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# THE MISAPPLICATION OF *GARCETTI* IN HIGHER EDUCATION

*Matthew Jay Hertzog\**

## I. INTRODUCTION

Tenure, as currently implemented in American colleges and universities, provides academics a high degree of job security. However, over the past few decades, with the financial restraints placed on public institutions due to the lack of state and federal funding and declining enrollment in certain disciplines, the value of tenure is being raised by university administrators, the media, the public at large and politicians.<sup>1</sup> These discussions on tenure primarily address faculty productivity and accountability when institutions attempt to remove a tenured faculty member. In addition, most colleges and universities have some form of tenure, resulting in a two class faculty system which may impact the faculty member's academic freedom.<sup>2</sup> Although there are various approaches to higher education in the United States,<sup>3</sup> the institution of higher education has focused on protection of faculty members from wrongful termination, or more so, termination without due

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<sup>1</sup> Neil Gross and Solon Simmons, *Americans' Views of Political Bias in the Academy and Academic Freedom* 13–14 (Working Paper May 22, 2006), <http://www.aaup.org/NR/rdonlyres/DCF3EBD7-509E-47AB-9AB3-FBCFF5CA9C3/0/2006Gross.pdf> (Gross and Simmons, with the help of Princeton Survey Research Associates International in conducting the survey, found that out of a thousand randomly questioned Americans, 80.7% believed that tenure protects incompetent faculty. Furthermore, 57.9% surveyed believe that awarding tenure to faculty removes incentives for hard work).

<sup>2</sup> For the specific purpose of this article, the two class faculty system created within higher education consists of tenured track and non-tenured track faculty.

<sup>3</sup> For the specific purpose of this article, the various approaches of higher education in the United States include junior colleges, private four year institutions, research institutions and typical four-year institutions.

process, as well as the academic freedom to discuss controversial topics in the classroom.<sup>4</sup> Similarly, the same rights that are awarded to faculty through the protection of tenure and academic freedom also provide students an opportunity to question theories presented in their courses of study.<sup>5</sup>

The rights and freedoms afforded by tenure and academic freedom did not coalesce until 1915, when the American Association of University Professors (AAUP) put forth the goals of what has become known as tenure and academic freedom. In a document drafted by the AAUP, the goals of tenure and academic freedom include: 1) protection of a faculty member's academic freedom in the classroom and 2) protection of the faculty member's ability to perform other job duties without the fear of termination.<sup>6</sup> However, with the decision reached by the United States Supreme Court in *Garcetti v. Ceballos* (2006), the Court stated that "when public employees make statements pursuant to their official duties"<sup>7</sup> the protections afforded through the First Amendment are not available.<sup>8</sup> This statement set the precedent for university administration to apply the *Garcetti* decision to faculty claims of violation of their academic freedom.

## II. ACADEMIC FREEDOM AND THE TENURE AS A NATIONAL STANDARD

Tenure as a vehicle to provide job security for faculty in American higher education can be traced back to the early Twentieth Century,<sup>9</sup> although other avenues to provide faculty job security can be seen as far back as the European

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<sup>4</sup> Walter Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 148-49 (London: GB: Jossey-Bass, Ltd., Publishers 1973) EDUCATION (London: GB: Jossey-Bass, Ltd., Publishers, 1973).

<sup>5</sup> *Id.*

<sup>6</sup> *History of the AAUP*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, (Nov. 6, 2013, 9:21 AM), <http://www.aaup.org/AAUP/about/history>.

<sup>7</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (This decision established that speech related to an employee's daily work did not receive 1<sup>st</sup> Amendment protection).

<sup>8</sup> *Id.*

<sup>9</sup> Melanie Peterson, *Academic Tenure and Higher Education in the United States: Implications for the Dental Education Workforce in the Twenty-First Century*, 71:3 JOURNAL OF DENTAL EDUCATION, 355 (2007).

universities of the Twelfth Century.<sup>10</sup> Prior to the arrival of tenure in American universities, faculty in higher education were retained in their positions on informal yearly contracts.<sup>11</sup> These contracts were referred to as “gentlemen’s agreements” because they were between gentlemen who were predominately the university administration and the professor.<sup>12</sup> Contracts such as these placed a faculty member’s continuation of employment at the whim of the university administration or wealthy donors who funded various aspects of the university.<sup>13</sup> This collegial arrangement changed, however, in the early part of the Twentieth Century when Edward Ross, a Stanford University professor, was summarily terminated for publicly taking stand on issues deemed unacceptable by the wife of Stanford’s founder.<sup>14</sup> Ross’s termination is seen as a catalyst for the formation of the American Association of University Professors (AAUP), an organization based on a fundamental tenet that formalized tenure and academic freedom among faculty in higher education.<sup>15</sup>

With ever increasing demands for productivity and scholarship coming from moneyed benefactors and external political forces placed on faculty, as well as university administrators terminating faculty for not adhering to university religious or political beliefs, the AAUP sought to codify its position on job security/tenure during its initial meeting in 1915.<sup>16</sup> The original position taken by this

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<sup>10</sup> Metzger, *supra* note 4, at 94.

<sup>11</sup> Peterson, *supra* note 9, at 355.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> William Tierney and Estela Bensimon, *Promotion and Tenure: Community and Socialization in Academe* 23 (1996) (Ross spoke out publicly against several controversial topics of the time: 1) municipal ownership of public utilities; 2) his public support for railway union strikes; and 3) how the use of Asian laborers instead of the European-American working class was destructive for the United States working classes’ wellbeing. Ross’s statements went directly against the business practices of Leland Stanford, the founder of Stanford University. When Stanford’s widow learned of his statements, she demanded Ross’s immediate termination. The university president adhered to her demand and Ross was terminated because of his views on immigrant labor and train monopolies).

<sup>15</sup> *Id.*

<sup>16</sup> Metzger, *supra* note 4, at 135–36 (There were two goals that the AAUP had when drafting its 1915 Declaration of Principles on Academic Freedom and Academic Tenure. These goals were: 1) to provide a means for protecting a faculty members academic freedom in and outside of the classroom; and 2) to provide a safeguard for faculty to perform other duties, such as research, without fear of reprimand from university administration).

association on tenure and academic freedom included a ten-year probationary period, during which time new faculty were to have annual reviews to determine their so-called fit with university life.<sup>17</sup> Areas considered essential to university life for faculty, and therefore under yearly review, included the faculty member's proficiency in three distinct components related to academic life.<sup>18</sup> These areas remain the foundation for tenure decisions and address: teaching/providing quality instruction; service to the university and community as a whole; and scholarly research/publications which are often further delineated depending on the discipline.<sup>19</sup>

Initially, many higher education institutions did not comply with the AAUP's recommendations on tenure;<sup>20</sup> however, in 1940, the association revised its tenure position and recommended that the probationary period be reduced from ten years to seven years.<sup>21</sup> Following the end of World War II, university enrollments began to swell with returning veterans entering higher education, spurred by financial assistance

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<sup>17</sup> *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 300 (Dec. 13, 2013, 11:29 PM), <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm> (In the AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure, the organization stated their position on principles and clarified concepts on the topic of academic freedom and tenure. According to the AAUP, academic freedom is essential to quality research and instruction and should be awarded to all academic professionals. Similarly, academic tenure is a "means to an end" and is essential to the safeguarding of academic freedom).

<sup>18</sup> *Id.*

<sup>19</sup> *Faculty Appointment, Salary, Promotion, and Tenure Policies*, ILLINOIS STATE UNIVERSITY, 32–34 (Nov. 27, 2013 4:35 PM), <http://provost.illinoisstate.edu/downloads/aspt/ASPTmasterAugust2011.pdf>. (An example of the components needed for promotion and tenure is seen in Illinois State University's policy for promotion).

<sup>20</sup> According to Roger Geiger in *Perspectives on the History of Higher Education* (2008), many universities throughout the country failed to implement the AAUP's recommendation for a 10 year probationary period due to the fact that there was no agreement for a set probationary period between the two leading teacher unions at the time, the AAUP and the American Federation of Teachers (AFT). The AAUP in its 1915 Declaration recommended a ten year probation period for newly hired faculty members. The other leading teacher union, the AFT, promoted a three year probation period for all newly hired teachers.

<sup>21</sup> *1940 Statement of Principles on Academic Freedom and Tenure*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm> (Nov. 6, 2013, 10:10 PM) (Additionally, with the release of the 1940 Statement of Principles on Academic Freedom and Tenure, academic tenure and academic freedom were identified as being inseparable and vital to the instruction provided by faculty within academia).

provided through the Montgomery GI Bill.<sup>22</sup> Universities looked for incentives to retain existing faculty as well as inducements for new faculty. At this point, institutions of higher education began to view tenure as a benefit of employment and therefore implemented the AAUP's recommendation for acquiring tenure following a seven-year probationary period.<sup>23</sup>

As universities moved forward based on the AAUP recommendations, the probationary period gave administration an opportunity to determine how the faculty member interacted with students and peers and provided the administration time to evaluate the value of the individual to the university. Even though newly hired faculty were given the opportunity for tenure, university administrators found that if non-tenured faculty were not awarded tenure, they could then seek legal recourse to challenge the administration's decision.<sup>24</sup> Attempts to have the courts reverse university tenure decisions have primarily been unsuccessful due to various state and university policies adopted for the acquisition of tenure.

Because the path to tenure has a professor undergo periodic review of three components deemed essential for success in university life as well as a probationary period of seven years, universities have found it difficult and costly to dismiss an instructor once tenure has been granted. Today, with tenure and academic freedom firmly in place at most institutions of higher education, questions concerning the legal relevance of these concepts within the court system have been raised as faculty bring legal proceedings against their institutions for their dismissal regardless of if tenure has been granted.

### III. A REVIEW OF *GARCETTI* (*GARCETTI V. CEBALLOS* – 2006)

Although *Garceti* does not directly address higher education, the implications of the U.S. Supreme Court's decision affect academia.<sup>25</sup> University administrations utilize

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<sup>22</sup> Also known as the Servicemen's Readjustment Act of 1944.

<sup>23</sup> Kathryn Moore, *Introduction: Academic Tenure in the United States*, C. & U. PERS. ASS'N J., Fall–Winter 1980, at 1, 4–5.

<sup>24</sup> PHILIP ALTBACH, ET AL., *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY* (2011).

<sup>25</sup> *Garcetti v. Ceballos*, 547 US 410, 425 (2006).

the Court's ruling in determining a professor's right to academic freedom. Richard Ceballos was employed by the Los Angeles County District Attorney's Office as a Deputy District Attorney in 1989.<sup>26</sup> In 1998, Ceballos was promoted to calendar deputy<sup>27</sup> in the Pomona branch of the District Attorney's office.<sup>28</sup> While working at the branch office, Ceballos was approached by Richard Escobedo, a criminal defense attorney representing a defendant who was charged through the Pomona branch office (at the time, Ceballos was one of the deputy district attorney's working on *People v. Cuskey* [2000]).<sup>29</sup> While in a conversation with Ceballos, Escobedo expressed his belief that one of the deputies that had arrested his client lied in the search warrant affidavit and requested that Ceballos review the case.<sup>30</sup> After reviewing the case file and visiting the scene of the crime, Ceballos determined that the deputy sheriff in question had grossly misrepresented the facts in the case.<sup>31</sup>

Upon arriving at his determination, Ceballos took his findings to his supervisor (Carol Najera) and the Head Deputy District Attorney (Frank Sundstedt) for the county.<sup>32</sup> After meeting with both individuals, it was determined by all that the evidence presented by the sheriff was questionable.<sup>33</sup> Therefore, on March 2, 2000, Ceballos submitted a formal memorandum to Sundstedt stating that the affidavit had been falsified and recommended that the case be dismissed.<sup>34</sup>

When the memorandum from Ceballos was received by the Head Deputy District Attorney, Sundstedt contacted Ceballos and instructed him to reword his memorandum so that it was not overly critical of the arresting sheriff.<sup>35</sup> Following the direction of the Head Deputy District Attorney, Ceballos reworked his memorandum and resubmitted it to Sundstedt. On March 9, 2000 a meeting was called with several representatives from the sheriff's department, the Head

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<sup>26</sup> Ceballos v. Garcetti, 361 F.3d 1168, 1170 (9th Cir. 2004).

<sup>27</sup> A Calendar Deputy is a supervisory position that oversees other deputy district attorneys.

<sup>28</sup> *Garcetti*, 361 F.3d at 1170.

<sup>29</sup> *Id.* at 1171

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Deputy District Attorney, Najera and Ceballos to discuss the concerns identified by Ceballos in his memorandum.<sup>36</sup> At the completion of this meeting, Sundstedt was still not convinced that the charges should be dismissed and decided to proceed with the case pending the outcome of a motion submitted by Escobedo challenging the search warrant.<sup>37</sup>

After being made aware of Sundstedt's decision to pursue the case, Ceballos contacted Escobedo to inform him that he believed the affidavit for the search warrant was falsified.<sup>38</sup> Upon hearing Ceballos' doubt regarding the validity of the warrant, Escobedo decided to subpoena Ceballos to testify on the legality of the search warrant affidavit.<sup>39</sup> Following his testimony at the hearing on the motion challenging the validity of the search warrant affidavit, Ceballos was removed from the prosecution team involved with the case against Escobedo's client.<sup>40</sup> According to Ceballos, following his testimony in court regarding the facts behind the awarding of the search warrant, Garcetti (the District Attorney), Sundstedt and Najera retaliated against him.<sup>41</sup>

Claiming that he had been subjected to adverse employment actions, Ceballos filed a suit against Sundstedt and Najera in their individual capacities and against Garcetti in his individual and official capacities, requesting the court find for him, his lost wages and injunctive relief.<sup>42</sup> Responding to the claims against them, the defendants petitioned the United States District Court for the Central District of California for summary judgment based on their Eleventh Amendment rights.<sup>43</sup> These rights were granted by the Court.<sup>44</sup> Furthermore, the defendants claimed that the issues raised by the plaintiff resulted from a staffing shortage and were in no way retaliation for the memorandum that he had sent.<sup>45</sup> Upon being notified of the defendant's claims that there was no retaliation, Ceballos amended his complaint and resubmitted it

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1171–72.

<sup>42</sup> *Id.* at 1172.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



to the Court, noting that his First and Fourteenth Amendment rights were violated when the Los Angeles County District Attorney's Office retaliated against him for his use of speech as protected by the First Amendment.<sup>46</sup>

The defendants responded to the plaintiff's claims alleging that they should be granted summary judgment based on their qualified immunity.<sup>47</sup> To support their claim, Garcetti, Sundstedt and Najera argued that: "1) . . . [p]laintiff's speech (the March 2, 2000 memorandum) was not protected by the First Amendment; 2) even if the Court finds such speech was protected, the right violated was not 'clearly established'; and 3) the defendants' actions were reasonable under the circumstances."<sup>48</sup> In its ruling, the United States District Court for the Central District of California stated that Ceballos's claim of First Amendment protection for his March 2, 2000 memorandum was unsupported by evidence, and that because the speech in question was not a matter of public concern, as defined in *Connick*,<sup>49</sup> the defendant's request for summary judgment was awarded.<sup>50</sup>

Upon receiving the verdict from the District Court, Ceballos decided to challenge the decision of the Court and submitted an appeal to the United States Court of Appeals for the Ninth Circuit.<sup>51</sup> In his appeal, Ceballos alleged that his use of protected speech in the March 2, 2000 memorandum resulted in being subjected to adverse employment actions by Garcetti, Sundstedt and Najera.<sup>52</sup> Additionally, Ceballos argued that the District Court erred when it awarded the defendants the right to qualified immunity.<sup>53</sup> Citing *Harlow v. Fitzgerald* (1982) in his defense, Ceballos stated that for a public official to receive qualified immunity, the person must have acted in a manner that did not violate "clearly established . . . constitutional rights of which a reasonable person would have known."<sup>54</sup>

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<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Ceballos v. Garcetti*, 2002 U.S. Dist. LEXIS 28039 (C.D. Cal. Jan. 30, 2002).

<sup>49</sup> *Connick v. Myers*, 461 U.S. 138 (1983) (The US Supreme Court indicated that for an employee's speech to be considered a matter of public concern, the speech had to address issues relating to political, social, or other concerns to the community).

<sup>50</sup> *Garcetti*, 2002 U.S. Dist. LEXIS 28039.

<sup>51</sup> *See Garcetti*, 361 F.3d at 1170.

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

During the Ninth Circuit's examination of the evidence, it identified that, for the purpose of summary judgment, qualified immunity was not available to the state or county officials because Ceballos's speech was considered a matter of public concern and, as such, was protected by the First Amendment.<sup>55</sup> Furthermore, the Court identified that "...[because] the Eleventh Amendment does not apply to political subdivisions of the state, the county could ordinarily not assert sovereign immunity, although in this case it could do so if such immunity applied to the District Attorney."<sup>56</sup> However, regarding the District Attorney's ability to receive protection under sovereign immunity, the Court noted that because Garcetti's actions were not deemed as the function of the state or county, he was disqualified from receiving protection from the Eleventh Amendment.<sup>57</sup>

The Court addressed Ceballos' claim of protected speech by referencing the US Supreme Court's ruling in *Connick*, noting that when an employee discusses matters of a personal nature in the workplace, such as soliciting an individual's colleagues to determine their perception of topics to promote a personal interest, the employee's speech is not protected by the First Amendment.<sup>58</sup> The Court further referenced *Connick* when it addressed the matter of an employee's use of speech to discuss "the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."<sup>59</sup> Reversing the lower court's decision, the United States Court of Appeals for the Ninth Circuit remanded the case for further proceedings.<sup>60</sup>

Upon learning of the Court of Appeals ruling, Garcetti submitted an appeal to the United States Supreme Court. Following the conclusion of the arguments in the case, the Supreme Court issued its ruling in which it stated that:

1) When public employees make statements pursuant to their official duties, such employees are not speaking as private

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<sup>55</sup> *Garcetti*, 361 F.3d at 1174.

<sup>56</sup> *Id.* at 1170.

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 1173–74

<sup>59</sup> *Connick*, 461 U.S. at 149.

<sup>60</sup> *Garcetti*, 361 F.3d at 1185.

citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech; 2) This result was consistent with the Supreme Court's precedents to the effect that government employees who make public statements outside the course of performing official duties retain some possibility of First Amendment protection; 3) This holding likewise was supported by the emphasis of the Supreme Court's precedents on affording government employers sufficient discretion to manage their operations; 4) A contrary rule would commit state and federal courts to a new, permanent, and intrusive role involving judicial oversight of communications among government employees and their superiors in the course of official business; 5) The deputy's allegation of unconstitutional retaliation failed, for the deputy had spoken, a) not as a private citizen and b) pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.<sup>61</sup>

The Court further explained that similar to *Pickering*, the Court faces the challenge of trying to provide a balance between an individual commenting upon a matter of public concern and the State, as an employer, providing a service to the public through its employees.<sup>62</sup> According to the Court, and referencing their decision in *Pickering*, it stated:

[In circumstances where] a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. . . . [T]he interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.<sup>63</sup>

As a result of their decision in *Pickering*, the Court developed a three step approach for courts to use when determining what constitutional protections can be awarded to

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<sup>61</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>62</sup> *Id.* at 416.

<sup>63</sup> *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 572–573 (1968).

a public employee's speech.<sup>64</sup> First, the court must determine if the individual's speech is considered a matter of public concern.<sup>65</sup> If the answer to this question is yes, then the individual's speech is awarded the protection of the First Amendment; however, if the answer to the question is no, then the individual has no claim against his/her employer for the employer's reaction based on the individual's speech.<sup>66</sup> Similarly, in the case of *Garcetti*, the government as an employer has the discretion to restrict an employee's speech, but when doing so, the employing agency must be certain that the restrictions imposed on the individual's speech are in response to the individual's speech and how that speech could negatively affect the individual's work performance and thus, the organization's ability to perform.<sup>67</sup>

The Court continued in its ruling by referencing *Waters v. Churchill*.<sup>68</sup> In that case the Court stated that "[T]he government as employer indeed has far broader powers than does the government as sovereign"<sup>69</sup> and as such ". . .[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."<sup>70</sup> Applying their statement from *Waters* to *Garcetti*, the Court stated that as a result of Ceballos' submitting a memorandum to his supervisor, an action that was identified as not being outside the realm of his responsibilities as a calendar deputy, his speech used was not that of a citizen but rather of an employee. As such, it was classified as not a matter of public concern; therefore, the protection of the First Amendment was not awarded.<sup>71</sup>

However, in the Supreme Court's ruling in this case, the Justices indicated that the ". . .expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need

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<sup>64</sup> *Id.* at 568

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Ceballos*, 547 U.S. 410, 418.

<sup>68</sup> *Waters v. Churchill*, 511 U.S. 661 (1994).

<sup>69</sup> *Id.* at 671.

<sup>70</sup> *Ceballos*, 547 U.S. at 418.

<sup>71</sup> *Id.* at 423.

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.”<sup>72</sup> Furthermore, in support of the rights awarded to an academic’s freedom of speech in the classroom, the Court referred to *Keyishian* in which it had stated 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. 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.”<sup>73</sup> The decision handed down by the U.S. Supreme Court in *Garcetti* reversed the Court of Appeals decision and remanded the case back to the lower court for further proceedings.

The question of an employee’s speech and the protection it is guaranteed by the First Amendment becomes a key element raised within *Garcetti*.<sup>74</sup> In the U.S. Supreme Court’s ruling, the Court reasoned that when an employee uses speech in his/her daily job, and that speech is considered to be within the realm of that individual’s responsibility, his/her speech is not considered a matter of public concern, and does not receive the protection of the First Amendment. However, even though the Court identified work related speech as being outside the realm of the protection of the First Amendment, the Court did indicate that the decision reached in *Garcetti* did not imperil the First Amendment protection awarded to educators in public institutions of higher learning.<sup>75</sup>

#### IV. *GARCETTI* REFERENCED IN HIGHER EDUCATION CASES

##### A. *Adams v. Trustees of the University of North Carolina – Wilmington (2011)*

One case in which a lower court referred to the application of *Garcetti* in higher education is that of *Adams v. Trustees of the University of North Carolina-Wilmington (2011)*.<sup>76</sup> In this

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<sup>72</sup> *Id.* at 425.

<sup>73</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>74</sup> *See Ceballos*, 547 U.S. 410–26.

<sup>75</sup> *Id.* at 425.

<sup>76</sup> 640 F.3d 550 (4th Cir. 2011).

case, Adams was employed as an assistant professor at the University of North Carolina, Wilmington Campus in the Department of Sociology and Criminal Justice.<sup>77</sup> During his probationary period Adams received high teaching evaluations from his supervisor and students, received two faculty awards, had articles published and was an active participant in university related service activities.<sup>78</sup> Upon the completion of his probationary period, without question from his peers and university administration, Adams received tenure and the new academic rank of associate professor.

Several years after his promotion, Adams changed his religious beliefs and became a conservative Christian, a change that redefined his moral and ideological views.<sup>79</sup> As his religious beliefs grew stronger, he became increasingly vocal about his views on the moral and political state of the university and nation.<sup>80</sup> In 2004, he published a book entitled, "Welcome to the Ivory Tower of Babel: Confessions of a Conservative College Professor" which contained past articles as well as new works he had written.<sup>81</sup> Although his views on the moral well-being of the nation had changed, his ability to be an effective teacher had not, and he continued to receive positive reviews from his supervisor and students.<sup>82</sup>

Over the years, Adams became even more vocal in his views and tension developed between him and several of his colleagues. As these tensions mounted, complaints concerning his public beliefs and values from the Board of Trustees and the surrounding community began to find their way to the university administration.<sup>83</sup> However, even though the university administration did not support Adams' views or the way he presented them to the public, they recognized his right to freedom of speech and academic freedom and agreed that he was able to express his thoughts without the fear of retaliation from the administration.

Several months after publishing his book, Adams submitted his application for promotion to full professor. According to the

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<sup>77</sup> *Id.* at 553.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 554

<sup>83</sup> *Id.*

Faculty Handbook at the University of North Carolina-Wilmington, faculty promotion is reviewed in four areas: 1) teaching ability; 2) research conducted or artistic achievement; 3) service to the university and community, and 4) scholarship and professional development completed.<sup>84</sup> In addition to these four areas, the review process for promotion placed an emphasis on the significance of teaching excellence and research conducted or artistic achievement attained, items that carry the most weight in the decision process for the awarding of promotion and tenure.<sup>85</sup> Adams included all of the required documents in his application packet plus a list of his published and pending publications, including the *Welcome to the Ivory Tower of Babel: Confessions of a Conservative College Professor*.<sup>86</sup>

After completing his application for promotion, Adams submitted his packet to the department chairperson, Dr. Kimberly Cook.<sup>87</sup> Following promotion guidelines identified within the Faculty Handbook, Cook forwarded Adams' packet to the senior most department faculty members requesting their feedback on Adams' request for promotion.<sup>88</sup> Upon receiving the recommendation from the senior faculty members, Cook compiled their responses and placed them in a document that summarized the overall themes of the comments submitted by the senior faculty.<sup>89</sup> Cook then called a meeting with the senior faculty members to discuss their comments and recommendations.<sup>90</sup> During this meeting, the scholarly works Adams had submitted were evaluated for their scholarly content.<sup>91</sup> According to those who participated in the meeting, the scholarly work was difficult to review because "they were not peer-reviewed or traditional academic writing related to his academic discipline."<sup>92</sup> As a result, the department denied Adams' request for promotion.<sup>93</sup>

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<sup>84</sup> *Faculty Handbook*, UNIVERSITY OF NORTH CAROLINA- WILMINGTON, (2013), available at, [http://uncw.edu/facsen/documents/2012\\_Faculty\\_Handbook.pdf](http://uncw.edu/facsen/documents/2012_Faculty_Handbook.pdf).

<sup>85</sup> *Adams*, 640 F.3d at 556.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 555

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Upon receiving notification of denial for his promotion, Adams requested a written response from the department chair identifying the reasons for the denial of his promotion.<sup>94</sup> In her response to Adams, Cook explained that the decision

. . . was based exclusively on the promotion application and supplementary materials [that he had] submitted and [with Cook's] consultation with the senior faculty in accordance with existing UNCW . . . policies and procedures. [Cook] indicated an overwhelming consensus of the senior faculty did not support the promotion and found the lack of support from the senior faculty provided compelling evidence that Adams' record [did] not merit promotion to professor at [that] time.<sup>95</sup>

Adams followed the receipt of Cook's explanation by filing a claim with the United States District Court for the Eastern District of North Carolina in which he stated that the University of North Carolina – Wilmington had violated his First Amendment rights and retaliated against him stating that the university's decision to deny him promotion was based on his protected speech.<sup>96</sup> Furthermore, Adams claimed that he had been denied the constitutionally protected right to due process.<sup>97</sup>

The defendants, who had been named in their individual and official capacities, requested summary judgment in this case and that the claims against them be dismissed in accordance to Federal Rule of Civil Procedure 12(b)(6).<sup>98</sup> After granting the motion submitted by the defense, the District Court referred to *Garcetti* where the U.S. Supreme Court ruled that when a public employee is speaking in his official capacity, he is not speaking as a citizen.<sup>99</sup> In the Court's decision in Adams, they indicated that the focus of this case was not placed on the speech itself, but the role of the speaker when it was said.

Adams appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. In filing his

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 556. Federal Rule of Civil Procedure 12(b)(6) calls for the dismissal of charges if it appears to the court that the plaintiff cannot provide support to their claims that would entitle them to relief.

<sup>99</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).



appeal, Adams submitted claims based on several actions committed by the university: 1) the university had violated his First Amendment rights by basing their decision for his request of promotion on his protected speech; and 2) that the university had violated his right to equal protection awarded him under the Fourteenth Amendment.<sup>100</sup>

In deciding this case, the U.S. Court of Appeals for the Fourth Circuit indicated that the District Court erred in granting summary judgment for the defendant on his First Amendment claims. However, basing their opinion on *Pickering* and *Garcetti*, the Court further explained that “while government employees do not lose their constitutional rights at work, the Supreme Court has repeatedly held that the government may impose certain restraints on its employees’ speech and take action against them that would be unconstitutional if applied to the general public.”<sup>101</sup> In making this point, the Court referenced their ruling in *McVey v. Stacy* (1998), identifying the complexity between a public employee acting as a citizen when the employee has commented on matters of public concern and the ability of government acting as an employer by providing a public service. In this case the Court had to determine:

- 1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest;
- 2) whether the employee’s interest in speaking upon the matter of public concern outweighed the government’s interest in providing effective and efficient services to the public; or
- 3) whether the employee’s speech was a substantial factor in the employee’s [adverse employment] decision.<sup>102</sup>

Referencing the *McVey* test, the U.S. Court of Appeals stated that the District Court had erred when it had only applied the first step of the test and identified that Adams had spoken in his official capacity and not that of a citizen.<sup>103</sup> Furthermore, the Court explained that the lower court had

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<sup>100</sup> *Adams*, 640 F.3d at 557.

<sup>101</sup> *Id.* at 560.

<sup>102</sup> *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir. 1998) (this three prong test is known as the *McVey* test).

<sup>103</sup> *Adams*, 640 F.3d at 561.

misinterpreted *Garcetti* in several areas. According to the Court, the District Court faltered when it: 1) held that protected speech was converted to unprotected speech based on its use after the fact; and 2) applied *Garcetti* without acknowledging the language used within the Supreme Court's decision indicating that the Court's analysis on freedom of speech did not apply to education.<sup>104</sup> Furthermore, the Appeals Court stated that the District Court faltered when it concluded that Adams' speech, which had been protected by the First Amendment, had turned into unprotected speech after the speech had been made.<sup>105</sup> In its decision, the U.S. Court of Appeals for the Fourth Circuit reversed the lower court's ruling on summary judgment on Adams' First Amendment claims.<sup>106</sup> The Court remanded the case back to the U.S. District Court for the Eastern District of North Carolina for further proceedings.<sup>107</sup>

The *Adams* case challenged academic freedom. The Appeals Court's ruling stated that "the underlying right Adams asserts the Defendants violated — that of a public employee to speak as a citizen on matters of public concern — is clearly established and something a reasonable person in the Defendants' position should have known was protected."<sup>108</sup> The purpose of academic freedom is to protect faculty members' freedom of speech without the fear of reprimand from their employer. Finally, in its decision, the Court of Appeals for the Fourth Circuit stated, "we conclude Adams' speech was clearly that of a citizen speaking on a matter of public concern. Adams' columns addressed topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality. Such topics plainly touched on issues of public, rather than private, concern."<sup>109</sup>

### B. *Demers v. Austin* (2013)

*Demers v. Austin* is a recent case that references *Garcetti* and is similar to *Adams*. In this case, David Demers, a tenured

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 566.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 565.

faculty member at Washington State University (WSU), was employed within the University's College of Liberal Arts.<sup>110</sup> While performing his duties as a faculty member, Demers distributed a controversial seven step plan calling for the separation of the College's communication school into two different faculty groups, Mass Communication and Communication Studies.<sup>111</sup> A committee was eventually formed (the Structure Committee) to research the feasibility for separating the communication school (the Murrow School) into two separate schools.<sup>112</sup> Their resulting proposition created a rift among those employed within the school of communication.<sup>113</sup>

While serving as a member of the Structure Committee, Demers proposed a plan (The Plan) defining seven reasons for separating the school into two distinct departments and submitted The Plan to the Provost of the University.<sup>114</sup> After waiting several months and receiving no feedback from the Provost, Demers submitted his plan to his faculty colleagues, the university administration, the advisory board for the Murrow School and the President of the University.<sup>115</sup> Shortly after the dissemination of The Plan to the community at large, the faculty at WSU began to receive questions from the public related to Demers's proposal.<sup>116</sup>

During the time relevant to The Plan being made available to the public, Demers submitted his annual self-prepared faculty evaluation report to the interim director of the Murrow School, Dr. Erica Austin.<sup>117</sup> As defined within WSU's faculty manual, each faculty member's annual review should include "a curriculum vitae that will include information concerning education, instructional performance, research activities and publications"<sup>118</sup> Following these guidelines, Demers submitted his report which included a book he had authored which

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<sup>110</sup> Demers v. Austin, 729 F.3d 1011, 1015 (9th Cir.,2013).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1016.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 2012–2013 Faculty Manual 63, WASHINGTON STATE UNIVERSITY, available at [http://facsen.wsu.edu/faculty\\_manual/2013facman\\_updatedTOC061413a.pdf](http://facsen.wsu.edu/faculty_manual/2013facman_updatedTOC061413a.pdf).

(A policy that is still evident in the most current version of the faculty manual).

criticized academia and WSU entitled *The Ivory Tower of Babel*.<sup>119</sup>

After receiving several negative annual evaluations from the interim director (from 2006 to 2008), Demers submitted a claim to the United States District Court for the Eastern District of Washington alleging that the university administration had retaliated against him for his publication of *The Plan* and *The Ivory Tower of Babel*, claiming both were protected under the First Amendment of the Constitution.<sup>120</sup>

In response to the claims made by the plaintiff, the defendants claimed that the plaintiff's negative yearly evaluations were in response to Demers' redirected priorities away from the position for which he was hired in academia, his lack of attendance at institutional committees, and the fact that he frequently cancelled his classes – all of which violated university policy.<sup>121</sup> Furthermore, the defendants claimed that with the decision reached in *Garcetti* by the U.S. Supreme Court, Demers's publications were pursuant to his official duties at the university and should not be awarded First Amendment protection.<sup>122</sup> The District Court's ruling "held that [T]he Plan and Ivory Tower [of Babel] were written and distributed in the performance of Demers's official duties as a faculty member of WSU, and were therefore not protected under the First Amendment."<sup>123</sup>

Demers appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit, claiming that: 1) his publication of *The Plan* and the *Ivory Tower of Babel* were not pursuant to his position at the university; and 2) even if the publication of *The Plan* and the *Ivory Tower of Babel* were pursuant to his official duties, the ruling in *Garcetti* did not apply to faculty speech and academic writing.<sup>124</sup>

In deciding the case, the U.S. Court of Appeals for the Ninth Circuit first addressed Demers's claim that his publication of *The Plan* and the *Ivory Tower of Babel* were not pursuant to his official duties at WSU. In their review of the evidence, the Court stated that as Demers was "preparing

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<sup>119</sup> *Demers*, 729 F.3d at 1014.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1017.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1017–18.

[T]he [P]lan, [he] sent an email to his fellow faculty members at the Murrow School, soliciting ideas and comments.”<sup>125</sup> Furthermore, the Court identified that within his 2007 annual self-prepared faculty report, Demers listed that he had “[d]eveloped a 7-Step Plan for reorganizing the Murrow School to improve the quality of the professional programs and attract more developmental funds.”<sup>126</sup> According to the Court:

it is impossible, as a real-world practical matter, to separate Demers’s position as a member of the Mass Communication faculty, and as a member of the Structure Committee, from his preparation and distribution of his Plan. Furthermore, we note that when it was to his advantage to do so, Demers characterized his development of the Plan as part of his official duties in his 2007 Annual Activities Report.<sup>127</sup>

However, basing their opinion on *Garcetti*, the Court referenced U.S. Supreme Court Justice Souter when he stated, “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.’”<sup>128</sup> Referencing *Keyishian v. the Board of Regents of the University of the State of New York* (1967), as well as the United States Court of Appeals for the Fourth Circuit in *Adams*, the Court of Appeals for the Ninth Circuit stated that “teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are ‘a special concern of the First Amendment.’”<sup>129</sup> In the Court of Appeals for the Ninth Circuit’s final summation of the case presented before them, the Court stated, “[w]e conclude that *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. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.”<sup>130</sup>

In Demers’ case, the concept of academic freedom was

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<sup>125</sup> *Id.* at 1018.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006).

<sup>129</sup> *Demers*, 729 F.3d at 1019.

<sup>130</sup> *Id.* at 1020.

challenged when a professor's academic speech and writing were linked in similar fashion to the definition of employee speech identified within *Garcetti*. However, the Court's ruling stated that "protected academic writing is not confined to scholarship. . . academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to things such as budget, curriculum, departmental structure, and faculty hiring. [S]uch writing may well address matters of public concern under *Pickering*."<sup>131</sup> The purpose of academic freedom, one that is well supported within the U.S. legal system, is to protect a faculty members' freedom of speech even if his/her actions are pursuant to their official duties at a university. In its decision, the Court of Appeals for the Ninth Circuit stated that "[w]e hold that there is an exception to *Garcetti* for teaching and academic writing."<sup>132</sup>

## V. CONCLUSION

Although the protections awarded the professoriate through academic freedom and freedom of speech were clearly established in *Keyishian v. Board of Regents of the University of the State of New York* (1967), these principles are once again being challenged within the U.S. legal system. As seen in the two United States Court of Appeals' cases discussed in this article, the application of the U.S. Supreme Court's decision in *Garcetti* has been erroneously applied towards a professor's academic writings and academic speech by university administration and District Courts alike.

If *Garcetti*, and its categorical approach to defining employee speech as an unprotected right of the First Amendment, is applied in higher education without university administration and the district courts first understanding the Supreme Court's meaning of employee speech and how it applies within higher education, professors will receive little or no protection from the disciplinary action of university administrators for the professor's use of speech and academic writing that has been classified as being pursuant to their official duties at their university.<sup>133</sup> However, in most cases,

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<sup>131</sup> *Id.* at 1023.

<sup>132</sup> *Id.* at 1025.

<sup>133</sup> Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. LAW REV. 54, 56-57 (2008).

university administrators do not act out against academic freedom because of their disdain for it,<sup>134</sup> but rather out of their lack of an understanding of the protections awarded faculty for their academic writings and academic speech.

With the decisions of the lower courts in these cases being reversed by various U.S. Courts of Appeals (as seen in *Adams* and *Demers*), the constitutionally protected rights of academics for their academic speech and writing is being recognized as a First Amendment protection. As social and political events within higher education over the past several years have led university administrators to question the parameters of Constitutional protections and challenge the academic's right to freedom of speech, the U.S. legal system has remained firm in its interpretation of the law by protecting a professor's civil rights as well as those rights awarded to their academic speech and writings.<sup>135</sup>

Those working as professionals within higher education need first to understand the Supreme Court's ruling in *Garcetti* prior to applying it as a way to regulate a faculty member's academic speech or writing. In *Garcetti* the Supreme Court held that when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus "the First Amendment does not prohibit managerial discipline of such employees for such speech."<sup>136</sup> Unfortunately, simply taking this statement and applying it to issues related to academic freedom is where many university administrators have fallen short. University administrators must not only recognize the language, but also understand that *Garcetti* further defines a professor's freedom of speech. Within the Supreme Court's decision the Court states: "...expression related to academic 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

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<sup>134</sup> Kevin Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty after Garcetti*, 33 J.C. & U.L. 313, 360 (2007).

<sup>135</sup> *Id.*

<sup>136</sup> *Ceballos*, 547 U.S. at 424.

involving speech related to scholarship or teaching.”<sup>137</sup> As evident from this review of the cases, the U.S. legal system supports the issue of Freedom of Speech, i.e., academic freedom, for those in education. This support is most notable in the following passage from *Keyishian*: “. . .[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. 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.”<sup>138</sup>

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<sup>137</sup> *Id.* at 425.

<sup>138</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).