



February 3, 2016

Chancellor Bernadette Gray-Little
University of Kansas
Office of the Chancellor
1450 Jayhawk Boulevard
Lawrence, Kansas 66045

Sent via U.S. Mail and Electronic Mail (chancellor@ku.edu)

Dear Chancellor Gray-Little:

As you will recall from our previous correspondence, 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 concerned by the threat to free expression and academic freedom presented by the University of Kansas' (KU's) investigation into the teaching of professor Andrea Quenette, spurred by complaints from graduate students regarding viewpoints expressed by Quenette during an in-class discussion on race. The complaining students claim that the mere expression of these opinions constitutes racial discrimination and harassment, and they demand that KU terminate Quenette. Their demand is profoundly misguided and, if heeded, would devastate the free speech and academic freedom rights of all KU faculty. As a public institution bound by the First Amendment, KU must respond to the students' demand by clearly and forcefully affirming Quenette's fundamental rights.

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

On November 11, shortly following student protests regarding racial controversies at the University of Missouri, KU held a forum for the discussion of racial and cultural issues affecting the campus. At this forum, attended by roughly 1,000 students, faculty, and community members, many students raised concerns about the climate at KU, suggested

measures to improve the campus atmosphere, and shared personal experiences of encountering racial and cultural insensitivity.

The next day in her Communications Studies 930 (COMS 930) graduate seminar, Quenette and her students discussed the previous day's forum. The content and perceived tenor of the discussion is described in the open letter Quenette's students later signed demanding her termination (attached). In response to a student's inquiry, according to the letter, Quenette offered her impression of the climate at KU compared to other institutions:

On the morning of November 12, 2015, a question was posed by Communication Studies Masters student Abigail Kingsford in her COMS 930 class, a required seminar with the primary purpose of instilling best practices in graduate students teaching COMS 130 (public speaking) for the first time. She inquired, "In light of last night's university-wide town hall meeting about race and discrimination on campus, what is the best approach to talk about that event and these issues with our students?"

We students in the class began discussing possible ways to bring these issues up in our classes when COMS 930 instructor Dr. Andrea Quenette abruptly interjected with deeply disturbing remarks. **Those remarks began with her admitted lack of knowledge of how to talk about racism with her students because she is white. "As a white woman I just never have seen the racism...It's not like I see 'Nigger' spray painted on walls..." she said.**

[Emphasis added.]

The discussion transitioned to the topic of minority student retention rates in higher education, which the open letter characterizes as follows:

As you can imagine, this utterance caused shock and disbelief. Her comments that followed were even more disparaging as they articulated not only her lack of awareness of racial discrimination and violence on this campus and elsewhere but an active denial of institutional, structural, and individual racism. This denial perpetuates racism in and of itself. After Ph.D. student Ian Beier presented strong evidence about low retention and graduation rates among Black students as being related to racism and a lack of institutional support, **Dr. Quenette responded with, "Those students are not leaving school because they are physically threatened everyday but because of academic performance."** This statement reinforces several negative ideas: that violence against students of color is only physical, that students of color are less academically inclined and able, and that structural and institutional cultures, policies, and support systems have no role in shaping academic outcomes. **Dr. Quenette's discourse was uncomfortable, unhelpful, and blatantly discriminatory.**

[Emphases added.]

The students declared a number of terms and viewpoints to be “unacceptably offensive” and unsuitable for classroom discussion. These include “[u]se of the n-word,” which they describe as, among other things, “terroristic and threatening to the cultivation of a safe learning environment”; the “assertion that an inability to see racism means it does not exist on this campus”; and the “assumption that retention rates of African-American students is solely due to their lack of academic ability,” which they call “academically irresponsible, morally abhorrent, and patently untrue.” The students claim that “Dr. Quenette’s deployment of racially violent rhetoric not only creates a non-inclusive environment in opposition to one of the University of Kansas’ core tenets, but actively destroys the very possibility of realizing those values and goals.”

The students further argue that Quenette’s comments “actively violate[d]” KU’s Racial & Ethnic Harassment policy, as well as KU’s mission statement, the KU College of Liberal Arts and Sciences mission statement, and the Communication Studies Graduate Handbook. Finally, the students maintain that Quenette’s speech contradicts the policy position espoused in an email you sent to the KU community on November 13, 2015. The eleven signees of the open letter include the students enrolled in Quenette’s COMS 930 seminar and one Communication Studies graduate student who was neither enrolled in the seminar nor present for this discussion.

In an interview with *Inside Higher Ed* following the letter’s publication, Quenette addressed specific charges from the students and explained her reasons for conducting the class discussion in the manner she did:

“I believe academic freedom is an important issue in this situation,” Quenette said. “This topic was already the focus of the readings in class for this day, and issues of race and discrimination are current issues our campus is focusing on. I did not call anyone this word, nor did I use it to refer to any individual or group. Rather, I was retelling a factual example about an issue elsewhere.”

She added, “Later in the discussion we discussed low graduation rates for African-American students at KU. I was trying to point out that there are a number of factors that contribute to graduate rate statistics for all students, among them varying levels of academic preparedness. The university needs to identify ways to provide additional academic support for students who may need greater resources to be successful. I believe it is well within the purview of my job to discuss these issues and indeed, it was related to the focus of the class for the day. My words were not intended to hurt anyone but

rather to make a larger point that the solutions to race and diversity issues on our campus must directly address the specific problems our campus faces.”¹

KU is reportedly investigating six complaints made by students against Quenette related to the November 12 class discussion.² In sum, the students argue that Quenette’s in-class remarks constitute racial discrimination and harassment, are not protected by the First Amendment, and are sufficient not only to justify, but to mandate, Quenette’s termination.

Following the publication of the students’ letter and the ensuing publicity, Quenette requested, and was granted, paid administrative leave through the end of the Fall 2015 semester.³

The students’ argument that Quenette’s speech constitutes discriminatory harassment unprotected by the First Amendment is profoundly mistaken, and KU must reject it. Quenette’s expression is fully protected by her rights as a professor at a public institution. If KU were to find otherwise, it would undermine any meaningful commitment to academic freedom. Faculty must be free to expose their students to arguments, viewpoints, and ideas with which they may disagree to cultivate an atmosphere of debate and discussion befitting a public university, which the Supreme Court of the United States has deemed to be “peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

That the First Amendment is fully binding on public universities like KU is settled law. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect 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.”); *Healy*, 408 U.S. at 180 (“[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). Further, the Supreme Court has made clear that academic freedom is a “special concern of the First Amendment,” stating that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹ Scott Jaschik, *A Class Implodes Over Race*, INSIDE HIGHER ED, Nov. 23, 2015, available at <https://www.insidehighered.com/news/2015/11/23/u-kansas-professor-leave-after-comments-race-result-5-complaints>.

² Sara Shepherd, *KU continues discrimination investigation into professor who used n-word in class; she was not scheduled to teach spring classes*, LAWRENCE JOURNAL-WORLD, Dec. 14, 2015, available at http://www2.ljworld.com/weblogs/heard_hill/2015/dec/14/ku-continues-discrimination-investigatio/.

³ The students also make separate, largely unspecified allegations against Quenette unrelated to the November 12 COMS 930 seminar, which purport to establish a pattern of unacceptable conduct to further support arguments for her termination. FIRE does not address those allegations in this letter and instead focuses on the students’ primary target: Quenette’s in-class remarks.

Quenette's speech is not harassment under KU's Racial & Ethnic Harassment policy, as further detailed in KU's Racial and Ethnic Discrimination and Harassment Brochure. In relevant part, that brochure defines racial and ethnic harassment as "racially or ethnically motivated" behavior or conduct that "has the purpose or effect of creating an intimidating, hostile, or offensive work or educational environment"; "interfering with an individual's or group's work, academic performance, living environment, personal safety, or participation in a university-sponsored activity"; or "threatening an individual's or group's employment or academic opportunities."

Quenette's speech does not satisfy these criteria. What's more, this policy recognizes that its provisions do not supersede free speech and academic freedom:

This policy is not intended to infringe upon freedom of expression or academic freedom. The University of Kansas, Lawrence, recognizes that such freedoms are fundamental to the educational process. This policy will be administered with respect for the necessity for the free exchange of ideas in the academic community.

Guidance from the Department of Education's Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation's campuses, makes further clear that public university harassment and discrimination policies must not infringe on First Amendment rights. In a July 28, 2003, "Dear Colleague" letter sent to the presidents of public and private universities nationwide, former OCR Assistant Secretary Gerald S. Reynolds made clear to colleges that "in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." Reynolds further cautioned:

Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.

A 2010 "Dear Colleague" letter regarding bullying from former OCR Assistant Secretary Russlynn H. Ali reaffirmed the 2003 "Dear Colleague" letter's understanding of the relationship between the First Amendment and harassment. On April 29, 2014, Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that "the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S.

Constitution” and stating that “when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.”

Quenette’s efforts engaging her COMS 930 students on topics of race and inequality are fully protected under the First Amendment and KU policy. Students, of course, have every right to question and criticize the views put forth by Quenette, and a graduate-level seminar is ideally situated to facilitate such discussion. But just as Quenette’s students have every right to challenge her, as their professor she has no obligation to uncritically accept their arguments without subjecting them to debate or offering possible alternative viewpoints or explanations. Quenette would be failing in her duties as a professor if she did so.

The students also make highly dubious arguments in an effort to provide legal support for their calls to terminate Quenette, citing the Supreme Court’s decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that statements made by public employees “pursuant to their official duties” are not protected by the First Amendment. *Id.* at 421–22.. However, as the students acknowledge, the Court explicitly reserved the question of *Garcetti*’s applicability in the academic context,⁴ and several federal appellate courts have since found the *Garcetti* framework inapplicable to faculty “speech related to scholarship or teaching.” *See, e.g., Demers v. Austin* 746 F.3d 402, 410–13 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). Likewise, the federal District Court for the District of Kansas has declined to apply *Garcetti* to classroom speech by university faculty. *See Heublein v. Wefald*, 784 F. Supp. 2d 1186, 1197 (D. Kan. 2011).

Judicial aversion to applying *Garcetti* to the academic speech of public university faculty is well-founded and recognizes the vital importance of academic freedom—“a special concern of the First Amendment.” *Keyishian*, 385 U.S. at 603. As the U.S. Court of Appeals for the Ninth Circuit has observed:

[I]f applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. . . . *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.

Demers, 746 F.3d at 411–12.

⁴ Addressing concerns for academic freedom raised in Justice Souter’s dissent, Justice Kennedy’s majority opinion states: “There is some argument that expression related to scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Garcetti*, 547 U.S. at 425.

The balancing test employed by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in which the Court held that the dismissal of a public school teacher for criticizing the Board of Education violated the First Amendment, is instructive here. See *Demers*, 746 F.3d at 412 (holding that “academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*”); see also *Adams*, 640 F.3d at 563 (rejecting *Garcetti* in favor of *Pickering* and its progeny for analysis of faculty speech involving scholarship and teaching). To establish First Amendment protection, the two-pronged test put forth in *Pickering* requires that speech by a public employee address “matters of public concern” and that the employee’s interest in commenting on such matters outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568. Quenette’s speech plainly satisfies the *Pickering* test’s requirements. Two contrasting cases from the United States Court of Appeals for the Sixth Circuit illustrate this point.

In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), a basketball coach sought to motivate players by referring to them using racial epithets. The U.S. Court of Appeals for the Sixth Circuit held that this speech was not protected under *Pickering* because it did not touch upon a matter of public concern. The Sixth Circuit noted that the relevant inquiry was the “content, form and context” of the speech—that is, not “what might incidentally be conveyed by the fact that the employee spoke in a certain way, [but] the point of the speech in question.” *Dambrot*, 55 F.3d at 1186–87. The basketball coach’s use of racial epithets to denigrate players had nothing “relating to any matter of political, social or other concern to the community.” *Id.* at 1187.

In *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001), by contrast, a professor used the words “nigger” and “bitch” in the context of discussing how the terms are used in society at large. *Hardy*, 260 F.3d at 675. Contra *Dambrot*, the Sixth Circuit in *Hardy* found that the professor’s speech satisfied both of *Pickering*’s balancing requirements. Because the professor’s speech “relate[d] to matters of overwhelming public concern — race, gender, and power conflicts in our society,” it was protected by the First Amendment. *Id.* at 679. Furthermore, the Sixth Circuit rejected the defendant college’s argument that the use of “racially derogatory language” should be sufficient to permit it to claim qualified immunity from suit because “reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.” *Id.* at 683.

As in *Hardy*, Quenette’s speech is protected by the First Amendment. Her comments were made during a single class session in response to inquiries from her students specifically seeking her opinions on how to approach particular issues in their own teaching. Thus, the comments were germane to the classroom subject matter and advanced an academic message. Quenette’s comments were not intended to insult or denigrate her students but were instead intended to demonstrate the limits of her knowledge and perceptions of racism in society, as the students’ letter acknowledges. And there can be no doubt Quenette was speaking on a matter of public concern. Indeed, the discussion of racial and cultural

issues in higher education was so pressing that KU held a forum to discuss those very concerns, attended by some 1,000 members of its community the evening before Quenette's class. Further, her interest in speaking freely with her students on these issues clearly outweighs KU's interest in disciplining her for her speech, which violates no KU policy.

Troublingly, Quenette's students are calling for the banishment of certain viewpoints, and even certain words, from classroom discourse, and for KU to punish those willing to venture them even in the context of scholarly debate. These demands could hardly be more opposed to the guidance of the Supreme Court, which in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), declared:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

FIRE asks that the University of Kansas recognize that Quenette's classroom comments are protected by the First Amendment, and that the university will not terminate or otherwise sanction her for expressing them. We hope that, in the face of such chilling demands, KU uses this controversy as an opportunity to affirm its fundamental commitments to faculty rights.

We request a response to this letter by February 24, 2016.

Sincerely,



Peter Bonilla

Director, Individual Rights Defense Program

Encl.

cc:

Sara Thomas Rosen, Senior Vice Provost for Academic Affairs

Carl W. Lejuez, Dean, College of Liberal Arts & Sciences

Don W. Steeples, Interim Dean, College of Liberal Arts & Sciences

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