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### REGULATING PROFESSORS' ONLINE SPEECH: ACADEMIC FREEDOM OR "INCIVILITY"

BY: KATHLEEN CONN

OF COUNSEL WITH THE EDUCATION LAW GROUP OF KING, SPRY, HERMAN, FREUND & FAUL, LLC IN  
BETHLEHEM, PENNSYLVANIA

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## Introduction

The then-Chancellor of the University of Illinois at Urbana-Champaign, Phyllis Wise, polarized the higher education community in August 2014 when she orchestrated the rescinding of the tenure track position offered to Steven Salaita by the Department of American Indian Studies nine months before. Wise accused Salaita of incivility in his tweets criticizing Israel's shelling of Palestine and the resultant killing of innocent Palestinian children. A number of Salaita's hundreds of tweets that summer were crude and vulgar, liberally spiced with curses condemning President Obama and any others who supported him or the state of Israel. A significant number of major donors to the university had threatened to withhold support if Salaita were allowed to join the faculty, but many university departments and other groups animatedly supported Salaita's right to First Amendment freedom of speech and academic freedom. The American Association of University Professors (AAUP) censured the university.

Salaita mounted two lawsuits against the university's administration and John Doe donors, one to force the university to release emails and other documents relevant to his case, and the other alleging substantive violations of his constitutional rights. Revelations incident to the lawsuits triggered the resignation of Chancellor Wise and a shuffling of university administration. Salaita ultimately agreed to a settlement amounting to \$875,000, of which, \$275,000 went to his lawyers. Salaita has moved on, and he now teaches in Beirut and continues to publish a voluminous number of tweets. The controversy that swirled around Salaita's job loss has apparently waned, but the questions that were raised have not been put to rest. What are the free speech rights of professors at public colleges and universities when they "speak" online? Does the right of academic freedom protect professors' online speech? And what role should "civility" play in evaluating the speech and expression of higher education faculty? Without a court decision in the Salaita case, no new judicial precedent has been established. However, a jurisprudence relating to academic freedom and professors' First Amendment speech rights has existed for at least three generations.

## Academic Freedom or Employer Regulation: Judicial Pronouncements

The U.S. Supreme Court has long championed academic freedom in public colleges and universities. In *Sweezy v. New Hampshire*, Chief Justice Earl Warren authored the often-quoted paean to academic freedom stating that, "The essentiality of freedom in the community of American universities is almost self-evident . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . ."

Ten years later, in *Keyishian v. Board of Regents*, Justice Brennan reaffirmed the Court's support for academic freedom, stating forcefully:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

However, the Court's First Amendment jurisprudence has also recognized that free speech may have to yield in the face of more practical concerns. Public universities are not only academic bastions;

they are also businesses, run by various administrators and Boards of Trustees who employ faculty and staff members. Alongside its pronouncements on the pre-eminence of academic freedom and the First Amendment rights of professors, the Supreme Court has also upheld the right of the state as employer to regulate the speech of its employees. In a trilogy of decisions from 1968 to 1983, roughly paralleling in time the Court's development of its student speech jurisprudence, the Court fashioned a comprehensive analysis by which lower courts might strike a balance between the rights of public employees to freedom of speech and expression and the rights of the state as employer to regulate employee speech.

### **The *Pickering* Decision**

Marvin Pickering was a public school teacher who complained in a newspaper editorial about his district's priorities in expending tax monies. The district censured Pickering, but when Pickering alleged in a lawsuit that the district had abridged his First Amendment rights, the court agreed. In order for the public employee's speech to be protected by the First Amendment, the *Pickering* majority ruled, the employee must be speaking as a citizen on a matter of true public concern, and the right of the employee must be balanced against the right of the employer to maintain efficiency and productivity in the workplace. This has often be referred to as the *Pickering balancing test*.

### **The *Mt. Healthy* Decision**

The Court expanded on the Pickering ruling several years later in *Mt. Healthy City School District Board of Education v. Doyle*. Fred Doyle was a social studies teacher fired for allegedly sharing his negative comments about his school's new dress code for teachers on a radio station. However, the Court noted that Doyle had been a less than stellar employee, and had previously engaged in obscene gestures toward students and other confrontations with colleagues. The Court stated that, although Doyle's speech was a substantial factor in the district's action, an employee cannot claim the protection of the First Amendment for otherwise unprotected conduct. The Court established a burden shifting analysis in which the disciplined employee would have to show that the speech alleged was a substantial factor in the district's disciplinary action, but the district could then show that but for the speech, the district would have taken the same action for other valid reasons.

### **The *Connick* Decision**

While the *Pickering* and *Mt. Healthy* decisions were in the context of K-12 school teachers' writings or speech, the third decision in the trilogy, *Connick v. Myers*, was in the context of an assistant district attorney's written survey to colleagues. Sheila Myers, unhappy with a proposed transfer in her work environment, circulated a survey among co-workers, attempting to uncover a lack of morale and a general dissatisfaction with the actions of supervisory personnel. Myers was disciplined. The Court looked to the *Pickering* and *Mt. Healthy* decisions and fashioned the third prong of what would become its public employee speech jurisprudence for years to come. The Court ruled that Myers was not speaking on a matter of true public concern, and stated that no First Amendment protection was available for purely internal expressions of dissatisfaction with workplace conditions. Employee speech that eroded interpersonal relationships between employer and employees, the Court concluded, was not subject to protection.

## **The *Garcetti* Decision**

Although handed down in different contexts, these three holdings have consistently been applied in controversies over speech that involved discipline or sanction for college and university professors' speech. Unfortunately, another decision arising in the context of a district attorney's speech, the 2006 decision of the Court in *Garcetti v. Ceballos*, has cast doubt on whether any First Amendment protection is available for public employees when they speak "pursuant to their official duties." *Garcetti* has proven to be highly controversial, and although the ruling has been almost universally applied in the K-12 context, whether the ruling applies in the higher education context is still debated.

Richard Ceballos was a Deputy District Attorney for the Los Angeles County District Attorney's office. He challenged the validity of a search warrant in a memo to his superiors, and testified to the warrant's deficiency in a subsequent court case in which he was called as a defense witness. He was subjected to what he alleged were retaliatory disciplinary actions for his pursuing the issue of the defective warrant. Justice Kennedy, writing for the majority, ultimately decided that Ceballos' expressions were made as part of his duties as a prosecuting attorney, and issued the majority decision that Ceballos' speech and expression were not protected by the First Amendment. Justice Souter, in his dissent, expressed his hope that the decision would not imperil the academic freedom of professors in public colleges and universities. However, Kennedy pre-empted Souter by stating in the majority opinion that "we need not decide whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." This failure of the majority opinion to address the concerns raised by Justice Souter has left the question unresolved, and the Court has not seen fit to address the issue in a subsequent decision. Therefore, lower courts and even several Circuit Courts of appeal have arrived at conflicting decisions about the constitutionality of regulating professorial speech in public institutions of higher education.

The proliferation of online modalities of expression, from social networking sites to blogs and tweets, has only exacerbated the concern over *Garcetti*'s application in higher education, and the need for judicial clarification. Query where Steven Salaita's tweets would fall under the judicial calculus of *Pickering*, *Mt. Healthy*, and *Connick*. The concept of civility was no part of the Supreme Court's rulings. It could be argued that Salaita's tweets were on a matter of true public concern. If Chancellor Wise were correct in her insistence that Salaita had no contract with the university until his job offer were ratified by the Board of Trustees, then perhaps Salaita's tweets were not even public employee speech, and should have had no bearing on his job offer. Alternatively, if Justice Souter's dissent is compelling, if a professor's speech and expression is actually part of his official duties, and Salaita was actually under university contract when releasing his tweets, under a *Garcetti* analysis, courts are not in agreement whether Salaita should have lost his First Amendment freedom of speech protection for his tweets.

## **Academic Freedom As Viewed by Academicians**

While the courts wrangle about the extent of academic freedom in higher education, the AAUP has been at the forefront in disseminating policy statements advocating respect for the academic freedom of college and university professors. The seminal AAUP statement on academic freedom for college and university professors is its Committee A *1940 Statement of Principles on Academic Freedom and Tenure*. AAUP revisited the *Statement* in 1969, but left the original wording unchanged, choosing

instead to merely add interpretive footnotes. The overarching principle from the *Statement* is that professors are entitled to full freedom in research, in the publication of research results, and in the classroom when discussing their subject, and, when they speak or write as citizens, they should be free from institutional censorship or discipline. However, the *Statement* also added the caution that the public may judge the teaching profession and professors' institutions by what they publish, and that at all times professors should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for their institutions. This last aspirational sentiment is extremely difficult in the 140-word world of tweets.

And the AAUP has not ignored technology's role in academic speech. Most recently, the AAUP Committee A has weighed in on academic freedom online in *Academic Freedom and Electronic Communications*, adopted by the Association Council in November 2013. The premise of this AAUP report is that academic freedom, free inquiry, and freedom of expression within the academic community is protected in electronic communications to the same extent as in print. The report's Executive Summary reaffirms the broadened concept of the classroom and that faculty's intellectual property rights are the same in a virtual classroom as in the physical classroom.

### **The Rise of the Civility Spectre**

The AAUP pronouncements on academic freedom apparently did not impress Chancellor Wise. Her decision appeared to be prompted not by either judicial sentiment nor by AAUP's pronouncements, but by economics, to stem the loss of major donors to the university. Professor Salaita was sacrificed on the altar of the bottom line, but Wise's statements championing civility were soon taken up by the university's Board of Trustees and high-level administrators in colleges and universities across the country. Administrators from several institutions, notably Penn State University, Main Campus, and Ohio University weighed in: civility is of paramount concern in a community of scholarly dialogue. Chancellor Nicholas Dirks of the University of California at Berkeley came under special fire when he used the 50th anniversary of the Free Speech Movement at his university to condition the exercise of free speech upon treating each other with civility. The negative reaction to his speech forced Dirks to backpedal, but the message was out there.

Many in academia began to voice fears that civility might become important not only in faculty appointments, but even in tenure decisions. Inside Higher Education's 2015 Survey of Chief Academic Officers reported that a majority of provosts believe that civility is a legitimate criterion in hiring and faculty evaluation decisions. However only one appellate court to date has upheld dismissal of a professor on the grounds of incivility.

### **The Keating Decision**

The Eighth Circuit in July 2014 ruled that civility can be articulated with sufficient clarity to pass legal muster as a standard by which to judge professorial misconduct. Christopher Keating, a tenured physics professor at the University of South Dakota, was dismissed after he dubbed his female colleague "a lieing [sic], back-stabbing sneak." The university argued that Keating had violated a provision of the university's employment policy that required employees to discharge their duties "civily, constructively and in an informed manner," and to "preserve and strengthen the willingness to cooperate." Keating argued *pro se* that the policy was unconstitutionally overbroad and vague, but, on appeal, the Eighth

Circuit ruled that the policy's comprehensive set of expectations, taken together, provided employees sufficient notice of the conduct required. The Eighth Circuit upheld Keating's dismissal.

## **Recommendations**

Civility as a standard for employment decisions in any context, but especially in academia, is problematic. Civility can be viewed differently by different individuals at different times, and the need to be viewed as "civil" may stall or foreclose full discussion of sensitive issues. The basic premise of the First Amendment is defense of the "marketplace of ideas."

At public institutions, contrary to *Garcetti*, professorial speech may be protected by the First Amendment, but at the current time that protection is jurisdiction dependent, with Circuit Courts of Appeals creating contradictory precedents for lower courts. In addition, the very different and more expansive nature of online speech may influence the outcome of any institutional disciplinary deliberation. The more controversial or profane the speech, the wider its dissemination, and the more tangential to the professor's assigned teaching duties, the less likely is First Amendment protection. Bad publicity translates into decreased funding, alumni and otherwise. Boards of Trustees fully comprehend this reality.

A professor's duties revolve around teaching and scholarship, with institutions of higher education known as "teaching institutions" or "research institutions." However, the common denominator is that institutions hire certain faculty members because the institutional search committees collectively decide that the successful candidates will fulfill a need in the institution, and will be a "good fit" with the institution's mission, goals, and colleagues. Even so, rescission of Steven Salaita's job offer because of his tweets was unprecedented.

What should be the guiding principles for professorial speech online? First, professors are by collective reputation "smart." Publishing controversial opinions in inflammatory rhetoric, without substantive factual support or elaboration, is not smart, and allowing those opinions to be broadcast online to the world is even less smart. Second, professors should remember the caution of the AAUP: the public, including donors to universities, may indeed interpret professorial speech as representing the university's mission and vision.

On the other hand, civility cannot be an excuse for bad decisions. As one commentator remarked, college and university administrators must take care not to create campuses of "nice people" where professors are afraid to state well-supported, but unpopular opinions. The Foundation for Individual Rights in Education (FIRE) recently surveyed 437 institutions of higher education and asserts that 55% maintain severely restrictive speech policies for students and faculty, prohibiting protected speech under the guise of respect for others and civility. College and university administrators must re-examine their speech policies together with their legal counsel, to make sure that protected speech rights are not abridged.

## **The Tradition of Academia**

The issue boils down to the basic conception of the academy. If the traditional label of the professoriate as the "company of scholars and gentlemen (or gentlewomen)" is to retain any meaning,

professors must remember the power of the written word. Posting blogs or tweets is potentially much more damaging, more enduring, and more widely disseminated than verbal expression or even hard copy publication. Profanity, bombastic commentary, factual errors, and/or discriminatory comments have no place in academic discourse. Viewpoints need to be expressed with a realization that a viewpoint is a personal, reactionary statement with which others are entitled to disagree. Reactionary viewpoints that are expressed online are by their very definition not “personal,” but typically inflammatory and intended to elicit a response.

Twenty-five years ago, Ernest L. Boyer sought to define the separate, yet overlapping functions of the professoriate, labeling those functions as the (1) scholarship of discovery, (2) the scholarship of integration, (3) the scholarship of application, and (4) the scholarship of teaching. Boyer cited “challenges on the campus and in society,” leading to “a deepening conviction that the role of higher education, as well as the priorities of the professoriate, must be redefined to reflect new realities.” The “new realities” of which Boyer spoke in 1990 have morphed into the new realities of the online world, where the paradigmatic ideal of scholarship is challenged by technology’s contribution of enticing 140-character communication modalities and the opportunity for pervasive blogging. A redefinition of the priorities of the professoriate is needed today, and whether it will come through the judiciary or through self-regulation by professors who think before they hit “Send,” gentlemanliness and civility in expression must be a part, but never the totality, of the definition.

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-- *Kathleen Conn*

Kathleen Conn, Ph.D., J.D., LL.M. is currently Of Counsel with the Education Law group of King, Spry, Herman, Freund & Faul, LLC in Bethlehem, Pennsylvania. Conn has published numerous commentaries in peer-reviewed law journals and authored three books and numerous book chapters. She is an annual presenter at the national Education Law Association (ELA) Conference, and has served on the Executive Board of ELA. Conn also teaches as an Adjunct Professor at her alma mater, Widener University School Law in Wilmington, Delaware, where she earned her J.D. and LL.M. degrees, and a Lecturer at Muhlenberg College in Allentown.

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