify his Social Security number, date of birth, and student ID number. Bechtol began advocating against the partnership on June 23, concerned about CVCC's sharing of students' sensitive personal information with Higher One.

According to Bechtol, CVCC and Higher One aggressively marketed Higher One checking accounts through emails to students, advertising that they would get their tuition refunds and Pell Grants faster if they opened Higher One accounts; a September 19 email reportedly had the subject line, "Want your refund? Activate your CVCC Onecard today" in all capital letters. After Bechtol activated his card on September 27, he reportedly received a marketing phone call on September 28 from Orchard Bank, a credit card company.

Bechtol criticized CVCC's partnership with Higher One on the school's Facebook page. On September 28, he also posted: "Did anyone else get a bunch of credit card spam in their CVCC inbox today? So, did CVCC sell our names to banks, or did Higher One? I think we should register CVCC's address with every porn site known to man. Anyone know any good viruses to send them?" He immediately added a second comment: "OK, maybe that would be a slight overreaction."

A week later, on October 4, as Bechtol waited for his second class of the day to begin, he was pulled out of his classroom by CVCC Executive Officer of Student Services Cynthia L. Coulter and told that he could not return. On October 5, Coulter sent him a disciplinary letter stating that Bechtol's first Facebook comment was "disturbing," "indicated possible malicious action against the college," and violated CVCC's policy against "[c]ommission of any other offense which, in the opinion of the administration or faculty, may be contrary to the best interest of the CVCC community." Bechtol was suspended without a hearing and was banned from campus for two semesters. He attended an appeal hearing on October 7 but remained banned from campus.

FIRE wrote CVCC president Garrett D. Hinshaw on October 10, pointing out that the Facebook comment was protected expression and was neither incitement nor a true threat. FIRE also noted that CVCC's policy was unconstitutionally vague, completely failing to give students any opportunity to know what is prohibited by the whims of administrators.

When CVCC did not respond, FIRE took the case public. Under pressure from national and local media, CVCC relented and allowed Bechtol back on campus and back into his classes. However, CVCC has so far refused to revise the policy under which it punished Bechtol. FIRE will continue to pursue the case until CVCC understands that it may not punish students for engaging in expression protected by the First Amendment.

Marc Bechtol is pictured above.

Auburn University Bans Ron Paul Banner from Dorm Room Window

Auburn University has ordered a Ron Paul for President campaign banner removed from the inside of a dorm room window while allowing students to display numerous other banners, stickers, and flags. Student Eric Philips, who was ordered to remove his sign in November 2011, used his cell phone to gather photographic evidence of the double standard and came to FIRE for help.

"An unreasonable and pointless ban on all window displays is bad enough," said FIRE President Greg Lukianoff. "Yet it's obvious from the photos that Auburn has actually singled out Eric Philips' Ron Paul poster for removal. If Auburn is selectively banning only speech it deems controversial—or worse, political speech it simply doesn't like—freedom of expression is in grave danger at Auburn."

On November 7, Philips was ordered by his residence hall director to take down the Ron Paul sign he had recently placed in his window. Philips did so. In a conversation between Philips and student affairs administrator Nick Wiard about the issue on November 18, Wiard cited the newly adopted Auburn Housing and Residence Life policy 1.4.5, which states: "Hanging or displaying items such as flags, banners, decals, or signs out of or obstructing residence hall windows is prohibited."

Philips contacted FIRE for assistance. FIRE sent a letter to Auburn President Jay Gogue on December 9, informing him of the unconstitutional double standard apparently in place at Auburn and of the evidence in FIRE's possession. FIRE wrote, "Such selective enforcement and viewpoint-based discrimination is untenable at Auburn, a public university bound by the First Amendment. Auburn must evenly enforce its policies on student expression."

FIRE's letter also reminded President Gogue that during the 2008 election season, the University of Texas at Austin attempted to enforce a similar policy banning all signs in residence hall windows. Two students were ordered to remove campaign signs from their windows or else be blocked from class registration. The resulting uproar led UT-Austin President William Powers Jr. to suspend the rule indefinitely, saying, "I believe that the free expression of ideas is crucial to our educational mission." The University of Alabama also abandoned a ban on window displays in 2003 after students protested the ban by hanging American flags all over a dormitory.

Auburn's response, however, was disappointing. Auburn Assistant Vice President for Student Affairs Amy Hecht replied to FIRE on December 13, failing to acknowledge that what she called a "total ban" on window displays had been selectively enforced but insisting that Auburn is "committed to the consistent and nondiscriminatory enforcement of this policy."

"As other universities have recognized, a total ban on window displays is an unjustifiable and unnecessary restraint on expression. Auburn has given no reason for its 'total ban' on such displays, which are a part of campus culture at colleges across America," said FIRE Senior Vice President Robert Shibley. "It's time for Auburn to admit that a ban on expression like this is not only wrong, it's ripe for abuse—and it's being abused."

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especially in campus justice systems. Yet, the federal government is now mandating that this flaw be enshrined at practically every university in the country," said FIRE Senior Vice President Robert Shibley.

Warner first requested a rehearing on July 28, 2010, but UND refused to grant it. In the spring of 2011, Warner asked for FIRE's help. On May 11, 2011, FIRE wrote UND President Robert O. Kelley, pointing out the university's procedural errors and criticizing its failure to reconsider the case. On May 20, UND responded to FIRE, once again denying Warner's request for a rehearing. In that response, UND revealed that it had used the very same evidence to find Caleb Warner guilty of sexual assault that the police and prosecutor had used to charge his accuser with lying to law enforcement.

On July 15, an opinion column in *The Wall Street Journal* by FIRE Chairman Harvey A. Silverglate launched FIRE's national press campaign to encourage UND to give Warner a fair rehearing. Two weeks later, UND Provost Paul LeBel finally invited Warner to appeal the finding against him. With the help of attorney Nathan Hansen, Warner submitted a new appeal on August 31.

In October, Warner received a ruling from LeBel announcing that "based on the specific fact of a law enforcement office filing an affadavit of belief that the complainant had provided false information to him" about the sexual assault accusation, a "continued finding of a violation of the [UND Student] Code is not substantiated." LeBel wrote that the sanctions were "vacated." Warner, who has been driving a delivery truck to support himself, is now free to return to his studies at UND.

Sam Houston State University Throws Out Controversial Social Media Policy



In October, FIRE announced via a national press release that a professor at Sam Houston State University (SHSU) had used a box cutter to cut an insult against President Obama out of a "free speech wall" promoted by four student organizations across the political spectrum. The free speech wall had been erected (with permission from SHSU) in order to protest a proposed new social media policy.

But when the students called the campus police after the professor's act of censorship (and vandalism), an officer demanded that the students censor the wall or else face criminal charges *for having offended the professor*. SHSU thus far has failed to reassure students that their speech is protected against such unconstitutional police action, and has yet to reform its unconstitutional speech code banning public profanity. The good news is that SHSU has reportedly abandoned its proposed social media policy and will start from scratch on a new one.

According to a report by Stephen Green in the student newspaper *The Houstonian*, the social media policy has been "eliminated." He quoted SHSU Student Government Association representative Steven Perry saying:

> The [social media] committee ultimately decided that instead of amending the proposed policy, we would rebuild it from the ground up to best affect the needs of both the University and the student body.

While this is good news, the most problematic part of the now-discarded policy from a free speech perspective was the requirement that student organizations turn over their social media passwords so that SHSU officials could censor postings that were inconsistent with SHSU's corporate message. (For posterity, key excerpts from the policy are posted on FIRE's website.) The best that can be said for the proposed policy is that it brought people together: the policy was a problem that the campus Democrats, Republicans, Libertarians, and Democratic Socialists *all* could agree on; student organizations representing all of these viewpoints had cosponsored the free speech wall in protest of the policy.

FIRE is maintaining pressure on SHSU to keep any of the unconstitutional provisions from the discredited policy, but is still waiting for SHSU President Dana Gibson to reassure students that the campus police will no longer threaten criminal charges against protected speech. Until then, free speech remains unsafe at Sam Houston State.

FIRE's THE TORCH Want more FIRE news and views? Check out *The Torch*, FIRE's blog, for daily updates at thefire.org/torch.

From the CFN
CAMPUS FREEDOM NETWORK



FIRE's 2011 Summer Interns

Apply for FIRE's 2012 Summer Internship Programs!

FIRE is now accepting applications for our 2012 Summer Internship and Legal Internship Programs. FIRE internships provide undergraduates and law students with the opportunity to spend the summer doing substantive work to defend individual rights on campus.

For undergraduates, FIRE offers a 10-week, paid Summer Internship Program. We are looking for intelligent and energetic current undergraduates who are interested in FIRE's mission and work. FIRE interns help with administrative tasks, write about FIRE cases and issues, and develop strategies for encouraging open discourse on their own campuses. Interns also participate in weekly seminars with FIRE staff and other prominent experts on civil liberties. The internship will run from Monday, June 4, 2012, to Friday, August 10, 2012, in our Philadelphia office.

For law students, FIRE's Legal Internship Program invites rising second- and third-year law students to work with FIRE attorneys to promote liberty on campus. Legal interns perform research and write memoranda about FIRE cases and issues. Interns are also encouraged to explore their own interests within FIRE's focus on constitutional law on campus, and can develop writing samples and legal scholarship with the assistance of FIRE attorneys.

The deadline for the undergraduate internship is March 15, 2012. FIRE considers applications for legal internships year-round and on a rolling basis.

Save the Date: 2012 Campus Freedom Network Conference

July 27-29, 2012

The annual CFN Conference brings together students from around the country to learn about why free speech on campus is important and how they can defend it. The conference is held at Bryn Mawr College, just outside of Philadelphia, each summer.

* Undergraduates and graduate students are welcome to apply
* FREE registration
* Meals and housing are provided
* Travel reimbursements are available up to $300

Space is limited, so apply today at www.thecfn.org/conference!



Isaac Rosenbloom (left) and Hayden Barnes (right), both former FIRE case subjects, were panelists at the 2011 CFN conference.

FIRE Essay Contest Inspires Hope, Vigilance in College-Bound High School Seniors

On December 16, FIRE announced the winners of the 2011 "Freedom in Academia" Essay Contest. **Vincent Kelley**, a homeschooled student from Eugene, Oregon, won first prize and $5,000 for his essay, "Civil Liberties in Academia." Rachel Anderson from Palm Beach Gardens, Florida, won second prize and a $2,500 college scholarship for her essay, "That We May Think What We Like—Or Not At All?" In addition, five runners up each will receive a $1,000 scholarship: Matthew Abel, Katherine Gerton, Blaire Landon, Michael Munther, and Zachary Trama.

FIRE's "Freedom in Academia" Essay Contest invites high school seniors to watch two short documentaries about key FIRE cases and submit an essay explaining why free speech is important in higher education. Vincent's winning entry argues that "freedom of speech is not an issue of left or right, liberal or conservative—it's a direct preservation of our very democracy." You can read excerpts of his essay below.



Free speech is something we often take for granted in America. We don't think it's necessary to worry about this basic right being infringed upon; after all, it's in the First Amendment of the Bill of Rights! Moreover, we often believe that the colleges and universities of America, which claim to be havens for free speech and the free exchange of ideas in America, are the least likely places for any encroachment upon free speech rights. Unfortunately, maintaining civil liberties like free speech in America, and especially academia, is an ongoing struggle. There are those in power, inside and outside of academia, who know that college students are at an intellectually malleable time in their lives and, therefore, seek to mold students' thinking, expression, and speech in a way that benefits their interests. This can be done through speech codes, expedient decisions in violation of due process, and the monitoring of controversial student groups on campus—just to name a few examples.

The question then becomes: Why is free speech important on campus? [...]

In the case of Valdosta State University, Hayden Barnes' rights to free speech, free expression, and due process were all unabashedly violated by the University's president. When Hayden respectfully asserted his basic constitutional rights, he was immediately assailed by the president, who attempted to suppress Hayden's viewpoint and coerce him into dropping his involvement in the parking garage issue. Hayden responded by exercising his free expression rights with the creation of a collage that poked fun at the president's attachment to his pet parking garage project. The response was immediate dismissal from the university. If Hayden and FIRE hadn't fought back, a precedent of censorship and conformity would have been set on the Valdosta State campus. This could have bled into everything from classroom discussions to interactions between administrators and students. This type of censorship doesn't just impinge upon students' First Amendment rights, it robs them of the essence of a liberal education—an education in which all viewpoints should be judged on their merits, not their popularity.

[...]

When colleges can gain control of students' thoughts, speech, and actions, America's very democracy is at risk. Without free exchange of ideas in higher education, how can we expect it in the rest of society? When certain opinions are excluded from debate, those in power will maintain their grip on society. This phenomenon leads to a citizenry that feels powerless, marginalized, and robbed of their individual voice.

The work of educating young people and adults alike about their civil liberties is the only way to combat this unfortunate trend of rights violations in our colleges and universities. First, people need to understand what free speech really means. Free speech is not merely supporting the opinions of those we agree with; that's not it at all. Only when we support the right of those whose opinions we despise to speak out freely, can we say we support free speech. This requires self-discipline and determination to stand by principles in a way many of us are not accustomed to doing. However, the benefits that accrue from supporting our enemies' free speech rights far outweigh the internal difficulty that it takes to do so. Secondly, we need to educate people about their right to exercise freedom of speech, especially at our colleges and universities. The famous opinion from *Tinker v. Des Moines* stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." All students should know this and feel perfectly comfortable asserting their free speech rights on campus.

True civil libertarians know that freedom of speech is not an issue of left or right, liberal or conservative—it's a direct preservation of our very democracy. When people with drastically different opinions can unite on this one principle, democracy in America is strengthened. We can't take our free speech rights for granted if we are to come together on this issue, especially in our colleges and universities. These institutions have the power to make or break the future of American democracy. Only true defenders of free speech, like FIRE, can protect the democratic republic of the United States of America envisioned by our forefathers.

by Vincent Kelley, pictured above

Threat to Student Due Process Rights Dropped from Draft of Violence Against Women Act



Responding to criticism from FIRE and others, Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee, dropped a provision in a draft of the Violence Against Women Reauthorization Act of 2011 that would have required college students accused of sexual assault to be tried under the weak "preponderance of the evidence" standard of proof. This is the very same standard that failed UND student Caleb Warner (see page 1).

The *Burlington Free Press* (Vt.) quoted Erica Chabot, spokeswoman for the Senate Judiciary Committee, as saying, "Because of the feedback [Sen. Leahy] has received concerning this proposal, he does not plan to include it in the bill he later will introduce."

"FIRE thanks Senator Leahy and all of the legislators and members of the public who brought their concerns to the Committee for working to remove this provision from the new draft of the Violence Against Women Act," said FIRE President Greg Lukianoff. "As I said when we asked FIRE supporters to oppose this provision, reducing protections for students accused of serious misconduct will not increase justice."

On October 31, FIRE called on its supporters to contact their senators and ask them not to support or cosponsor the reauthorization of the Violence Against Women Act (VAWA) unless new provisions threatening student rights were removed. The provisions came from the draft's incorporation of elements of the proposed Campus Sexual Violence Elimination (SaVE) Act, which contains nearly identical requirements and similarly restricts fundamental due process rights. The Campus SaVE Act, in turn, aims to codify into law the damage already done to student due process rights by new regulations from the Department of Education's Office for Civil Rights. FIRE also has been leading the charge against these new regulations as well.

FIRE continues to harbor concerns about the previous draft bill's requirement that colleges must maintain "procedures for the accused *and the victim* [emphasis added] to appeal the results of the institutional disciplinary proceeding." The requirement contradicts the principle behind the Fifth Amendment's prohibition on "double jeopardy," whereby someone accused of a crime cannot be tried again for the same charge once the original hearing has properly ended in either acquittal or conviction. FIRE is uncertain if this provision will be included in the next version of the draft bill.

Victory at University of North Carolina: Religious Student Group Free to Practice Its Beliefs

The University of North Carolina at Chapel Hill (UNC) has cleared a Christian student group of any wrongdoing after it dismissed a student who felt that he could no longer adhere to the group's religious beliefs. In October, Christian *a cappella* student group Psalm 100 learned that UNC had determined that the group had complied with UNC's nondiscrimination policy, which allows belief-based student groups to make decisions about members and leaders based on those beliefs. FIRE had intervened to ensure that UNC follow its stated policy.

In August, Psalm 100 voted to dismiss a member who, having recently come out as gay, had affirmed that he no longer agreed with the group's belief that the Bible restricts sexual activity to heterosexual marriage. (At the request of Psalm 100, FIRE will not identify the student.) While no complaint was filed by the dismissed member or anyone else, UNC nevertheless opened an investigation to determine whether the dismissal violated UNC's nondiscrimination policy.

UNC's Student Organizations Nondiscrimination Policy bans discrimination based on a wide variety of protected classes, including sexual orientation, but also specifies that "[s]tudent organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs." Psalm 100 is such an organization. According to its website, "Every note we sing ... is under [God's] will and for His glory."

FIRE wrote UNC Chancellor Holden Thorp on September 16, 2011, asking that any investigation be "straightforward and brief, granting those involved time to reflect and move on following what has by accounts been a painful process for all parties." FIRE further asked that UNC "have the wisdom to follow its own policy, and to resist the temptation to prolong the investigation to make a political point or to satisfy other ideological groups on campus." Psalm 100 was also advised by North Carolina attorneys Luke Farley and Tyler Younts.

In response, in a letter to Psalm 100's president, UNC Vice Chancellor for Student Affairs Winston Crisp wrote that "based upon the evidence we received from Psalm 100 and the member who was removed from Psalm 100, we were unable to conclude that Psalm 100 excluded the former member based upon the former member's status rather than upon the former member's beliefs."

'Princeton falls short on protecting free speech'

This fall, FIRE Chairman Harvey Silverglate ('64) and Director of Speech Code Research Samantha Harris ('99) published an essay on free speech at their mutual alma mater in the *Princeton Alumni Weekly*. The full essay is printed below:

A lot may have changed since 2005; unfortunately for Princeton students, the state of their free speech rights has not.

Many alums may remember the controversy that arose in 2005 when student humor magazines *Nassau Weekly* and *The Princeton Tiger* each published articles that offended members of the campus community (a "top-ten list" of "Holocaust movies I've never seen but would like to" and a list of "Facebook Groups You Hope to Never See" that included a reference to the KKK. (Jen Albinson, "Debating when humor crosses the line," *Princeton Alumni Weekly*, Mar. 23, 2005). The controversy led to a wide-ranging conversation, in this publication and elsewhere, about the line between free speech and punishable "harassment." Six years later, however, Princeton and universities across the country are still conflating protected expression with punishable harassment, to the great detriment of their students' rights.

While the authors of those 2005 articles were not punished for their writings, statements by Princeton administrators during and shortly after the controversy made clear that Princeton students can indeed be disciplined for speech that, outside the bounds of campus, would without any doubt be protected by the First Amendment. In the wake of the controversy, then–Associate Dean of Undergraduate Students Hilary Herbold said that while the articles in question were not punishable, an article containing "offensive language directed toward someone in particular" would be (Diane Krauthamer, "Student editors will not be disciplined for 'Top 10 Holocaust movies' list," Student Press Law Center, Feb. 18, 2005, available here). The following year, in an article about the use of profanity in the classroom, Dean Herbold reiterated her stance, telling *The Daily Princetonian* that while profanity was not punishable per se, "We do discipline students for using abusive, demeaning, threatening or harassing language toward individuals" (Chip McCorkle, "Prof(anity): Cursing in the Classroom," *The Daily Princetonian*, Mar. 31, 2006).

The brouhaha over the controversial articles was—to utilize a ubiquitous phrase—a perfect "teachable moment" for the school. Students and administrators alike had the opportunity to articulate the importance of free speech—even difficult, at times objectionable, speech—to the promotion of a vibrant and vigorous academic and social atmosphere. Unfortunately, an analysis of Princeton's current speech codes indicates that Princeton is still failing to live up to its stated belief that "free speech and peaceable assembly" represent "basic requirements of the University as a center for free inquiry." It all seems a variant of the familiar "I believe in free speech, but …" argument so often heard in debates about the limitations to free discourse.

In February of this year, we sent a letter to President Tilghman outlining our concern that, five years after the campus-wide discussion, Princeton's policies do not live up to the standards of the school's stated commitment to freedom of expression. The issue initially arose back in 2010 when one of us wrote a protest letter to President Tilghman, accompanying his Annual Giving check. Tilghman wrote back denying that Princeton maintained policies that clearly and substantially restrict students' freedom of speech. Later, the other of us responded with a detailed analysis of Princeton's speech codes, prompting yet another presidential response defending those codes. This piece for *PAW* followed.

Princeton's policy on "Respect for Others," for example, prohibits any speech that "demeans, intimidates, threatens, or injures another because of personal characteristics or beliefs" despite the fact that the overwhelming majority of "demeaning" speech is, outside the bounds of campus, considered protected free speech. (It is not difficult to imagine, for example, how a heated debate about religious issues might lead someone to feel "demeaned" on the basis of religion, despite the fact that such discussions and debates are a critical part of the open discourse that should characterize a university like Princeton.)

Also problematic is Princeton's policy regarding "Information Technology Resources and Internet Access," which implies that any student accessing the University's network is an "agent of the University" and must not send any "hostile" or "malicious" messages "regarding another person, via e-mail … by posting to blogs, social networks … or by inclusion in a video produced for broadcast via the campus network or Tiger TV." In other words, according to this policy, the University reserves the right to punish students for any e-mails, Facebook posts, or tweets deemed hostile or malicious.

Our letter to President Tilghman pointed out the problems with these and other Princeton speech codes and explained how these policies could be revised to better protect the right to free speech that Princeton ostensibly promises its students. We found her reply to be deeply unsatisfactory, as she did not address any of our specific concerns. She simply disagreed that Princeton's policies are restrictive, despite the fact that they unquestionably restrict speech that a public university could not lawfully suppress under the First Amendment. And she defended Princeton's policies by noting that no students had ever complained about them, despite the fact that restrictive speech codes produce precisely the kind of chilling effect that hinders people from expressing opinions that might be controversial or unpopular.

Perhaps we should not be surprised by this response. After the 2005 controversies, one of us relayed our concerns about Princeton's speech codes to a Princeton administrator. There was a polite back-and-forth, followed by an invitation to give an interview that would be published in the *Princeton Alumni Weekly* about campus speech codes. While large segments of the interview ran in the

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University of Denver Calls Teaching 'Sexual Harassment,' Ignores Faculty; AAUP Launches Inquiry

University of Denver (DU) Professor Arthur N. Gilbert is daring to teach his "Drug War" course again after the university violated his academic freedom and suspended him earlier this year, deeming his teaching about sexual issues to be "sexual harassment." Over the objections of FIRE, a faculty committee, and the University of Denver chapter of the American Association of University Professors (DU AAUP), DU refuses to correct its error. On November 30, the national AAUP opened an inquiry into the case.

Over his 50 years of teaching, Arthur Gilbert, a tenured professor in DU's Josef Korbel School of International Studies, has taught such notable American figures as former Secretary of State Condoleezza Rice and former U.S. Army Chief of Staff George Casey. In spring 2011, Gilbert taught his graduate-level course on "The Domestic and International Consequences of the Drug War." According to the syllabus, one of the themes in the course is "Drugs and Sin in American Life: From Masturbation and Prostitution to Alcohol and Drugs," which focuses in part on the negative effects of "purity crusades."

On April 1, 2011, two students anonymously raised subjective concerns about Professor Gilbert's teaching with regard to this section of the course. On April 6, Dean Christopher Hill of the Korbel School (who is the former U.S. Ambassador to Iraq) placed Gilbert on paid administrative leave pending an investigation, without offering Gilbert a hearing. DU's Office of Diversity and Equal Opportunity (ODEO) and Department of Human Resources investigated the allegations.

On June 8, ODEO notified Gilbert that none of the conduct-based allegations sustained a sexual harassment finding, and that the speech-related allegations did not constitute hostile environment sexual harassment if they had an "academic justification." Accordingly, ODEO deferred academic judgment regarding "the academic integrity of [Gilbert's] teaching of the subject matter." Nevertheless, on July 14, Hill unilaterally declared that Gilbert had committed sexual harassment. He required that Gilbert cease "this behavior" immediately and that Gilbert attend "sensitivity training."

Gilbert appealed to his academic peers on the Faculty Review Committee, which found on October 4 that DU had violated Gilbert's academic freedom: "To summarily remove a member of the faculty from the classroom and ban that person from campus and from contacting colleagues and students because of something that was said in the classroom and reported anonymously, without full consideration, ... violates academic freedom and overall concepts of fairness."

Despite the committee's clear finding, DU Provost Gregg Kvistad denied Gilbert's appeal on October 20. By Kvistad's own admission, **the relevance and appropriateness of Gilbert's academic expression in the classroom has never been evaluated**. DU administrators have completely ignored the critical differences between the classroom and the workplace, and have failed to evaluate Gilbert's comments in the context of the *entire* classroom environment, as required by harassment law. Kvistad did reduce the "sensitivity training" to a single conversation with ODEO Director Kathryne Grove.

FIRE wrote DU Chancellor Robert Coombe on November 4, asking that the sexual harassment findings be vacated or properly reconsidered in light of their full academic context. DU AAUP echoed this request in a November 12 letter. DU replied to FIRE on November 14, arguing without evidence or further discussion that the university had "carefully investigated the complaints."

On November 30, national AAUP Associate Secretary Anita Levy conveyed AAUP's concerns to DU, writing: "[T]he actions taken against [Gilbert] and the manner in which they were imposed raise basic concerns for our Association under widely accepted standards of academic due process. The imposition of a severe sanction without a prior faculty hearing is seriously at variance with established Association-supported procedures with regard to sexual-harassment complaints, especially those related to academic expression in the classroom."

Gilbert plans to teach the course again this spring.

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magazine, no specific mention of these censorship problems at Princeton found their way into the *PAW*'s pages. A criticism of Harvard's speech codes was fine; Princeton's, however, did not merit discussion ("A Moment with Harvey Silverglate '64," *Princeton Alumni Weekly*, May 11, 2005).

President Tilghman's response reminds us of the earlier omission because, in both cases, there was an apparently genuine desire for engagement, followed shortly with a deeper and more profound decision to avoid the problem.

Sadly, Princeton is far from alone in restricting students' right to free speech in the name of, to use President Tilghman's words, the protection "of dignity and respect." What remains deeply disappointing is that at a sterling institution such as Princeton, there is no recognition that both dignity and respect are rendered meaningless when they are "protected and promoted" by censorship imposed by a third party. Respect is something earned from without, dignity something felt from within. Both lose all meaning when "protected" by the imposition of official power.

The links referenced in this essay can be found at http://paw.princeton.edu/issues/2011/10/26/pages/9281/index.xml.

Fanning the Flames: Why FIRE is Needed Now More Than Ever

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MORE BUREAUCRACY

As of 2008, only 46% of full-time employees on campus were faculty members while **54% were full-time "professionals."**

Spending on administration per student increased by nearly 66% from 1993–2007, far more than the growth in cost for instruction.

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A recent study showed that 45% of students show **no increase in critical thinking**, complex reasoning, and writing skills from when they enter college to when they graduate.

OUT-OF-CONTROL COSTS

Between 1999–2000 and 2009–10, prices for undergraduate college tuition, room, and board at public institutions **rose 37%**, while prices at private institutions rose 25%, adjusted for inflation.

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Outstanding student debt in the United States will soon total more than **$1 trillion**, and recently surpassed the country's total credit card debt.

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65% of the nation's largest and most prestigious campuses currently have speech codes that **violate the First Amendment** or their own promises of free speech.

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About This Publication

The FIRE Quarterly is published four times per year by the Foundation for Individual Rights in Education.

The mission of FIRE is to defend and sustain individual rights at America's increasingly repressive and partisan colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.

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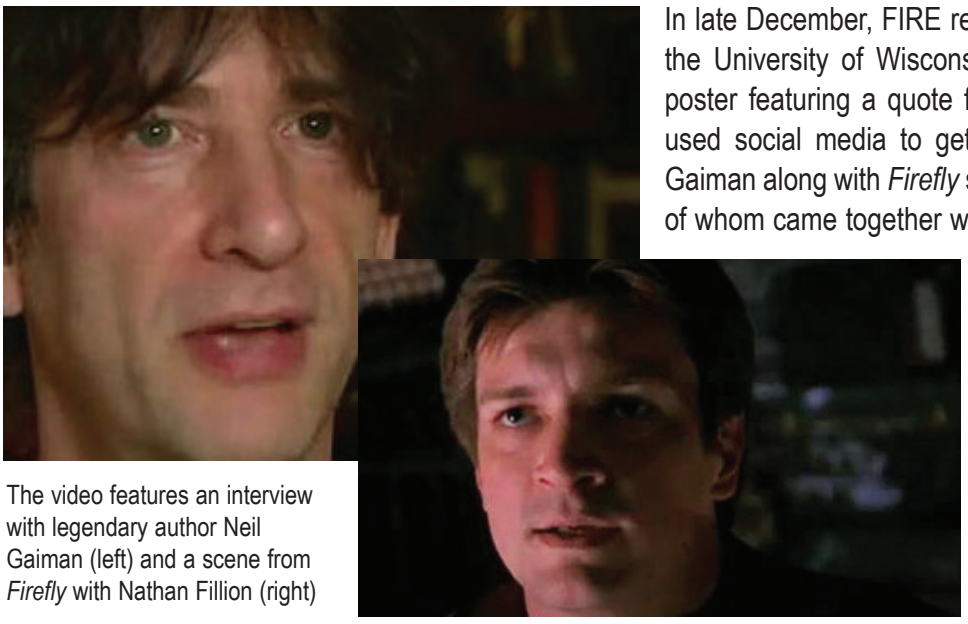
Don't Mess with 'Firefly'! How SciFi Fans Made a Campus Safe for Free Speech



The video features an interview with legendary author Neil Gaiman (left) and a scene from *Firefly* with Nathan Fillion (right)

In late December, FIRE released a video that tells the story of how the University of Wisconsin-Stout sought to censor a professor's poster featuring a quote from the classic sci-fi show *Firefly*. FIRE used social media to get the word out to legendary author Neil Gaiman along with *Firefly* stars Nathan Fillion and Adam Baldwin, all of whom came together with FIRE to fight back against a university so far gone that it equated putting up a poster with actual violence. You can watch this video, which currently has nearly 80,000 views, and many others on FIRE's YouTube channel at youtube.com/thefireorg.