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HAS *GARCETTI* DESTROYED ACADEMIC FREEDOM?

HARVEY GILMORE*

I. INTRODUCTION

The case of *Garcetti v. Ceballos*¹, decided by the United States Supreme Court in 2006, established that a public employee's job related communications are not protected by the First Amendment. The Court also held that an employer has the right to impose disciplinary sanctions against that employee based on those job related communications.² Although the Court specifically did not address how its decision would affect public university professors in the future, *Garcetti* has already alarmed academicians who believe in the concept of academic freedom.

College professors, especially those who teach in research institutions, are now concerned that the *Garcetti* decision poses a serious threat to academic freedom. In academia, the perceived threat is that in the future, cases similar to *Garcetti* will lead to public university professors losing their First Amendment protection, and thus be subject to discipline for their on the job speech.

This note will look at the factual dispute leading to the Court's decision, as well as the dissent. It will also look at how the issues of job status, citizenship, and controversial

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¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

² *Id.*

speech are connected with academic freedom. This note will also look at a glaring potential problem regarding the issue of equal protection, and finally comes to the confident conclusion that academic freedom will ultimately prevail.

II. WHAT *GARCETTI* WAS ALL ABOUT

In *Garcetti*³, the U.S. Supreme Court considered whether statements made by a public employee in the regular course of his official duties are protected by the First Amendment.⁴ The *Garcetti* controversy involved Richard Ceballos, who was a deputy district attorney for the Los Angeles County District Attorney's Office.⁵ Ceballos was a calendar deputy in the Ponomo branch office who had supervisory functions over other attorneys.⁶

In the course of his duties, Ceballos had spoken with a defense attorney who said that there were certain inaccuracies in an affidavit used to secure a search warrant.⁷ Ceballos reviewed the affidavit and determined that it had serious misrepresentations.⁸ The misrepresentations that Ceballos referenced in the affidavit were that: 1) it should have referred to a long driveway as a separate roadway, and 2) certain parts of the roadway in question were extremely difficult to leave tire tracks.⁹ This led Ceballos to doubt the veracity of the information contained in the affidavit.

Ceballos subsequently discussed his concerns with a deputy sheriff from the Los Angeles County Sheriff's Department who swore the affidavit, and discussed the matter with his (Ceballos) two immediate superiors (Frank Sunstedt and Carol Najera).¹⁰ He followed up the discussion by

³ *Id.*

⁴ U.S. CONST. amend. I.

⁵ *Garcetti*, 547 U.S. at 413.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 414.

⁹ *Id.*

¹⁰ *Id.*

submitting a memorandum to his superiors recommending that the case be dismissed.¹¹

Afterward, Ceballos, his two superiors, the deputy sheriff, and other members of the sheriff's department had a meeting to further discuss the affidavit.¹² The meeting was contentious, and Ceballos' supervisors continued with the prosecution despite his concerns.¹³ Ceballos later testified for the defense about his findings at a hearing to challenge the warrant, and the trial court eventually dismissed the defense's challenge to the warrant.¹⁴

After this turn of events, Ceballos alleged that he was subject to a series of retaliatory actions by his supervisors ranging from being reassigned from his calendar deputy position to a trial deputy position, transferred to another courthouse, and finally being denied a promotion.¹⁵ Ceballos subsequently filed an employment grievance, alleging that his supervisors retaliated against him because he voiced his concerns about the accuracy of the affidavit.¹⁶ After exhausting his grievance remedies, Ceballos then initiated a claim against his supervisors alleging a violation of 42 U.S.C. §1983.¹⁷ Section 1983 imposes liability on any person who violates another person's rights while acting pursuant to a federal or state statute.¹⁸ The District Court granted the defendant supervisors' motion for summary judgment, but the Court of Appeals for the Ninth Circuit reversed the decision.¹⁹ The U.S. Supreme Court reversed the Ninth Circuit and rejected Ceballos' First Amendment claims on the ground that he was a public employee speaking within the ordinary course of his employment.²⁰

¹¹ *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 414–415.

¹⁵ *Id.* at 415.

¹⁶ *Id.*

¹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006).

¹⁸ 42 U.S.C. §1983 (1996).

¹⁹ *Garcetti*, 547 U.S. at 415.

²⁰ *Id.* at 426.

III. THE MAJORITY OPINION

In a controversial 5-4 decision²¹, the Court held that a public employee has no First Amendment protection if he is not speaking as a private citizen on a matter of public concern. In other words, if the employee's speech is job related, then he does not have any First Amendment recourse against his employer if the employer responds negatively to the speech.²² The Court started its analysis by acknowledging that a public employee maintains First Amendment protection as long as he is speaking as a citizen addressing matters of public concern.²³

In its majority opinion, the Court decided that Ceballos made his communications to his supervisors in the regular course of his duties as a deputy district attorney.²⁴ As such, Ceballos was *not* acting as a private citizen when he performing his normal job functions. These duties would include writing his memos to his supervisors spelling out his concerns about the allegedly defective search warrant.²⁵ The Court next points out government employers have necessary discretion in managing their operations.²⁶ Next, the Court goes on to mention that while it is true that official communications must be accurate and clear in order to promote the public employer's mission, the employer also has the authority to take corrective action if the employer believes that the communication is incendiary or otherwise misplaced.²⁷

Finally, the majority takes great pains to state that the *Garcetti* result does not implicate the academic freedom of

²¹ *Id.* at 412. Justice Kennedy delivered the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Alito and Thomas. Justice Stevens filed a dissenting opinion. Justice Souter filed a dissenting opinion joined by Justices Stevens and Ginsburg. Justice Breyer filed a dissenting opinion.

²² *Id.* at 418.

²³ *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See also* *Connick v. Myers*, 461 U.S. 438 (1983).

²⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²⁵ *Id.* at 421.

²⁶ *Id.*

²⁷ *Id.* at 422–423.

classroom instruction and academic scholarship.²⁸ The majority acknowledged the dissent's concern that it would eventually apply the *Garcetti* analysis to academia. However, the majority decided that it did not need to try to reconcile *Garcetti*'s issues with academic concerns.²⁹

IV. THE DISSENTING VOICES

Justice Stevens, in his dissenting opinion, mentioned that a supervisor can, of course, take the necessary corrective actions when an employee's speech is "inflammatory or misguided."³⁰ However, Justice Stevens also raises the question of what could happen if the employee's speech discloses facts that reveal employer misconduct.³¹ Justice Stevens cites several examples of the issue.³² These included, among others, a police internal investigator being demoted after disclosing the false testimony of a fellow employee to a city official³³; a police officer's demotion after opposing the police chief's attempt to use his position to coerce a financially independent organization into a potentially ruinous merger³⁴; and an engineer fired after reporting to supervisors that contractors' failures to complete dam related projects could result in the dam being structurally unsound.³⁵

Justice Souter's dissent raises several concerns as well. He starts by suggesting that although an individual may be a government employee, he is still a citizen, and speaks as such.³⁶ "Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or

²⁸ *Id.* at 425.

²⁹ *Id.*

³⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 426 n.* (2006) (citing *Branton v. Dallas*, 272 F.3d 730 (CA5 2001)).

³⁴ *Id.* (citing *Miller v. Jones*, 444 F.3d 929, 936 (CA7 2006)).

³⁵ *Id.* (citing *Kincade v. Blue Springs*, 64 F.3d 389 (CA8 1995)).

³⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006).

public benefit thought to flow from the statements.”³⁷ Justice Souter also mentions that a public employee’s First Amendment rights should not be watered down on the basis that he receives his paycheck from the government.³⁸ His statement means that a government employee is entitled to the same First Amendment protection as any other salaried employee; the fact that he works for the government is irrelevant.

Justice Souter next suggests that public employers can expand a teacher’s job description to a more general obligation of contributing to the school’s operating on an orderly basis, and his classroom duties would be rendered merely incidental to the process.³⁹ This would suggest that expanding an employee’s job description could now mean *anything* that the employee discusses during work hours could be deemed objectionable by the employer. This, of course, can result in the employee’s being subject to employer retaliation and unfortunately outside the realm of First Amendment protection.

Finally, Justice Souter takes the majority to task for leaving the potential academic freedom issue for public universities unanswered:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to . . . official duties.”⁴⁰

Justice Souter goes on to mention that the Court has consistently protected free speech within the university

³⁷ *Id.* at 428.

³⁸ *Id.*

³⁹ *Id.* at 431.

⁴⁰ *Id.* at 438.

environment.⁴¹ “We have long recognized that given the purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”⁴² The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.⁴³

V. THE CASE FOR MANAGERIAL PREROGATIVE

The *Garcetti* majority also raised the point that federal courts should not interject themselves into professional communications between government employers and their employees. As long as an employee performs his duties within the regular scope of his job, judicial review is not needed.⁴⁴ “To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”⁴⁵

Thus, *Garcetti* has now become the definitive statement on a public employer’s discretion in managing office operations, and that discretion includes controlling an employee’s speech made in the scope of the employee’s professional capacity.⁴⁶ For example, when an attorney is hired to work as a prosecutor, he is working on the government’s behalf as an advocate.⁴⁷ Thus, the government has the power to regulate the attorney’s professional speech and even steer the speech in the direction that is consistent with the employer’s business objective.⁴⁸ Therefore, the attorney would not have any First Amendment recourse if he

⁴¹ *Id.*

⁴² *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

⁴³ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

⁴⁴ *Garcetti*, 547 U.S. at 423.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Lawrence Rosenthal, *The Emerging First Amendment Law Of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 44 (2008).

⁴⁸ *Id.*

were to act on his personal views that are contrary to the employer's office policy.⁴⁹

Similarly in academia, a public university has the same discretion in ensuring that employee speech is consistent with the university's operational objectives.⁵⁰ A university regularly evaluates its faculty in deciding promotion or tenure.⁵¹ Consequently, a faculty member at a university would be subject to the university's standards of performance and competence, as would any other employee.

Although I agree with the dissenting justices, I also understand that an employer must have discretion in supervising employees during business hours. During business hours, an employee works to further the legitimate business interests of the employer. Thus, the employer has to supervise the employee's work to ensure that the employee is performing competently.

Every day, an employer hires employees based on their training, education, and practical experience that is suitable for the specific job. Let us assume, for example, that my college hired me to teach a course in Contract Law based on my law degree, my law school transcript and that I had practical experience as an accountant.⁵² Let us further assume that my personal dream in life, however, is to teach philosophy, a subject in which I have very little experience (only six undergraduate credits). Needless to say, things would not go too well if I spent every class extolling the intellectual virtues of Kant and Nietzsche; especially when my tuition paying students go to class expecting me to discuss *Lucy v. Zehmer*,⁵³ along with the relevant sections of the Uniform Commercial Code. If that were to happen of course, I have no doubt that my department chair and academic dean would quickly correct the situation. They

⁴⁹ *Id.*

⁵⁰ *Id.* at 100.

⁵¹ *Id.*

⁵² Harvey Gilmore, *To Failure And Back: How Law Rescued Me From The Depths*, 10 FLA. COASTAL L. REV. 4, 567, 585 (2009).

⁵³ *Lucy v. Zehmer*, 196 Va. 493 (1954), (discussing whether writing the terms of a purchase and sale agreement on the back of a restaurant check constituted a valid contract).

would either show me the error of my ways (at best), or show me the door (at worst).⁵⁴

VI. THE SEPARATION OF EMPLOYEE STATUS FROM CITIZENSHIP STATUS

The *Garcetti* majority seems to suggest that when one goes to work for the government, he checks both his First Amendment *and* citizenship status at the door during business hours. Therefore, Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. Consequently, he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work, Ceballos acted as a government employee. He did the job that the state of California paid him to do. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance.⁵⁵

However, Justices Stevens and Souter point out in their dissents that a public employee is still a citizen, even during business hours. Justice Stevens noted:

The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous court rejected "the conclusion that a public employee forfeits his protection against governmental abridgement of freedom

⁵⁴ See, e.g., Frederick Schauer, *The Thirteenth Ira C. Rothgerber, Jr. Conference On Constitutional Law: Horowitz, Churchill, Columbia—What Next For Academic Freedom?: Is There A Right To Academic Freedom?*, 77 U. COLO. L. REV 907, 915–916 (2007).

⁵⁵ *Garcetti*, 547 U.S. at 422.

of speech if he decides to express his views privately rather than publicly.”⁵⁶

Justice Souter notes that the Court in *Madison Joint School District*⁵⁷ pointed out how the teacher in that case “addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views as on an important decision of his government.”⁵⁸

If we accept the proposition that citizenship is in fact severable from one’s job status, as *Garcetti* argues, then the next logical question must be this: *If a public employee is not a citizen, then what is that person, exactly, during work hours?* Does *Garcetti* really suggest that during work hours that a public employee ceases being, for example, a person of color not protected by civil rights legislation?⁵⁹ This just cannot be right. Similarly, is a disabled employee not protected by the Americans with Disabilities Act⁶⁰? This cannot be realistic, either. How would *Garcetti* treat a female employee protected by the Lilly Ledbetter Fair Pay Act?⁶¹ How might *Garcetti* treat an attorney (like Richard Ceballos) protected by his state’s rules of professional responsibility and ethics? Again, I think *Garcetti* takes an untenable position that certain individuals lose their protected status simply because they go to their job.

To make the *Garcetti* majority’s logic seem that much more untenable, does a public employee stop being left-handed, or stop walking with a limp, or is no longer straight, gay, or lesbian simply because he or she walks through the office door? In other words, does an employee lose his

⁵⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) (quoting *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)).

⁵⁷ *Madison Joint Sch. Dist. No. 8 v. Wisconsin Public Relations Comm’n*, 429 U.S. 167 (1976).

⁵⁸ *Garcetti*, 547 U.S. at 429 (quoting *Madison Joint Sch. Dist.*, 429 U.S. at 168).

⁵⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

⁶⁰ Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §12101 (1990)).

⁶¹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009).

immutable individual characteristics simply because he shows up for work? Again, I think *Garcetti* would be hard pressed to justify such a stance.

Using the *Garcetti* rationale, assume that a public university has a dress code that requires male professors to wear professional attire (suit and tie). Under this rationale, *Garcetti* even opens up the possibility that a professor could be summarily subject to disciplinary sanctions because of his choice of attire. How could this happen? Because the professor's attire would be job related, the administration could conceivably object to that professor's color scheme on any given day. As unlikely as that might be, *Garcetti* does not leave this kind of scenario all that farfetched now. In my opinion, *Garcetti* lends itself to that kind of criticism, right or wrong.

VII. WHAT EXACTLY IS ACADEMIC FREEDOM?

I define academic freedom as a professor's discretion in determining how to do his job. For example, my college schedules me to teach sections of Individual Income Tax, Corporate Income Tax, and Business Law at certain times every semester. Once I walk into the classroom, I have significant latitude regarding how I will direct the class. My job is to deliver the subject matter so that it makes sense to my students.

Every professor has his own methodology as to how he conducts his classes. Some professors are regimentarians, others are free flowing. Some professors are disciplinarians, others are classroom comedians. It depends on the professor's individual style. As a song by the late Sammy Davis, Jr. once observed, "I've Gotta Be Me."⁶² Therefore, since a professor is responsible for successful classroom instruction, I believe that a professor has to be able to determine how he does his job.

I do not mean to suggest that any professor can do his job without any supervision. A professor answers to his

⁶² SAMMY DAVIS, JR., I'VE GOTTA BE ME (Collector's Choice Music 1968).

department chair, who is his immediate supervisor. A professor can also answer to deans, other administrators, and even the president. Of course, a professor cannot engage in any classroom misconduct (e.g., inappropriate language, religious intolerance, sexual innuendo, and the like) without suffering the consequences. I believe that as long as a professor is ultimately responsible for successful student learning, the professor should have the freedom to decide how he is going to do his job. If my college wants me to be successful in my teaching efforts, I have to be able to figure out the way of teaching that works best for me. That way, I can do my job right. This is what academic freedom means to me.

In response to several controversial firings at Stanford University and elsewhere,⁶³ a group of professors from leading universities came together to form a national association of university professors, similar to the American Bar Association and the American Medical Association.⁶⁴ This organization became the American Association of University Professors (hereinafter “AAUP”)⁶⁵, whose purpose was to establish a type of procedural due process designed to protect faculty interests involving tenure and establish legitimate grounds for faculty dismissal.⁶⁶ In 1915, the AAUP published its first definitive statement on academic freedom within the confines of academic autonomy and self governance.⁶⁷ The 1915 statement outlined its reasons for the necessity of academic freedom:

The importance of academic freedom is most clearly perceived in the light of the purposes for which universities exist. They are:

⁶³ Mark L. Adams, *The Quest For Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 72 (2006).

⁶⁴ James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 165–167 (2000).

⁶⁵ *Id.* at 167.

⁶⁶ *Id.* at 166.

⁶⁷ Adams, *supra* note 63, at 72–73.

- A: To promote inquiry and advance the sum of human knowledge;
- B: To provide general instruction to the students; and
- C: To develop experts for various branches of the public service.⁶⁸

The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure⁶⁹ updated its definition of academic freedom as follows:

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties, but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their

⁶⁸ AAUP 1915 Declaration of Principles on Academic Freedom and Academic Tenure 295, *available at* <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm>.

⁶⁹ AAUP 1940 Statement of Principles on Academic Freedom and Tenure, *available at* <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesofAcademicFreedomandTenure.pdf>.

special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.⁷⁰

I believe that the Court will eventually have to decide whether *Garcetti* will also apply to public university professors. I believe it must happen because the *Garcetti* majority deliberately avoided the issue in its opinion. In my opinion the *Garcetti* majority already performed legal atom splitting by separating employee status from citizenship. Thus, I would like to see how it can reconcile the *Garcetti* decision to a public university professor whose job *is* speech. In other words, *Garcetti* and its progeny has made the statement that a public employee's on-duty communication is a constitutionally unprotected part of the job. I believe that the Court will ultimately have to decide the fate of a university professor (in a situation similar to Richard Ceballos) whose job is communication, both in classroom teaching and in academic research.

To be fair, I understand that the Justices, all intelligent people, have been out of school for quite some time. Therefore, I will take a moment to speak on what happens in an actual classroom setting. As we all know, an individual stands in front of a roomful of students and will lead a discussion of the subject matter at hand, whether it is Calculus, Constitutional Law, English Literature, Financial Accounting, or Geology, to name just a few. During the class, students will ask questions of the instructor and the instructor will answer them, and vice versa.

Depending on the academic discipline, the subject matter can be fairly cut and dry, as in $\text{Assets} = \text{Liabilities} + \text{Owner's}$

⁷⁰ *Id.*

Equity⁷¹; or it can be rather nebulous and cover controversial subjects, as in determining a right to privacy,⁷² a right to an abortion,⁷³ requiring parental notification prior to an abortion,⁷⁴ or the constitutionality of the death penalty.⁷⁵ Depending on the course content, people will offer their opinions about the particular subject matter under discussion. This is based on the idea that a college classroom is a “marketplace of ideas”⁷⁶, necessary for students and teachers to engage in a search for the truth. The court has historically upheld the proposition that scholarship is best nurtured in an unfettered environment:

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 straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to enquire,

⁷¹ JERRY J. WEYGANDT, PAUL D. KIMMEL, DONALD E. KIESO, ACCOUNTING PRINCIPLES 12 (9th ed., 2009).

⁷² *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷³ *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

⁷⁴ *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁷⁵ *See, e.g.*, *Furman v. Georgia*, 408 U.S. 153 (1972) (declaring the death penalty unconstitutional as its application was arbitrary and capricious); *Coker v. Georgia*, 433 U.S. 584 (1977) (finding the death penalty for the rape of adult women unconstitutional because the sentence was disproportionate to the crime); *Thompson v. Oklahoma*, 487 U.S. 15 (1988) (holding that youths younger than 16 years of age cannot be constitutionally executed).

⁷⁶ *See Abrams v. United States*, 250 U.S. 616, 630 (1919). *See also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

to study and evaluate, to gain new maturity and understanding; otherwise our civilization will become stagnant and die.⁷⁷

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights.⁷⁸

This would suggest, therefore, that a university professor has a special interest in conducting his classroom teaching and research in a way that is innovative and introduces new and undiscovered ideas into his area of expertise. Sometimes, a professor's scholarship will look into certain subject areas that might be considered controversial or politically incorrect. Even so, the professor's teaching and scholarship must be balanced against the university's right to conduct its operations in an orderly manner consistent with the university's academic objectives.

Therefore, can we take academic freedom to mean that a university professor can conduct his classroom and research activities in any way he sees fit? Could a professor's academic research consist exclusively of "writing articles for People magazine about celebrity romances or the secret lives of participants in television reality shows?"⁷⁹ Could that kind of situation plausibly come under constitutional protection as an academic search for the unvarnished truth under the *Keyshian*⁸⁰ or *Sweezy* decisions? Frankly, I doubt that the professor would have either a winnable First Amendment argument or any other protection against institutional sanctions. I, for one, would not be convinced that a classroom

⁷⁷ See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁷⁸ *Id.*

⁷⁹ Schauer, *supra* note 54, at 916.

⁸⁰ *Keyshian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).

discussion on the results of “Dancing With the Stars” could somehow advance anyone’s academic interests.

VII. CONTROVERSIAL ACADEMIC SPEECH

Sometimes, a professor’s academic or research interest deals with subject areas that others may find offensive. What if, however, a professor conducted classroom discussion or academic research that was in fact controversial, or even inflammatory? Consider the case of Kevin Barrett, a University of Wisconsin-Madison professor who claimed that the events of 9/11 were an inside job perpetrated by United States government officials acting in concert with the Central Intelligence Agency (CIA)⁸¹. Professor Barrett also claimed that 9/11 was orchestrated by the Bush Administration “to justify military operations in Iraq.”⁸² He made his claims on a conservative radio talk show but also stated that he would let his students make up their own minds on the issue when discussed in his class.⁸³

Professor Barrett had planned to discuss his theory for one week in his fifteen week class called “Islam: Religion and Culture.”⁸⁴ The resulting uproar over his remarks even caused several members of the Wisconsin legislature to threaten budget cuts in the University’s public funding.⁸⁵ Ultimately, the University, after reviewing Professor Barrett’s course outline, allowed him to teach the one week segment on the war on terror in his class.⁸⁶ The University Provost, Patrick Farrell, defended his decision to allow Professor Barrett’s segment on the grounds of academic freedom: “We

⁸¹ Robert S. Rosborough IV, *A “Great” Day For Academic Freedom: The Threat Posed To Academic Freedom By The Supreme Court’s Decision in Garcetti v. Ceballos*, 72 ALB. L. REV. 565 (2009).

⁸² *Id.*

⁸³ *Id.* at 566.

⁸⁴ *Id.*

⁸⁵ *Id.* at 566–67.

⁸⁶ *Id.* at 568.

cannot allow political pressure from critics of unpopular ideas to inhibit the free exchange of ideas.”⁸⁷

Indeed, if academic freedom really and truly allows university professors and students to search for the unvarnished truth in examining certain theories, no matter how ugly or unpopular, then there has to be room, both academically and legally, for Professor Barrett to give his side of the story. I am not taking sides as to whether his version of the events of 9/11 is accurate; I am merely agreeing with his right to articulate his views. As a professor has the right to express his academic views, students and administrators also have the right to disagree with him in the classroom. Students and administrators also have the right to not read his publications, or not register for his classes in future semesters.

In another well known controversy, Ward Churchill, then a tenured professor at the University of Colorado, wrote a highly inflammatory essay titled “‘Some People Push Back’ On the Justice of Roosting Chickens.”⁸⁸ In his essay, Professor Churchill suggested that the events of 9/11 were direct retribution for, as he saw it, the previous genocide of Iraqi children allegedly caused by economic sanctions imposed on Iraq by the United States.⁸⁹ Professor Churchill goes on to mention in his piece that the people who died in the World Trade Center were “little Eichmanns” who were knowing facilitators in the Iraqi genocide and thus deserved their fate.⁹⁰ Admittedly, I would like to see Professor Churchill’s empirical research that conclusively proves a nexus between Iraq’s economic sanctions and the

⁸⁷ Robert S. Rosborough IV, *A “Great” Day For Academic Freedom: The Threat Posed To Academic Freedom By The Supreme Court’s Decision in Garcetti v. Ceballos*, 72 ALB. L. REV. 565, 568 (2009).

⁸⁸ Ward Churchill, “Some People Push Back” *On the Justice of Roosting Chickens*, THE DARK KNIGHT PRESS (Sept. 11, 2001), <http://web.archive.org/web/20070203133506/www.darknightpress.org/index.php?i=news&c=recent&view=9>.

⁸⁹ Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor’s Academic Freedom*, 96 CALIF. L. REV. 1669, 1673 (2008).

⁹⁰ *Id.*

maintenance workers, fire fighters, police officers, receptionists, interns and administrative assistants who died in the World Trade Center that horrible day. Professor Churchill was later fired by the University after an internal investigation concluded that he had plagiarized and fabricated his research.⁹¹

Let me be absolutely clear on one point: I am not commenting on whether Professors Barrett and Churchill are unpopular or incompetent. Again, I am merely defending their rights under the rules of academic freedom (assuming, of course, that their research is in fact valid) to express their opinion, as I hope they would for me should I ever find myself in a similar situation. Yet, academic freedom has never been construed to mean that a professor can say *anything* in the classroom or in his academic research as he sees fit with impunity. “Still, even the canonical accounts of academic freedom have never asserted that it includes protection for shoddy reasoning or unsupported accusations in a faculty member’s non scholarly writings.”⁹²

If the university can prove by a preponderance of the evidence that a professor engaged in academic misconduct, committed plagiarism, doctored his research, or committed some other form of academic malfeasance, of course the university can do what is necessary to remedy the situation. Such remedies could include probation, suspension, or even termination of the professor’s employment contract. I do not believe that anyone would disagree with that assessment. However, in my opinion, if an unpopular or controversial (but otherwise competent) instructor suffers low enrollment in his classes, or has his academic research unread, unacknowledged, unheeded, or worse, discredited by his peer group, that in itself would do more to damage that person’s credibility in the academic community than any university retaliation.

⁹¹ Joseph Rosse et al., Report and Recommendations of the Standing Committee on Research Misconduct Concerning Allegations of Research Misconduct by Professor Ward Churchill (June 13, 2006), <http://www.colorado.edu/news/reports/churchill/download/ChurchillStandingCmteReport.pdf> at 7.

⁹² Rosenthal, *supra* note 47, at 109.

VIII. *GARCETTI'S* IMPACT ON ACADEMIC EMPLOYEE SPEECH

The *Garcetti* opinion has established that if one wants to work for the government, one checks his First Amendment rights at the door. This now gives school employers almost absolute immunity to retaliate against teachers. Teachers voice their legitimate concerns regarding on the job issues, only to suffer retaliation and discipline at the hands of their employers. Such retaliation happens precisely because the employee had the temerity to voice those work related concerns during business hours. This turn of legal events is truly disconcerting because, thanks to *Garcetti* and its recent progeny, teachers are now subject to retaliation by their employers simply by doing their jobs correctly.⁹³

What might happen to a university professor if, for example, he were to report a dean's misconduct in changing students' grades? According to *Garcetti*, that professor would not have a First Amendment cause of action against any job related retaliation. Under the *Garcetti* rationale, lower courts have already upheld employer retaliation against teachers who spoke out concerning schools that did not serve disabled children properly⁹⁴, committed fraud in the operation of a federal program⁹⁵, and misused athletic funds.⁹⁶ In addition, *Garcetti* even denied First Amendment protection to a teacher who carried out his legal obligation (to report incidents of

⁹³ Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1282 (2008).

⁹⁴ See e.g., *Houlihan v. Sussex Technical Sch. Dist.*, 461 F. Supp. 2d 252, 260 (D. Del. 2006) (holding that the First Amendment does not apply to a school psychologist's reports of Individuals with Disabilities Education Act violations as the reports were generated in accordance with her official duties).

⁹⁵ See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (holding that an employee's notifying her supervisors that applicants to the district's Head Start program were misrepresenting their incomes were within the scope of her official duties).

⁹⁶ See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) ("We thus hold that Williams' memoranda to the office manager and principal Wright were written in the course of performing his job as athletic director; thus, the speech contained therein is not protected by the first Amendment.").

child abuse to the Connecticut Department of Children and Families) only to be demoted after reporting an incident in which middle school students were shown a picture of a nude man with two equally nude women.⁹⁷

Although the *Garcetti* majority punted on the academic freedom issue, the *Garcetti* decision has, unfortunately, also stretched its tentacles into public university education. The Seventh Circuit in *Renken v. Gregory*,⁹⁸ for example, upheld the University of Wisconsin's motion for summary judgment against a professor who complained about the University's use of grant money from the National Science Foundation.⁹⁹ The *Renken* court determined that the professor voiced his complaints “. . . pursuant to his official duties as a university professor. Therefore, his speech was not protected by the First Amendment.”¹⁰⁰

Similarly, in *Gorum v. Sessoms*, the Third Circuit held that the committee activities of a former professor at Delaware State University (DSU) were within the scope of his official duties.¹⁰¹ “It was Gorum's special knowledge of, and experience with, the DSU disciplinary code that made him ‘*de facto*’ advisor to all DSU students with disciplinary problems.”¹⁰² The Third Circuit also found that “[t]he Faculty Senate Bylaws include within the responsibilities of professors aiding ‘faculty and alumni involvement with student organizations and clubs as mentors and advisors.’”¹⁰³

⁹⁷ See, e.g., *Pagani v. Meridan Bd. of Educ.*, No. 3-05-CV-0115, 2006 WL 3791405 at *1-2 (D. Conn. Dec. 19, 2006) (holding that teacher who filed report with the Connecticut Department of Children and Families was not speaking as a citizen but as a teacher performing a duty imposed on him by law as a result of his position).

⁹⁸ *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

⁹⁹ *Id.* at 774.

¹⁰⁰ *Id.* at 775.

¹⁰¹ *Gorum v. Sessoms*, 561 F.3d 179 (3rd Cir. 2009).

¹⁰² *Id.* at 186.

¹⁰³ *Id.*

IX. WHAT ABOUT EQUAL PROTECTION?

As I see it, *Garcetti* exposes another serious problem that now implicates equal protection. The Fourteenth Amendment extends constitutional protections against official misconduct at the state level.¹⁰⁴ If we carry *Garcetti* to its logical conclusion that a public employee's speech on the job is outside the scope of the First Amendment, the next logical question is: what happens if a non public employee finds himself in a similar controversy?

For example, let us assume that there are two college professors, both of whom have earned a Bachelor's Degree in Accounting, a Master's Degree in Taxation, a Juris Doctor, and a Master of Laws degree specializing in taxation. They both teach taxation courses, one at Fordham University, a private institution located in the Bronx, New York, and the other at Queens College, a public institution operated by the City University of New York (hereinafter "CUNY"), located in Flushing, New York. While each professor gives his lecture in tax law, each makes remarks that some would call disparaging toward the Internal Revenue Service (hereinafter the "IRS"). If the academic deans at both institutions take issue with both professors and decide not to invite them back to teach next semester, only the Fordham professor would have any First Amendment protection. Under the *Garcetti* analysis, the Queens College professor would be completely out of luck.

As a second assumption, we have an adjunct professor with the academic credentials listed in the previous hypothetical, except he teaches part time at both Fordham University and Queens College. If the adjunct professor makes the same negative commentary about the IRS in his tax classes at both institutions, and the academic deans at both institutions react as described in the previous example, our professor has his day in court against only one employer. This obviously unjust result penalizes our professor for doing the exact same thing at two institutions, but *Garcetti* gives

¹⁰⁴ U.S. CONST. amend. XIV.

him a chance for redress against only the non public employer (Fordham University). In my opinion, it is unconscionable that the *Garcetti* majority could not see such a flagrant inconsistency.

If it does happen that *Garcetti* is applied to academic freedom in the college setting, I think that public colleges and universities would be severely hard pressed to hire quality professors. If a professor could be summarily subject to retaliation by his university employer for his classroom instruction and scholarship, why would he, or anyone else for that matter, want to work at a place like that? “Not many would choose to teach at or attend institutions of higher education that eliminated academic freedom in teaching and scholarship.”¹⁰⁵

X. CONCLUSION

I have discussed in the preceding pages why I believe that *Garcetti* is a serious threat to the concept of academic freedom. I have referred to several examples where some courts have already applied the *Garcetti* rationale to academic settings. As *Garcetti* has effectively chilled public employee speech on the job, it is conceivable that *Garcetti* could be applied to public university professors as well.

However, I see too many hurdles for the Court to clear to apply the *Garcetti* ruling to academic speech. First, as explained elsewhere, the Court’s history has protected professors and universities on academic freedom grounds.¹⁰⁶ Secondly, as explained previously, the *Garcetti* ruling would impose serious Fourteenth Amendment inconsistencies as it would apply to public university professors but not private university professors. Next, the Court’s history of First Amendment jurisprudence shows that it has given First

¹⁰⁵ Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and Sec. 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 586 (Jan. 2008).

¹⁰⁶ See *Pickering*, *supra* note 23; *Sweezy*, *supra* note 77; *Keyshian*, *supra* note 80.

Amendment protection to unpopular speech¹⁰⁷ as well as commercial speech.¹⁰⁸

In the alternative however, if the Court sees fit to continue its seeming antipathy toward public employee job related communications, I believe that academic freedom can still prevail in spite of *Garcetti* and its progeny. The AAUP, in its most recent executive summary, gives a suggestion.¹⁰⁹ What public (and private) universities could do is to include specific language in its policy statements that would protect academic freedom while balancing the university's interests in running an efficient operation.¹¹⁰ The AAUP's executive summary refers to an amendment recently adopted by the Board of Regents of the University of Minnesota¹¹¹ in its statement on academic freedom, as shown below:

1. Academic Freedom and Academic
Responsibility sections of the Academic
Freedom and Responsibility Policy of the

¹⁰⁷ See, e.g., *Texas v. Johnson*, 491 U.S. 307 (1989) (holding that a conviction for flag desecration is inconsistent with the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that the government cannot punish inflammatory speech unless it is directed to inciting and likely to incite imminent lawless action); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a state cannot, consistent with the First and Fourteenth Amendments, punish the conduct of wearing a jacket saying "Fuck the Draft" absent a compelling and particularized reason); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students' quiet wearing of armbands protesting Vietnam was within the First and Fourteenth Amendments).

¹⁰⁸ See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (invalidating a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription medication); *Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (holding that the 21st Amendment does not justify Rhode Island's ban on advertisement of liquor prices at locations other than the place of sale).

¹⁰⁹ Am. Ass'n of Univ. Professors, *Executive Summary—Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, AAUP.ORG 64 (Nov. - Dec. 2009), <http://www.aaup.org/NR/rdonlyres/6B30844E-7CD2-4E21-9756-D365BA694A47/0/ExecutiveSummaryGarcetti.pdf>.

¹¹⁰ *Id.* at 65.

¹¹¹ *Id.* at 65–66.

University of Minnesota, as amended by the Board of Regents on June 12, 2009:

Academic Freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution.¹¹²

In spite of the Court's apparent opposition to protecting job related communications, I believe that colleges will take definitive steps to protect faculty instruction and research. I also believe that colleges will fight hard to maintain their reputations and integrity as scholarly institutions. When a college shows in its admission statement (and daily operations) that it is committed to academic freedom, I believe that it will be very attractive for faculty to work at that institution. I believe that such a college would also be very attractive to students who value a high quality education. For the above reasons, I remain optimistic that academic freedom will continue in force **in spite of** *Garcetti*.

¹¹² *Id.* at 66.