



April 24, 2020

President Margee M. Ensign  
Office of the President  
Dickinson College  
P.O. Box 1773  
Carlisle, Pennsylvania 17013-2896

**URGENT**

*Sent via Electronic Mail (ensignm@dickinson.edu)*

Dear President Ensign:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the efforts of the Dickinson College Department of Public Safety and Office of General Counsel to identify anonymous online commenters involved in an Instagram account, "menofdickinson." The use of official college resources—including its police—to identify anonymous speakers because their expression is offensive to others is contrary to Dickinson College's stated commitments to freedom of expression. We call on Dickinson College to abandon any such investigation.

**I. The "Men of Dickinson" Instagram Account Investigated By Dickinson's Police**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, Dickinson College's administration is seeking to identify one or more students for anonymous online speech that does not violate the college's regulations.

In early February, Dickinson students mounted protests criticizing the college's response to sexual assaults, leading the college to adopt a number of reforms sought by student protesters.<sup>1</sup>

At approximately the same time, one or more anonymous students created an Instagram account with the username "menofdickinson."<sup>2</sup> The account's biography ("Empowering men since 1783. Made for men and woMEN") mirrored another Instagram account dedicated to Dickinson students, "womenofdickinson," whose bio reads: "empowering women since 1783 [...] made for women and feMENists."<sup>3</sup>

The "menofdickinson" account shared memes and images captioned with misogynistic language and views, including images that criticized "[c]ollege girls when they successfully falsely accuse an athlete of" rape, depicted a cartoon drawing of the earth improving after "women's rights are terminated," and depicted "wife beating and strapping explosives to women[.]"

Students who were "shocked and repulsed" by the account alleged that it belongs to a particular student, based on purportedly identifying the account's IP address.<sup>4</sup> According to *The Dickinsonian*, that student, who has not been identified by the newspaper, denies operating the account.

The account was also reported to Dickinson's administration, which is, according to Vice President of Institutional Effectiveness and Inclusivity Brenda Bretz, pursuing "every legal and authorized avenue . . . to identify the owner of the account." This includes efforts by the Department of Public Safety to "identify the owner of the account" and communications from the college's attorneys to Instagram seeking the account's closure. The account is no longer available on Instagram, but it is not clear whether it was deleted by its owner or by Instagram.

## II. Freedom of Expression Protects Anonymous Online Speech and Offensive Expression

Anonymous speech, including offensive speech, is protected by fundamental principles of freedom of expression. While the "menofdickinson" Instagram account is offensive to other students, Dickinson's policies expressly recognize that the offensive nature of expression, standing alone, is not enough to remove it from Dickinson's commitment to freedom of

<sup>1</sup> Jacob DeCarli, *College Agrees to Title IX Reform*, THE DICKINSONIAN, Feb. 13, 2020, <https://thedickinsonian.com/news/2020/02/13/college-agrees-to-title-ix-reform>.

<sup>2</sup> Sarah Manderbach, *College Probes Controversial 'menofDickinson' Instagram Account*, THE DICKINSONIAN, Apr. 19, 2020, <https://thedickinsonian.com/news/2020/04/19/college-probes-controversial-menofdickinson-instagram-account>. Except where otherwise noted, the balance of the facts described in this letter are derived from *The Dickinsonian's* article.

<sup>3</sup> Women of Dickinson (@womenofdickinson), INSTAGRAM, <https://www.instagram.com/womenofdickinson> (last visited Apr. 23, 2020).

<sup>4</sup> This letter does not address efforts by third parties to identify an anonymous speaker, but the claim that an IP address is linked to an anonymous Instagram user merits skepticism.

expression. As the expression is protected, using police and other official college resources to investigate it is contrary to that commitment.

**A. *Dickinson promises its students freedom of expression.***

Though private institutions like Dickinson are not required by virtue of the First Amendment to recognize students' freedom of expression, Dickinson has made clear, affirmative commitments to recognize the freedom of expression of students and faculty. We are sure you will agree that Dickinson should keep the legal and moral commitments it has made.

For example, Dickinson's Technology Policies note that while Dickinson is private, it is "fully committed to the ideals of . . . freedom of expression . . ." <sup>5</sup> Similarly, Dickinson's bias reporting policies explain that the college "embraces the free exchange of ideas essential to an academic community of inquiry." <sup>6</sup> Its Non-Discrimination Policy also asserts that Dickinson is "an intellectual and social community that values" freedom of inquiry, an expressive freedom. <sup>7</sup>

These promises are consistent with Dickinson's accreditation by the Middle States Commission on Higher Education, which requires that each accredited institution "possess[] and demonstrate . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression." <sup>8</sup> Middle States' standards require not only dedication to these principles, but action in conformity with those promises.

Having made these commitments, Dickinson is legally and morally bound to adhere to them. For almost a century, Pennsylvania has recognized that "the relation between the student and the [private] college is solely contractual in character." *Barker v. Bryn Mawr Coll.*, 122 A. 220, 221 (Pa. 1923); *see also Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. Ct. 1999) (finding the contractual relationship "is comprised of the written guidelines, policies, and procedures as contained in the written materials distributed to the student over the course of their enrollment in the institution").

**B. *Freedom of expression protects anonymous speech against compelled disclosure.***

Freedom of expression protects not only the right to speak, but to do so anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance requiring canvassers to identify themselves to mayor's office);

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<sup>5</sup> DICKINSON COLL., 2019-2020 DICKINSON COLLEGE STUDENT HANDBOOK 81 (2019) ("HANDBOOK"), *available at* [https://www.dickinson.edu/download/downloads/id/10633/2019-2020\\_policies\\_and\\_procedures.pdf](https://www.dickinson.edu/download/downloads/id/10633/2019-2020_policies_and_procedures.pdf).

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 59.

<sup>8</sup> MIDDLE STATES COMM'N ON HIGHER EDUC., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION 5 (13th ed. 2015), [http://www.msche.org/wp-content/uploads/2018/06/RevisedStandards\\_FINAL.pdf](http://www.msche.org/wp-content/uploads/2018/06/RevisedStandards_FINAL.pdf).

*Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

In defending the expressive right to anonymity, the Supreme Court explained that anonymous speakers may have a variety of motivations for remaining anonymous:

[A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.

*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995). Anonymous communication, the Court explained, “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *Id.* at 357. The roots of that tradition can be traced through the competing pamphlets distributed by Federalists like James Madison, Alexander Hamilton, and John Jay—who jointly published *The Federalist Papers* under the pseudonym “Publius”—and the Anti-Federalists, who also published under pseudonyms such as “Brutus,” “Centinel,” and “The Federal Farmer.” *Id.* at 344 n.6. Thomas Paine, fearing prosecution for seditious libel against King George III, published “Common Sense” anonymously in 1776. *State v. North Dakota Educ. Ass’n*, 262 N.W.2d 731, 735 (N.D. 1978). This understanding of freedom of expression was incorporated 15 years later in the First Amendment.

Today, internet users follow in that path, continuing to use pseudonyms in the forms of handles and usernames. Although the internet is, in context, a recent development, the analysis of the expressive rights it facilitates remains as it has for decades, as the right to remain anonymous extends “beyond the literary realm.” *McIntyre*, 514 U.S. at 342. It extends to unsigned handbills,<sup>9</sup> association with political organizations,<sup>10</sup> purchasing books anonymously,<sup>11</sup> and receiving political mailings viewed as subversive.<sup>12</sup> It has also, for decades, extended to online speech. *See, e.g., Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014) (finding scrutiny “warranted” where statute burdened “sex offenders’ ability to engage in *anonymous* online speech”); *Doe v. 2themart.com Inc.* 140 F. Supp. 2d 1088, 1092 (W.D.Wash. 2001) (finding the “right to speak anonymously extends to speech via the Internet”).

Of course, the mask of an anonymous speaker may be removed where the speech itself is not protected. As discussed below, the offensive nature of speech, including the speech at issue here, does not present such a basis.

<sup>9</sup> *Talley v. California*, 362 U.S. 60, 64 (1960).

<sup>10</sup> *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

<sup>11</sup> *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002).

<sup>12</sup> *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

**C. *Speech does not lose its protection on the basis that it is subjectively offensive.***

The speech at issue here is, concededly, not of the sober, civic-oriented character of *The Federalist Papers*. However, freedom of expression protects “not only informed and responsible criticism, but the freedom to speak foolishly and without moderation.” *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). As the Supreme Court aptly observed in *Cohen v. California*, although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971). “That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength,” because “governmental officials cannot make principled distinctions” between what speech is sufficiently inoffensive, and the “state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us.” *Id.* at 25.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. Speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). For example, in holding that a student newspaper’s political cartoon depicting the Statue of Liberty and Goddess of Justice being raped by police officers was protected speech, the Supreme Court explained that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

This principle is expressly reflected in Dickinson’s policies. Its Bias Incident Protocol is careful to note that “[a]lthough the expression of an idea or point of view may be offensive or inflammatory to some, it is not necessarily a violation of our Community Standards or law.”<sup>13</sup> It similarly explains that while some speech may be viewed as “hate speech,” it remains protected expression if it does not also “incite imminent violence or other criminal activity . . . against the group in question.”<sup>14</sup> Speech that is “[d]istasteful, hateful and offensive” is “in and of itself” not unprotected expression.<sup>15</sup>

That principle does not waver with respect to offensive speech concerning sex or gender. While true threats, incitement, and fighting words directed at another in a face-to-face

<sup>13</sup> HANDBOOK, *supra* note 5, at 5.

<sup>14</sup> HANDBOOK, *supra* note 5, at 4.

<sup>15</sup> *Id.*

encounter are not protected by freedom of expression, speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” remains protected by freedom of expression. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

***D. The Instagram account does not amount to unprotected hostile environment harassment.***

In keeping with its commitments to freedom of expression, Dickinson’s recently-updated Sexual Harassment and Misconduct Policy acknowledges that expression does not violate that policy solely on the basis that it is deeply offensive:

Offensiveness of conduct, standing alone, is not sufficient for the conduct to constitute prohibited conduct. The conduct must be sufficiently serious, pervasive or persistent to interfere with an individual’s ability to participate in employment or educational program and activities from both a subjective and objective perspective.<sup>16</sup>

We recognize that the posts of the “menofdickinson” account are subjectively offensive to other members of the community. But even assuming that they would also be found objectively offensive, they do not amount to conduct that is “sufficiently serious, pervasive or persistent” to frustrate participation in Dickinson’s programs or activities. From the information available to FIRE, we do not see any indication that the account’s posts have tagged any particular individuals, nor is there any indication that its operator has sent any messages *to* anyone. While it has made some references to violence, those references remain protected expression because they fall far short of a “true threat,” where “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). In short, however offensive the posts may be, those who do not wish to encounter them can do so by blocking the user—the modern equivalent of avoiding offensive speech “simply by averting their eyes.” *Cohen v. California*, 403 U.S. 15, 21 (1971) (anti-war jacket emblazoned with “Fuck the Draft” was protected expression).

### **III. Conclusion**

At Dickinson’s 2015 commencement, Ian McEwan offered an enlightened defense of the importance of freedom of expression, which he called “the life blood, the essential condition of the liberal education you’ve just received.”<sup>17</sup> McEwan noted that “[b]eing offended is not to be confused with a state of grace; it’s the occasional price we all pay for living in an open society,”

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<sup>16</sup> DICKINSON COLL., SEXUAL HARASSMENT AND MISCONDUCT POLICY 6 (Feb. 2020), *available at* [https://www.dickinson.edu/download/downloads/id/10502/sexual\\_harassment\\_and\\_misconduct\\_policy.pdf](https://www.dickinson.edu/download/downloads/id/10502/sexual_harassment_and_misconduct_policy.pdf).

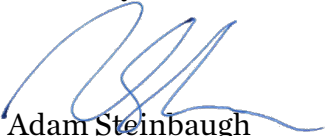
<sup>17</sup> Ian McEwan, Dickinson College Commencement Address (May 17, 2015) (transcript *available at* [https://www.dickinson.edu/info/20309/commencement/2950/2015\\_commencement\\_address](https://www.dickinson.edu/info/20309/commencement/2950/2015_commencement_address)).

and exhorted Dickinson's graduates to "use your fine liberal education to preserve for future generations the beautiful and precious but also awkward, sometimes inconvenient and even offensive culture of freedom of expression we have."

Dickinson's administration should heed McEwan's wisdom. It need not ignore expression that students find offensive; the very freedom of expression that allows for offensive expression also facilitates the most appropriate response to it: more speech. But a commitment to free expression is a promise to refrain from utilizing police and disciplinary mechanisms as a means of penalizing speech that some or many find offensive.

Given that the use of police to investigate speech is an urgent threat to freedom of expression, we request receipt of a response to this letter no later than the close of business on Wednesday, April 29, confirming that Dickinson has abandoned any investigation or pursuit of disciplinary consequences relating to the "menofdickinson" account.

Sincerely,



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Cc: Dolores Danser, Chief of Public Safety  
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