



National
Coalition
Against
Censorship

May 17, 2019

Jacque Carter
Office of the President
Doane University
The Observatory
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Crete, Nebraska 68333

Sent via Electronic Mail (presidentoffice@doane.edu)

Dear President Carter:

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. The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of over 50 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

FIRE and NCAC write today out of concern for the state of expressive rights at Doane University after a faculty librarian, Melissa Gomis, was investigated, suspended, and punished for an exhibit, which depicted, among photographs assembled from Doane's archives, Doane students wearing blackface in 1926. Doane's punishment of Gomi cannot be reconciled with Doane's stated commitments. Neither can explanatory language and content warnings be mandated by the university. Such matters must be left to the discretion of the curator of the exhibition, who should be prepared to frame exhibition materials so that they will not be misconstrued or misinterpreted.

I. Statement of Facts

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, Doane must reverse Professor Gomis' punishment, remove any permanent notations on her employment record, and clarify to students and faculty that the university remains committed to expressive and academic freedom.

Gomis is the director of Doane's Perkins Library and holds the faculty rank of Associate Professor of Practice in Library Science. Her work as an archivist includes researching and curating historical information for students at Doane.

In March, Gomis and other library staff curated an exhibit using photographs and memorabilia assembled from student scrapbooks in the university's archives.¹ The exhibit followed the ongoing national debate surrounding offensive Halloween and party costumes, as well as a national effort to confront the history of blackface in universities' yearbooks.² A subsection of the exhibit explored the topic of "Parties of the Past" and highlighted the history of Doane social events as far back as the 1800s. Among the photos selected were two from a 1926 masquerade that depicted a group of students, some of whom appear to be wearing blackface.

In mid-April, after the exhibit had been up several weeks, a student complained to Gomis about the blackface photos. Shortly after her conversation with the student, Gomis decided on her own accord to remove the photos showing blackface, out of "genuine concern for the student while also recognizing the current atmosphere of elevated sensitivity on many college campuses."³

On April 29, after Gomis had already removed the two photos, Doane Provost Paul Savory ordered the remainder of the exhibit shuttered.⁴ Gomis was "removed from campus and placed on administrative leave as a consequence of a grievance complaint" pending an investigation.⁵ *Inside Higher Ed* quoted several Doane professors as saying that Gomis was suspended under the university's broad anti-harassment policy, which prohibits "visual harassment" including "posters, cartoons, drawings," as well as "conduct that has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive work or academic environment."⁶

¹ Colleen Flaherty, *Colliding Values at Doane*, INSIDE HIGHER ED, May 6, 2019, <https://www.insidehighered.com/news/2019/05/06/doane-u-suspends-library-director-over-exhibit-included-1920s-era-students-blackface>.

² See, e.g., Kirk Johnson, *Halloween Costume Correctness on Campus: Feel Free to Be You, but Not Me*, N.Y. TIMES, Oct. 30, 2015, <https://www.nytimes.com/2015/10/31/us/cultural-appropriation-halloween-costumes.html>; Adam Harris, *America Can't Seem to Kick its Racist Costume Habit*, THE ATLANTIC, Oct. 31, 2018, <https://www.theatlantic.com/education/archive/2018/10/americans-keep-wearing-racist-halloween-costumes/574516>.

³ Flaherty, *supra* note 1.

⁴ Rick Ruggles, *'Mistakes were made': Old blackface photos in library exhibit cause stir at Doane University*, OMAHA WORLD-HERALD, May 7, 2019, https://www.omaha.com/news/education/higher-education/mistakes-were-made-old-blackface-photos-in-library-exhibit-cause/article_1173a91a-6d33-55ea-8f05-22829f443c93.html.

⁵ DOANE UNIV. CHAPTER OF THE AM. ASS'N OF UNIV. PROFS., *Statement on Academic Freedom, Censorship, and Libraries at Doane University*, May 3, 2019, available at http://doaneline.com/pdf_377b1ac6-6de1-11e9-8a91-fb5df9d99ef0.html.

⁶ DOANE UNIVERSITY EMPLOYEE HANDBOOK, *Section 5.04 Anti-Harassment Policy*, http://catalog.doane.edu/content.php?catoid=10&navoid=661#Section_5.04_Anti-Harassment_Policy_ (last visited May 12, 2019); Flaherty, *supra* note 1.

During this time, you commented publicly on the situation in both an email to the campus community and in news reports. According to the *Omaha World-Herald*:⁷

Carter sent a letter to Doane staffers last week, saying, in part: “Blackface has a history of dehumanization and stereotyping, which perpetuates systemic racism in society. Displaying these images runs counter to Doane University’s values and beliefs.”

Carter said in Monday’s letter that the photos lacked “appropriate educational context,” information and caution. If those elements had accompanied the photos, “there would not have been concern,” he wrote.

You also told the *Lincoln Journal-Star* that “[Doane would] carefully review material that may be in our archives,” and investigate the selection of the photos:⁸

“This is about providing context and education surrounding some of our history,” [Carter] said. “My hope is that any such material would only be displayed in the future if it is put in appropriate context. Unfortunately, that did not occur in this situation.”

Following the investigation and removal of the exhibit, Gomis was reinstated.

II. Doane University’s commitment to academic freedom precludes the university from penalizing a professor’s choice to exhibit historical photos from the university’s own archives

A commitment to academic freedom must necessarily allow an educator to choose whether, when, and how to teach, write, or display material pursuant to their role within the university—even when that material might be deeply offensive to others or depict the university’s history in an unflattering light. Gomis’ use of historical photos from the university’s own archives, in an exhibit intended to prompt students to think critically about historical and ongoing issues regarding racism, is well within the expressive freedom to which Doane is purportedly committed. As an isolated, pedagogical choice, Gomis’ inclusion of the photos certainly does not rise to the level of discriminatory harassment. Doane’s censorship of the display is alarming and suggests that Doane would rather hide its past than confront it.

A. Doane University guarantees professors the right to academic freedom in its policies and via its accreditation.

As a private institution, Doane is not required to make commitments to academic freedom or free expression by virtue of the First Amendment. However, the university makes affirmative, robust commitments to provide its faculty members with the rights to freedom of expression and academic freedom, and it is therefore contractually and morally obligated to adhere to the promises it makes. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (Wis. 2018)

⁷ Ruggles, *supra* note 4.

⁸ Chris Dunkler, *Historical ‘blackface’ photos lead to suspension, spark concerns at Doane*, LINCOLN J.-STAR, May 3, 2019, https://journalstar.com/news/local/education/historical-blackface-photos-lead-to-suspension-spark-concerns-at-doane/article_58881589-53c1-5758-8b3c-a0f2281c3589.html.

(private university breached its contract with a professor over a blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the blog post was “a contractually-disqualified basis for discipline.”).

In the Faculty Handbook, for example, Doane University affirms its commitment to faculty members’ “full freedom in research and the publication of the results,” adopting a policy based on the American Association of University Professors’ 1940 Statement of Principles.⁹ The Handbook likewise commits Doane’s administration to following “best practices regarding the principle of academic freedom” in employment matters.¹⁰

Doane’s commitments to academic freedom and freedom of expression are not merely aspirational; this commitment is also critical to its status as an accredited institution of higher learning. Doane University is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools, whose standards require that accredited institutions be “committed to freedom of expression and the pursuit of truth in teaching and learning.”¹¹ In committing to these ideals of academic freedom and freedom of expression, Doane rightly hews to the United States Supreme Court’s sound observation that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

B. Librarians are afforded academic freedom in their roles as researchers, curators, and publishers.

A librarian at Doane University is afforded academic freedom both by virtue of their faculty appointment¹² and their role within the academic community. Librarians facilitate the information-gathering and research functions of the university’s constituents, and often participate in the pursuits of academia themselves, including through teaching, research, and publication. These roles necessarily require freedom from institutional censorship in order to preserve the library’s central function within the university.

As the Joint Statement on Faculty Status of College and University Librarians authored by the Association of College and Research Libraries (a division of the American Library

⁹ *Doane University Faculty Handbook*, https://www.doane.edu/sites/default/files/webform/service-bureau/Doane_University_Faculty_Handbook-Oct_2018.pdf (Last visited May 13, 2019).

¹⁰ *Id.*

¹¹ HIGHER LEARNING COMM’N, CRITERIA FOR ACCREDITATION (rev. June 2014), *available at* <https://www.hlcommission.org/Policies/criteria-and-core-components.html>. Notably, During the 2019-20 year, the Higher Learning Commission is planning to augment this standard by expressly referencing academic freedom and adopting, in its glossary, a comment explaining that academic freedom entails more than just “freedom from constraint.” *See* HIGHER LEARNING COMM’N, CRITERIA FOR ACCREDITATION ADOPTED REVISIONS EFFECTIVE SEPTEMBER 2020, *available at* http://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision_2019_INF.pdf.

¹² At Doane, “[l]ibrarians with faculty status will be considered practice faculty.” *Doane University Faculty Handbook*, *supra* note 9. As Committee A of the AAUP has cogently explained, practice faculty are entitled to academic freedom, which “encompasses the right to express opinions on all manner of issues having to do with their institution and its policies and practices.” Ernst Benjamin *et al.*, *Professors of Practice* (Nov. 2004), *available at* <https://www.aaup.org/report/professors-practice>.

Association), the Association of American Colleges and Universities, and the American Association of University Professors observes:

Librarians perform a multifaceted role within the academy. It includes not only teaching credit courses but also providing access to information, whether by individual and group instruction, selecting and purchasing resources, digitizing collections, or organizing information. In all of these areas, librarians impart knowledge and skills to students and faculty members both formally and informally and advise and assist faculty members in their scholarly pursuits. They are involved in the research function and conduct research in their own professional interests and in the discharge of their duties. Their scholarly research contributes to the advancement of knowledge valuable to their discipline and institution.

[...]

College and university librarians share the professional concerns of faculty members. Academic freedom is indispensable to librarians in their roles as teachers and researchers. Critically, they are trustees of knowledge with the responsibility of ensuring the intellectual freedom of the academic community through the availability of information and ideas, no matter how controversial, so that teachers may freely teach and students may freely learn. Moreover, as members of the academic community, librarians should have latitude in the exercise of their professional judgment within the library, a share in shaping policy within the institution, and adequate opportunities for professional development and appropriate reward.

Faculty status entails for librarians the same rights and responsibilities as for other members of the faculty.¹³

These roles embrace the freedom to publish—that is, to engage in public display of the fruits of research—including within the spaces created by the library. For example, in *Burnham v. Ianni*, the United States Court of Appeals for the Eighth Circuit found “unreasonable” a university’s suppression of professors’ photographs in a public display case reserved for use by the university’s history department. 119 F.3d 668, 671 (8th Cir. 1997). The photographs—seen by a university administrator as “totally inappropriate,” “insensitive,” and tantamount to

¹³ Joint Committee on College Library Problems, *Joint Statement on Faculty Status of College and University Librarians* (rev. June 2012), available at <https://www.aaup.org/sites/default/files/files/2013%20Bulletin/librarians.pdf>. The Joint Committee was composed of the Association of College and Research Libraries (a division the American Library Association), the Association of American Colleges and Universities, and the American Association of University Professors.

sexual harassment—depicted professors bearing weapons related to their academic interests. *Id.* at 670–71. The university’s administration, following anonymous complaints, removed the photographs at the direction of the university’s chancellor. *Id.* at 672. In striking down the university’s censorship of the display, the court observed that “[u]nderlying our holding today” was a “recognition of the professors’ academic freedom,” which was a “special concern of the First Amendment.” *Id.* at 680 n.19 (quoting, in part, *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265, 312 (1978)).

Curated campus displays do not amount to expression by the institution itself, and are not reasonably seen as such. To the contrary, they are manifestations of the curator’s research and publication. The choice to exhibit images or other expressive works on a university campus is rarely, if ever, likely to be seen by a reasonable observer as bearing the university’s endorsement of its content. *See, e.g., O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1219–31 (10th Cir. 2005) (selection by university panel and president of a statue of a “Roman Catholic bishop with a contorted facial expression and a miter that some have interpreted as a stylized representation of a phallus” was perceived as anti-Catholic, but a reasonable observer would not believe its content was endorsed by the institution).

C. Academic freedom entails a right to confront, use, and discuss offensive material.

Faculty at institutions that promise academic freedom must be free to discuss, view, or display a wide variety of materials germane to their research in the manner of their choosing. This includes material that may shock or offend others—including photographs of former students wearing offensive costumes or blackface. Courts have found that these kinds of pedagogical choices are protected under the tenets of academic freedom and do not rise to the level of discriminatory harassment.

The Ninth Circuit, for example, found that even faculty who express sincerely held offensive viewpoints pertaining to matters of public concern will rarely amount to actionable workplace harassment. *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2009). In ruling on a hostile environment claim prompted by a math professor’s “racially-charged” emails, which were sent to a listserv that reached every employee in his community college district, the Ninth Circuit distinguished between protected expression and targeted harassment:

Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment. For instance, racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities, as they do not ‘seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way[.]’

Id. (cleaned up). In contrast to this form of targeted harassment, the Ninth Circuit was particularly concerned that characterizing faculty members’ protected expression as

harassment would cast a chilling effect on higher education, which has “historically fostered” the exchange of disparate or competing viewpoints. *Id.* at 708. “The desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.” *Id.* at 708–09 (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)) (cleaned up).

Academic freedom requires that displays like that assembled by Gomis be free of administrative interference, whether effectuated by outright censorship or by a requirement that the display be accompanied by disclaimers or qualifying language satisfactory to administrators or aggrieved observers of the display.

D. Doane’s punishment of Gomis creates a chilling effect on speech and scholarship.

While the university has reinstated Gomis, the chilling effect precedes the imposition of final, formal discipline and instead arises from the initiation, announcement, and maintenance of an investigation into expression Doane has explicitly pledged to protect under its academic freedom policy. Indeed, courts have held that official “inquiry alone trenches upon” freedom of expression. *Paton v. La Prade*, 469 F. Supp. 773, 778 (D.N.J. 1978) (student’s speech impermissibly chilled when anonymous request for information from a political organization resulted in being labeled a “subversive” and formally investigated).

The effect investigations have on free expression is reflected in First Amendment jurisprudence. 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.” Accordingly, several appellate courts, including the Ninth Circuit, have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988).

Doane’s interest in investigating speech it deems “counter to Doane University’s values and beliefs” or determining whether expression falls within the “appropriate educational context” is insufficient to justify any restriction on protected faculty speech. At institutions that promise academic freedom, such choices are reserved for faculty alone.

III. Conclusion

There can be no serious contention that Gomis, a Doane University librarian and practicing professor, is not entitled to academic freedom by virtue of her role. Nor does the location of the display authorize administrative censorship on the basis that administrators, or some constituents of the university, find the materials displayed offensive. Any member of the university—whether administrator, faculty, or student—is free to ask Gomis to consider providing additional context as a means of more constructively confronting offensive images in the university’s archives. But Doane’s administration cannot mandate that outcome without abandoning the institution’s commitment to academic and expressive freedom.

We recognize that, in our polarized times, the careful contextualization of exhibitions is important, especially where the mission of the institution is to educate. But decisions about how to frame and contextualize an exhibition should be left to the curator or organizer of the exhibition. To guide curators, librarians and administrators, the National Coalition Against Censorship (NCAC) has produced a set of guidelines, *Smart Tactics: Curating Difficult Content*, (<http://ncac.org/resource/smart-tactics>), which includes a handbook to help curators meet the challenges of presenting sensitive materials. NCAC will be happy to provide Doane University with a copy.

FIRE and NCAC call on Doane to rescind any punishment related to this matter and clarify its commitment to academic and expressive freedom.

We request receipt of a response no later than the close of business on May 31, 2019.

Sincerely,



Alexandria Mofey
Program Officer, Individual Rights Defense Program
Foundation for Individual Rights in Education



Svetlana Mintcheva
Director of Programs
National Coalition Against Censorship

Cc: Paul Savory, Provost and Executive Vice President