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Academic Freedom

The Jury is Still Out

BY JASON WALTA

THE FIRST AMENDMENT was meant to foster a "marketplace of ideas," and what better place for that market to flourish than in our public institutions of higher learning? Many public university professors therefore take it as an article of faith that the Constitution protects their academic freedom to teach and publish on controversial topics. But, in 2006, the Supreme Court decided a case called *Garcetti v. Ceballos*, and with two little words—"pursuant to"—virtually demolished free-speech protections for most public employees. And now, five years later, lower courts are still picking through the rubble to figure out what, if any, constitutional protection remains for academic freedom.

In *Garcetti* itself, the Supreme Court addressed a First Amendment claim by Richard Ceballos, a deputy district attorney, who complained of retaliation after he wrote a memo exposing police misconduct. Because Ceballos's whistleblowing clearly involved a matter of public concern, the only issue under then-existing precedent should have been whether the employer's interest in promoting office efficiency outweighed Ceballos's interest in speaking out (a balance that surely tipped in Ceballos's favor). But the Supreme Court departed from precedent and held that the First Amendment does not protect public-employee speech when it is made "pursuant to" the employee's official duties. And, because Ceballos wrote his memo as part of his official duties, the Court dismissed his case.

The *Garcetti* decision, however, noted a limitation on the scope of its ruling: "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." Predictably, that Delphic pronouncement has caused lower courts to struggle over how to resolve First Amendment claims arising from

academic employment. Two decisions from the past year show just how divergent their approaches can be.

In *Evans-Marshall v. Board of Education* (2010), the Sixth Circuit Court of Appeals concluded that *Garcetti*'s "pursuant to" requirement applied in the academic setting of a high school and that all of a teacher's classroom and curricular speech was unprotected because it was made "pursuant to" her teaching duties. And, although the court noted that its holding did not necessarily extend to public universities, it spoke of academic freedom as right of educational institutions, not of individual educators.

More recently, in *Adams v. U.N.C.-Wilmington* (2011), the Fourth Circuit Court of Appeals took virtually the opposite tack, declaring that *Garcetti* was largely inapplicable in the academic context of a public university. Instead, the court acknowledged that professors "engage in writing, public appearances, and service within their respective fields," and that a strict application of *Garcetti* would improperly place "beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." Accordingly, the court allowed a professor—who claimed he was denied a promotion based on the conservative political views expressed in his public writing—to proceed on his First Amendment claim.

Ultimately, it will be up to the Supreme Court to resolve this conflict (it recently declined the opportunity to review the *Evans-Marshall* case). But given the current composition of the Court—and its apparent hostility to the constitutional rights of public employees—perhaps that day can come too soon, and we should be content to let the issue percolate in the lower courts for awhile longer.



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In Civil Society

The puzzle of academic freedom in the age of social media

BY JASON WALTA

THE INTERNET, AND PARTICULARLY SOCIAL MEDIA, is perhaps the most powerful tool in human history for the dissemination and discussion of ideas. It is no wonder, then, that academics spend an increasing amount of their scholarly lives online. But what has emerged in recent years is a confound-ing puzzle over whether it is less—or more— regulation of the Internet's ground rules that truly supports academic freedom.

On the one hand, faculty have clearly seen their speech and academic freedom diminished by schools' imposition of social-media and other policies. Indeed, just recently, a federal appeals court upheld the dismissal of a tenure-track professor at the University of South Dakota for referring to a colleague as a "back-stabbing sneak" in an email (<http://goo.gl/1TAHBL>). The university successfully argued that the dismissal was justified because the email violated a broadly worded "civility" policy for faculty. (The administrators who wrote that policy are perhaps unaware that a great deal of academic debate can be less than civil—such as one philosopher recently calling another's book "mind-numbingly repetitive, toe-curlingly pretentious, and amateurish in the extreme" in the pages of an Oxford philosophy journal [<http://goo.gl/PvzSYd>].)

Another high-profile example came earlier this year, when the Kansas Board of Regents announced a strict social media policy that applies to all faculty in the state's public universities, community colleges, and technical colleges. The new policy was handed down shortly after the University of Kansas suspended David Guth, a tenured journalism professor, for posting to Twitter this criticism of the National Rifle Association: "#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you."

Under the Kansas Regents' policy (<http://goo.gl/7BwYmR>), faculty face discipline for statements on social media that are "contrary to the best interests of the employer." As many have rightly noted (<http://goo.gl/t2NpX9>), such a policy would have a profoundly stifling effect on academic freedom. After all, how

can an academic freely discuss important or controversial topics—such as the role of guns in society—knowing all too well that it is a fireable offense to say something the school later decides is not in its "best interests"?

Unfortunately, as a result of the U.S. Supreme Court's long war of attrition against the constitutional rights of public employees, the Kansas Regents' vague and stifling social-media policy is probably enforceable. The Court's decision in *Garcetti v. Ceballos* (2006)—which I've discussed in this column before—holds that a public employee is entitled to no First Amendment protection at all for speech made "pursuant to" her job duties. And, even when a public employee speaks as a "citizen" rather than as an employee, the Roberts Court's decisions have made clear that the employer's interest in maintaining order and efficiency will trump the First Amendment rights of employees.

Yet, as troubling as this trend may be, it is far from clear that academic freedom necessarily benefits from a completely unregulated, Wild-West approach to social media and the Internet. In an eye-opening article entitled "Why Women Aren't Welcome on the Internet" (<http://goo.gl/Mkyivs>), writer Amanda Hess described how women routinely face gendered threats, abuse, and harassment—often from anonymous sources—that discourage them from fully participating in online discussion and communities.

That is true for women scholars, as well. When Mary Anne Franks, a feminist law professor, appeared on a popular legal blog to discuss her pioneering scholarship on how to combat so-called "revenge porn," she was barraged with abusive anonymous comments, including one stating, "she needs to be raped" (<http://goo.gl/mDixep>).

Maintaining academic freedom online requires protection of scholars' ability to raise and discuss controversial, even dangerous, ideas. But it also requires norms ensuring that important voices will not be hounded out of the discussion through threats and abuse. Right now, the balance seems out-of-whack in both directions. Getting it right will be a delicate—and evolving—task for academics and administrators alike.



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Academic Freedom

The Messy Reality of the Internet Age

BY JASON WALTA

THE CLASSIC FORMULATION OF ACADEMIC FREEDOM holds that faculty are “entitled to full freedom in research...” as well as “full freedom in the classroom in discussing their subject.” Moreover, “when they speak or write as citizens, they should be free from institutional censorship or discipline.” [Source: the American Association of University Professors’ *Statement of Principles on Academic Freedom and Tenure*.] As an abstract principle, it seems impossible not to embrace wholeheartedly. But reality can be messy—sometimes *very* messy. And, a particularly messy dispute unfolding at Marquette University may just test the limits of what qualifies for protection under aegis of academic freedom.

That dispute concerns John McAdams, a tenured professor of political science and an outspoken conservative who writes a blog called “Marquette Warrior.” Last fall, McAdams wrote a post that criticized a graduate student instructor’s handling of the issue of same-sex marriage. In a nutshell, an undergraduate in that instructor’s philosophy course was disappointed that same-sex marriage opponents were not given time to air their views when another student raised the issue. That student confronted the instructor with his concerns after class and surreptitiously recorded their conversation, during which the instructor said the undergrad’s views on the subject might be offensive to other students in the class.

In his blog post, McAdams, who received a copy of the recorded conversation, identified the instructor by name and criticized her for stifling disagreement in the name of “political correctness.” McAdams also criticized the way the chair of the philosophy department handled the complaint, claiming she “pretty much blew the issue off.” McAdams also reported that the dispute had led the undergrad to drop the course.

If that was all that had happened, this would appear to be a clear-cut exercise of academic freedom. McAdams’ actions wouldn’t have been terribly collegial, to be sure, and his colleagues likely would have appreciated him taking his concerns directly to the instructor and depart-

ment chair. But, if academic freedom means anything, it surely encompasses the right to speak on issues of public concern like same-sex marriage and whether university classrooms are inhospitable to conservative viewpoints.

Even so, the Marquette administration moved quickly to punish McAdams, first by suspending him (without a hearing) and then by serving him with notice of its intent to fire him. According to the administration, two features of the blog post carried it beyond the bounds of protected academic freedom. First, the administration asserts the post contained false or incomplete characterizations of the facts. In particular, they pointed out that, far from “blowing the issue off,” the department chair took extensive steps to address and mediate the complaint. Also, the administration noted the undergrad decided to drop the class—not because of the dispute—but because he was in danger of failing the course.

Second, and far more importantly, the administration detailed how McAdams’s post had unleashed a torrent of misogynistic online abuse toward the instructor, including veiled threats of violence. Indeed, concern for the instructor’s safety was so serious that the university posted a guard outside her classes. What’s more, the administration claims McAdams had been admonished at least two times before for disclosing the names of students in a way that exposed them to possible harassment.

Recent experience tells us there is no lack of anonymous internet dwellers willing to harass and intimidate people—especially women, who often endure threats and abuse as a kind of tax for participation in public debate. Yet, to what extent should McAdams be held responsible for actions of these abusive hordes? Is it enough that he could’ve, or at least should’ve, foreseen the consequences of his identifying the instructor? Or does the breathing room necessary for academic freedom require something more—perhaps that he actually intended for his readers to contact or harass the instructor. McAdams’s may be one of the first, though certainly not the last, that attempts to resolve that question.