Professorial Speech and Academic Freedom:
Balancing First Amendment Rights Against Administrative Responsibilities

George M. Shur, Esquire

General Counsel

Northern Illinois University

and

Jonathan Mitchell[1]

Introduction

On October 9, 2001, the United States Supreme Court refused to hear an appeal by John Bonnell, professor of English at Macomb Community College near Detroit, thereby upholding a lower federal court's ruling that Macomb had just cause to suspend him for, among other things, using vulgarity in the classroom.[2] Although dealt with in greater detail *infra*, *Bonnell v Lorenzo* involves many of the same fundamental issues which arise in the context of conflicts between administrators and academics in which academic freedom and First Amendment rights are implicated in the course of employment. In upholding Bonnell's suspension for use of crude language, the 6th Circuit stated that "while a professor's rights to academic freedom and freedom of expression are paramount . . . , they are not absolute . . . ," to which Bonnell responded

[1] Jonathan Mitchell is currently a third-year law student at Northern Illinois University - College of Law.

[2] *Bonnell v Lorenzo*, 241 F.3d 800 (6th Cir., 2001), *cert. den.* 122 S.Ct. 347 (2001) (hereinafter *Bonnell*).

that "the First Amendment is dead."[3] Alternatively, Macomb welcomed the decision citing its "obligation to provide a hostile-free learning environment."[4]

Bonnell exemplifies the type of issues that arise where the rights of professorial speech and academic freedom conflict with what is typically the administrative responsibility of providing a non-hostile work and educational environment. Furthermore, *Bonnell* is instructive as current evidence of the historical progression of judicial decisions over the past fifty years, during which time the pendulum has swung away from protecting the rights of professorial employees and toward protecting state educational institutions in terms of meeting these responsibilities. In other words, governmental employers, state public schools, and state universities are required to navigate a sort of legal tightrope in balancing the interests of freedom of speech and expression, against the interests of confronting and eliminating harassment, whether sexual, racial, or otherwise. We can add to this the emerging right of institutions to do what is necessary to assure the efficiency of their own operations.

This paper will examine how the balance has historically been struck in weighing the academic versus institutional interests in free speech, where the balance stands now, and provide some analysis of several recent judicial decisions that indicate the direction courts are moving. **Part I** briefly sketches the issues implicated under the First Amendment in the context of state employment with a general overview as to how such free speech issues are legally evaluated. **Part II** provides a chronological breakdown of cases interpreting the First Amendment regarding freedom of speech for state employed

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[3] Robin Wilson, *Supreme Court Declines to Hear Suspended Professor's First-Amendment Appeal*, THE CHRONICLE OF HIGHER EDUCATION, 10 Oct., 2001, at A14. (hereinafter Wilson, *Supreme Court*).

professors, and other governmental employees. A chronological breakdown is used to illustrate more readily the historical development of judicial decisions that balanced free speech rights against state regulation. **Part III** focuses upon the recent decisions in *Urofsky v Gilmore*[5] and *Hardy v Jefferson Community College*[6] where two different courts reasoned two different holdings in weighing academic freedoms against institutional regulations. The specific issue is whether the two holdings can be reconciled, or do they represent a conflict in the judicial view of in-class or professorial speech. **Part IV** concludes by way of a brief summary.

Part I

Overview of First Amendment Issues

The First Amendment of the Constitution states:

"Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. Const. Amend. I.

The amendment generally provides freedom of speech against regulation by the government. In an employment context, a private employer has no general legal requirement to honor the Amendment, whereas governmental employers would. For the scope of this discussion, the cases below will relate to First Amendment issues involving public school teachers, state university professors, and governmental employees.

Free speech analysis is often complex and fact based, but the usual threshold issue is to determine if the speech is in a protected class, or not. A classic example of

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[4] Wilson, *Supreme Court, supra* note 3, at A14.
[5] *Urofsky v Gilmore*, 216 F.3d 401 (4th Cir., 2001), *cert. den.* 121 S.Ct. 759 (2001) (hereinafter *Urofsky*).
[6] *Hardy v Jefferson Community College*, 260 F.3d 671 (6th Cir., 2001) (hereinafter *Hardy*).

unprotected speech is falsely yelling "fire" in a crowded theater.[7] Other generally unprotected classes of speech include obscenity[8], defamation[9], certain pornography[10], and so called "fighting words."[11] Such forms of unprotected speech may be regulated or prohibited provided the government acts in a content neutral manner.

If the speech is in a protected class, the next step is to determine if the speech touches upon a matter of public concern since this is one of the most protected forms of speech.[12] If the speech is not of public concern, then deference is usually given to the employer's judgment in taking actions which regulate or limit such speech. Alternatively, the state cannot sanction or infringe upon employee speech that is protected without showing that such speech impaired the efficiency of governmental operations.[13] To establish that the government has violated an employees Constitutional right of speech, the employee must show speech involving a public concern, and that such speech was a substantial or motivating factor in the government's decision to discipline the employee.[14] The government, however, may raise an affirmative defense if it can show that the discipline would have occurred regardless of the speech, or that the

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[7] *See generally, Schenck v United States*, 249 U.S. 47 (1919).
[8] *See generally, Miller v California*, 413 U.S. 15 (1973).
[9] *See generally, Dun and Bradstreet, Inc., v Greenmoss Builders, Inc.*, 42 U.S. 749 (1985); *New York Times v Sullivan*, 376 U.S. 254 (1964).
[10] *See generally, New York v Ferber*, 458 U.S. 747 (1982).
[11] *See generally, Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).
[12] *See generally, Connick v Meyers*, 461 U.S. 138 (1983) (discussed in greater detail *infra*) (hereinafter *Connick*).
[13] *See generally, Rankin v McPherson*, 483 U.S. 378 (1987) (discussed in greater detail *infra*) (hereinafter *Rankin*).
[14] *See generally, Jeffries v Harleston*, 21 F.3d 1238, at 1245 (2nd Cir., 1994). (discussed in greater detail *infra*) (hereinafter *Jeffries*).

speech significantly interfered with the operation of government.[15] In *Jeffries*, CUNY was allowed to predict an interference with its operations. Many other factors may come into play when analyzing free speech, but this brief sketch provides some indication of the type of balancing that takes place in such analyses involving governmental and employee interests.

As applied to the university setting, free speech and academic freedom are the first defenses made when employment or administrative actions impinge upon speech. In the academic setting, policies toward protecting these two freedoms are jealously guarded. The policy statement of the American Association of University Professors [AAUP] states in part:

> "The teacher is entitled to full academic freedom in research and in the publication of the results subject to the adequate performance of his other duties . . . . The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject."[16]

> On the other hand, the AAUP has recognized that there are

> "special obligations of faculty members arising from their position in the community: to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate they are not speaking for the institution . . . . [A]n institution may file charges . . . if it feels a faculty member has failed to observe the above admonitions and believes that the professor's external utterances raise grave doubts concerning the professor's fitness for service . . . ."[17]

> The standard, however, clearly includes that

> "a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to

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[15] *Jeffries*, *supra* note 15, at 1246.
[16] *1940 Statement of the Principles on Academic Freedom and Tenure,* ACADEME, Vol. 76, May-June 1990, 37-41.
[17] *Committee Statement on Extramural Utterances,* AAUP POLICY DOCUMENTS AND REPORTS, 9th Edition, 2001, at 32. (hereinafter *Extramural*).

> serve. Extramural utterances rarely bear upon a faculty member's fitness for continuing service."[18]

In sum, according to AAUP standards, there must be a connection, a nexus, between the speech and the ability of the faculty member to fulfill his/her responsibilities of teaching, research, and service. However, the recent line of cases, to be discussed later in this paper, are as (or even more) sensitive to institutional responsibilities. In other words, courts are now willing to explore the effect of speech on the institution itself, without relying solely on how it may effect the performance of the utterer's professional duties.

Recently decided cases, such as *Urofsky*, belie the fact that there is "full academic freedom in research," however, even AAUP policy statements admit to the need for a balancing between what is relevant to introduce "in the classroom." This balancing of interests between freedom of speech and academic freedom becomes further strained in the context of federal statutes designed to provide university employees and students with recourse for discrimination and harassment. Although it goes beyond the scope of this article, Title VII claims, in general, will hold a state employer liable for the misconduct of its employees if it is shown that the employee created a hostile or harassing work environment.[19] Concomitantly, students in a similar position may seek relief under Title IX that requires educational institutions that receive federal funding to provide a non-discriminatory or harassing learning environment.[20] Analysis of these causes of action is beyond the scope here, but it is notable that these federal statutes place requirements upon state employers, as well as university administrators, to regulate through policies

[18] *Extramural*, *supra* note 18, at 32.
[19] 42 U.S.C.A. §2000e (1994).

designed to achieve the goals of Title VII and Title IX. These administrative responsibilities - - to protect the learning and employment environment, and, more recently, to assure smooth operations - - often come in conflict with the established academic policies of academic freedom and free speech concerns, such as the AAUP statements cited above. As the cases below will demonstrate, the balance between protecting the right of free speech for professors against the responsibilities of state employers to regulate the academic environment has not been constant. From the mid-1950s onward, the balance has shifted from affording greater protection to academic freedom under the First Amendment to affording greater protection to the educational institution itself to administrate policies that affect academic freedom and free speech rights. Ultimately, the problem lies in whether a balance can be struck whereby the freedom from harassment and discrimination can be reconciled with the freedom of speech such that the growth and development of academic knowledge is not stunted.

According to Robert M. O'Neil, the Director of the Thomas Jefferson Center for the Protection of Free Expression, the AAUP Committee on the Status of Women was especially sensitive to faculty speech which compromises the work atmosphere, and/or interferes with the institutional mission.[21] This is, of course, different from the earlier AAUP statements giving essential *carte blanche* to in-class utterances. Now we have the more modern realization that words can indeed alter the academic environment, can harass, and can hurt. From the AAUP perspective, this may have been resolved by a 1995 statement that harassing conduct or speech may be punished only if coercive or

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[20] 20 U.S.C.A. §1681 (1994).

[21] ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 43-44 (Indiana University Press 1997) (hereinafter O'NEIL).

directly abusive and, if during the teaching process, only if "persistent, pervasive, and not germane to the subject matter."[22]

But consider the source. As mentioned, recent court decisions (outlined below) have rejected the broad protection urged by the AAUP, adopting instead a more pragmatic or "politically correct" analysis designed to protect the listener and/or the institution/employer more than the faculty speaker.

Part II

A Chronological Sketch of the Historical Development of Free Speech Cases Relating to Educational and Governmental Employees

One of the first and most important decisions in the twentieth century regarding education law arose in *Pickering v Board of Education* which eliminated the "privilege" doctrine of employment by recognizing that a teacher had constitutional rights against their employer.[23] Pickering was a teacher who was dismissed for sending a letter to a local newspaper criticizing the school board for mishandling school funds. The school board dismissed him, raising the "privilege" doctrine that a teacher owes a duty of loyalty to support one's employer. The issue revolved around whether Pickering was employed by privilege requiring loyalty, or could speak out as a citizen on an important community issue.[24] Pickering's right to free speech was upheld on the grounds that the boards alleged mishandling of funds was "a legitimate public concern."[25] *Pickering* established a six-part balancing test of factors for weighing a free speech analysis in this context.

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[22] O'NEIL, *supra* note 22, at 44.
[23] *Pickering v Board of Education,* 391 U.S. 563 (1968) (hereinafter *Pickering*).
[24] *Pickering, supra* note 24, at 568.
[25] *Pickering, supra* note 24, at 571.

1. Was the speech directed at "any person with whom the [speaker] would normally be in contact in the course of his daily work. . . . "
2. Are there issues of "maintaining either discipline . . . or harmony among coworkers."
3. Did the speech have a "detrimental effect or impact" upon the operation of the school.
4. Was the speech a "matter of legitimate public concern."
5. Did the speech "impede the teacher's proper performance of his daily duties."
6. Did the speech include "false statements knowingly or recklessly made."[26]

Pickering thus established a rather broad set of interconnected factors for courts to use in performing the balancing test for analyzing free speech in the arena of state employment. As the following cases will illustrate, the *Pickering* test was winnowed down and effectively replaced through latter judicial decisions that narrow the rights of state employees to exercise their First Amendment rights.

Mt. Healthy City Board of Education v Doyle, involved a public school teacher who contacted a local radio station, publicly complained of a school dress code, and received a termination notification explaining the public statement as the reason for termination.[27] The case took a rather circuitous route through the courts, however, it was held that Doyle's speech was "clearly protected by the First Amendment" and because it was "a substantial part" of the reasoning for termination, it was a constitutional violation.[28] Ultimately, Doyle's termination was allowed to stand, notwithstanding a finding of a violated constitutional right, on the ground that "by a preponderance of the evidence, [the school] would have reached the same decision on other grounds."[29] The effect of this ruling is to make it more difficult for employees to challenge a free speech violation, even where one is legitimately found. It is notable that the school initially

[26] *Pickering, supra* note 24, at 569-570, 570, 570-571, 571, 572-573, 573-574. (respectively).
[27] *Mt. Healthy City Board of Education v Doyle*, 429 U.S. 274, at 281-283 (1977) (hereinafter *Mt. Healthy*).
[28] *Mt. Healthy, supra* note 28, at 283.

provided the employee with a statement that the reason for termination was the public comments made to the radio station, but later succeeded to uphold the termination by showing further (largely circumstantial) evidence that was not originally mentioned in the notice of discharge. In this light, *Doyle* can be seen as an invitation to pretext.

Connick v Meyers involved a state's attorney who was fired on the grounds of insubordination for circulating an internal questionnaire regarding office morale, and other issues of potential employment dissatisfaction. She case claimed a First Amendment violation and relied upon the reasoning in *Pickering*, which ultimately gave the Court an opening to pull most of the teeth out of the *Pickering* balancing test. The Supreme Court held that the majority of the issues in the questionnaire were not of "legitimate public concern" and refused to consider the other balancing factors in *Pickering*.[30] In other words, absent a public concern regarding speech, employers are allowed wide latitude in how they perform their managerial duties. In *Connick*, it seems that efficiency took precedent over employees' freedom of speech under the pretext that Meyer's speech was not a matter of public concern. The decision seems to rely upon a factual finding, as a matter of law, that the public has no interest in the manner in which its government office in this instance is operated.[31]

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[29] *Mt. Healthy, supra* note 28, at 287.
[30] *Connick, supra* note 13, at 148.
[31] *Cf: Jett v Dallas Independent School District*, 798 F.2d 748 (5th Cir., 1986) (Holding that coach's comments on players meeting NCAA guidelines was of public interest because players' eligibility was a concern of the community.) *See also, Hall v Ford*, 856 F.2d 255 (D.C. Cir., 1988) (Recognizing public concern in athletic director's comments regarding NCAA and UDC rules and guidelines on eligibility, scholarships, and grade eligibility, *reversed on other grounds*).

Dube v State University of New York[32] exemplifies the extent that external pressures may potentially impact administrative decisions within the academic environment. In *Dube*, a black psychology professor drew public and political outrage for making in-class comments equating elements of Zionism with Nazism. During tenure review, the University dean, provost, and president denied him tenure despite some evidence that the faculty portion of the review was slightly favorable to his appointment. Dube brought a federal suit complaining of his denial. The suit, however, did not fall on all fours as a First Amendment issue in that Dube did not claim administrative retaliation for his speech, but rather as a result of the political and public pressure his speech created. The case thus turned, and fell, on his failure to show a legally protected interest for the court to recognize. Dube won a pyhrric victory. Although the court was uncomfortable with the specter of public/political pressure, it also found that Dube failed to articulate a legally recognizable interest in tenure.

In line with *Connick*, is *Bishop v Aronov* finding that a teacher's interjection of religious beliefs in in-class discussion was an issue of public concern, but ruled that the school had an overriding interest in avoiding the appearance of endorsing religion that outweighed the teacher's Constitutional interests.[33]

As in the above case of *Dube*, *Levin v Harleston*[34] involved a professor whose controversial speech precipitated public and political outrage. By contrast, Levin's comments were mostly in-print, out-of-class, speech, arguing his opinion that blacks were typically intellectually inferior to whites. When the internal university policing

[32] *Dube v State University of New York*, 900 F.2d 587 (2nd Cir., 1990).
[33] *Bishop v Aronov*, 926 F.2d 1066 (11th Cir., 1991).
[34] *Levin v Harleston*, 966 F.2d 85 (2nd Cir., 1992).

bodies failed to take action against Levin, the president took matters into his own hands. In brief, he convened an *ad hoc* committee to investigate Levin and created "shadow sections" for prospective students of Levin's classes in case they should become offended by his speech. Levin brought a federal suit claiming unwarranted intrusion upon his right to conduct classes, and violation of his First Amendment rights. The district and appellate courts sided with Levin, but it, too, was ultimately a hollow victory. After recognizing these violations of his rights, the appellate court merely granted declaratory relief recognizing the violations but refusing to act to enjoin the university from further action.

The *Levin* decision is notable for the fact that the steps the administration took against Levin, while being clear violations of his rights, were also somewhat pro-active in that prospective students were contacted about the "shadow sections" in the absence of any current complaints. This is an issue that comes to a head in what could be seen as the companion case of *Jeffries v Harleston*[35], dealing with the same institution and many of the same administrators.

Jeffries, the chair of the City College of New York's African Studies Department, made off-campus anti-Semitic remarks espousing black racial superiority. As in *Levin* and *Dube*, public and political outrage ensued. As in *Levin*, the internal policing organizations within the college chose sanction over discipline, prompting the president to again take matters in his own hands. In brief, the president and the City University Board limited Jeffries term as chair and chose to find a replacement for him. Jeffries brought a federal suit which the lower court upheld in finding that the decision to replace

[35] See *Jeffries*, *supra* note 15.

Jeffries was based upon external pressure to limit what was essentially extramural speech. The Supreme Court, however, overturned the decision, reasoning along the lines of the contemporary case of *Waters*, described *infra*, in which public employers are given the benefit of the doubt in regulating their employees - - even if that regulation is pro-active in anticipation of controversy. In this respect, *Jeffries* exemplifies the progression in which academic freedoms have given way, at least in New York, to the interests of institutional administrative regulation.

In *Waters v Churchill,* a nurse in a government run hospital was terminated for making allegedly derogatory comments about her boss and the working conditions of her department. One version of the speech had Churchill complaining of her boss and the department, the other of hospital staffing procedures in general with her encouraging a co-worker to transfer to a different department. Upon termination, Churchill raised a claim of First Amendment violation. Despite the unresolved question of fact regarding which version of the speech was true, the Supreme Court held that the proper test was what facts the governmental employer reasonably believed to be true[36] in taking actions that limit the free speech of employees.[37] In fact, the employer terminated Churchill's employment without any initial investigation into the incident. The effect of this ruling is to provide governmental employers with an even greater range of power over employee rights than in *Connick*.

[36] Of course, this presumes a good faith determination being made on the part of the employer.
[37] *Waters v Churchill*, 511 U.S. 661, at 671-680 (1994) (hereinafter *Waters*).

In dissent, Justice Stevens commented that the interest in "efficiency does not demand an additional layer of deference to employers' 'reasonable' factual errors."[38] In essence, the majority lauds efficiency over free speech in this employment context. *Waters* is a fair example of the extent that free speech protection in the context of state employment has eroded with greater deference being paid the employer.

It would seem reasonable to argue that a nurse's comments made out of concern for the conditions of hospital management would be a matter of legitimate public concern that should be afforded protection, provided such comments further pass a First Amendment balancing test against state interests. The majority's apparent concern for efficiency in governmental operation would seem to run counter to the effect of the actual holding in *Waters* which would chill otherwise legitimate speech that is in the legitimate public interest of correcting inefficiency. Instead, a cynic might argue, the Court's decision rewards apathetic acquiescence to the current conditions of the workplace with the prize of continued employment.

A contemporary case to *Waters* and *Jeffries* is *Silva v University of New Hampshire*[39] involving sanctions against a writing instructor on the grounds that his in-class speech constituted sexual harassment. In this case, Silva was alleged to make comments equating the process of writing with that of sex, and compared creativity to belly dancing. As a result, he was suspended and ordered to seek counseling. His federal suit against the university was upheld on the grounds of lack of evidence to support suspension. The holding in this case would seem otherwise unremarkable. In the following year, however, the AAUP issued a policy statement addressing the issue that

[38] *Waters, supra* note 38, at 696-697.

harassing speech may be punished is persistent, pervasive, and not germane to in-class subject matter.[40] It is not apparent whether or not the action by the AAUP was in direct response to the cases of harassment that *Silva* represents. It does, however, reflect the growing concern for balancing in-class, germane speech against extramural speech. What constitutes that which is germane would likely involve a balancing of the subject matter of the course and the expertise of the instructor against the institution's interest in maintaining a particular atmosphere on campus. All might depend on the nature of the course, the level (graduate or undergraduate) of the students, and , even, the general institutional culture.

The final case in this section, *Bonnell v Lorenzo*, provides a concise example of the current type of judicial analysis that is applied to claims of First Amendment violations in the academic setting, as it has evolved from the time of *Pickering*. Bonnell taught English at Macomb Community College since 1967 and had a reputation for using vulgar language in classroom discussions, allegedly to underscore gender bias in language.[41] Following one particular in-class discussion, a student charged that he had created an offensive classroom atmosphere. After an administrative investigation, he received a warning. Eight months later a formal sexual harassment complaint was issued complaining of the atmosphere of hostility formed by Bonnell's general use of profane language. In response, Bonnell posted the complaint on a billboard, and circulated copies to all his students and to over two hundred College faculty members, with an eight-page

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[39] *Silva v University of New Hampshire*, 888 F.Supp. 293 (D.N.H., 1994).
[40] *See* O'NEIL, *supra* note 22.
[41] *Bonnell, supra* note 2, at 803.

attachment of a satirical essay lambasting the complainant entitled *An Apology: Yes, Virginia, There is a Sanity Clause*.[42]

The *Apology* essentially consisted of a long, allegedly anonymous, diatribe against the complaining student with certain off-hand comments on the First Amendment. The College suspended Bonnell for three days and instructed him to stop circulating the materials. In response, he sent a copy of the complaint and *Apology* to two local television stations and a local newspaper, for which he was suspended for a semester. Bonnell brought an action for reinstatement on the grounds his First Amendment rights were violated by the suspension. Ultimately, the appellate court ruled that even though Bonnell's right to free speech was violated, this right was trumped by the interest of the College in regulating the academic environment. Perhaps the two most salient features of this case is the succinct manner in which it sets out the test for analyzing a First Amendment issue, and the rather unsettling way in which the court appears to expand the notion of academic freedom to the entity of the educational institution itself.

The modern test for a free speech violation as applied in *Bonnell*, requires that a:

> Plaintiff has to demonstrate that 1) he was disciplined for speech that was directed toward an issue of public concern, and 2) that his interest in speaking as he did outweighed the College's interest in regulating speech. *Connick v Meyers*, U.S. 138, at 147-50 (1983) [string citation omitted] The inquiry into whether plaintiff's speech is entitled to protection under the First Amendment as addressing a matter of public concern is of law for the court to decide. *Rankin v McPherson*, 483 U.S. 378, at 383 (1987) The inquiry into whether plaintiff's interests in speaking outweigh the College's interests in regulating plaintiff's speech is a factual determination conducted under the well known *Pickering* balancing test.*See Pickering*, 391 U.S., at 568 If plaintiff's interests in the prohibited speech outweigh the College's interests, then plaintiff's First Amendment rights have been violated. *Dambrot v Central Michigan University*, 55 F.3d 1177, at 1186 (6th

[42] *Bonnell, supra* note 2, at 806.

> Cir., 1995) If the First Amendment violation was a substantial or motivating factor in defendant's disciplinary action against plaintiff, defendant may present evidence that they would have disciplined plaintiff in the absence of his protected conduct. *McHealthy v City Sch. Dist. Bd. Of Educ. v Doyle*, 429 U.S. 274, at 285 (1977) However, if plaintiff's speech does not involve a matter of public concern, it is unnecessary for the court to scrutinize the reason for the discipline. *See Connick*, 461 U.S., at 146.[43]

The court recognized three acts of expression in applying this test to Bonnell's in-class generalized use of profanity, his circulation of the complaint, and his circulation of his vitriolic attack upon his complainant in his *Apology*. In brief, the court found the general profanity used in the classroom to be unprotected speech because it "was not germane to the subject matter" of those in-class discussions.[44] Somewhat ironically, the court held that the circulation of the complaint and the *Apology*, although dealing with personal matters and written out the animus for retaliation, were protected forms of speech. The court reasoned that "it is well settled that allegations of sexual harassment, . . . are matters of public concern," which implies that the *Apology* is afforded First Amendment protection as it tangentially relates to those allegations.[45]

After having acknowledged the protected nature of at least some of Bonnell's speech, the court went on to determine that that his rights were outweighed by the College's interests in maintaining an educational environment that is free from harassment and retaliation. In making this argument, the court reasoned that academic freedom is not solely a professorial right, but one that extends to the institution itself. The court states that "the term 'academic freedom' is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the

[43] *Bonnell, supra* note 2, at 809-810.
[44] *Bonnell, supra* note 2, at 821.
[45] *Bonnell, supra* note 2, at 813 (quoting *Connick, supra* note 13, at 146).

freedom of the individual teacher to pursue his ends without interference from the academy."[46]

The result of the holding in *Bonnell* may not be particularly unsettling. Eliminating harassment and maintaining a non-hostile learning environment are significant actions. The broader question is how far should professorial rights to free speech be constricted, and the definition of academic freedom stretched, in order to realize these goals. Perhaps the most ground-breaking and, depending on one's perspective, most disturbing aspect of *Bonnell* is the extent it appears to establish academic freedom as an institutional right, rather than a sole individual professorial right designed to protect the independence, and individuality, of academic thought. In any event, *Bonnell* exemplifies the extent to which the protections of free speech and academic freedom have generally shifted since *Pickering* from the person of the instructor to the realm of the institution.

The following section compares the holdings in *Hardy v Jefferson Community College* and *Urofsky v Gilmore*. Both address issues of professorial free speech in academe, but both resulted in differing decisions as to their First Amendment claims. By comparison, *Bonnell* falls somewhere between these two cases. In *Hardy*, the court found that a professor's dismissal for using profane language in the classroom was a violation of his First Amendment right to free speech given that the language was germane to the discussion at hand, and the College had no outweighing interest in restricting this speech. At the opposite end of the spectrum is *Urofsky* in which the court extended the reasoning in *Bonnell* to the extreme of positing that academic freedom does

[46] *Bonnell, supra* note 2, at 823.

not exist as an individual right, but rather adheres to the educational institution itself. As such, these two cases are inherently irreconcilable, with *Urofsky* being, perhaps, at the far end of the spectrum of the *Pickering* progeny.

Part III

A Comparative Evaluation of the Judicial View of Professorial Speech as Applied in *Urofsky v Gilmore* and *Hardy v Jefferson Community College*

The holdings in *Hardy* and *Urofsky* are generally irreconcilable in that the court in *Hardy* applied the *Pickering* balancing test after determining the threshold question as to whether the *content* of the speech dealt with a matter of public concern. From there, the court moved on to determine whether the College had an outweighing interest in regulating that speech, and found it did not. By contrast, the *Urofsky* court performed an initial *status* test on the speaker to determine whether the speech is made primarily as an employee as citizen, or primarily as an employee. According to the Fourth Circuit, the First Amendment only protects against government regulation of its employees speaking as citizen, and not merely as an employee. In keeping with the reasoning in *Waters, supra*, the court recognized that government employers have broad discretion in regulating the speech of its employees beyond that of the public in general. In *Urofsky*, the court found that the professors' speech in question was made solely in the context of their role as employees and provided no further analysis, or *Pickering* balancing. In addition, the court consequentially ruled that academic freedom does not exist on an individual professorial basis, but rather that any freedoms beyond the First Amendment to which citizens are afforded, falls to the institution. Thus, the suggestions in *Bonnell*, changing the nature of academic freedom, have been adopted - - at least in the Fourth

Circuit. The essential distinction between the reasoning of these two cases is whether the threshold question of a First Amendment analysis is to look at the *content* of speech, or the *status* of the speaker.

Hardy involved a professor who taught Communication Studies. One of his courses focused upon the use of language as a means of "marginalizing minorities and other oppressed groups in society."[47] The language used in the course involved several racial and gender based epithets. One African-American student contacted a local minister and civil-rights activist who brought her complaint of the language used in the course to the College's administrators. Subsequently, Hardy contract was not renewed, thus giving rise to his complaint of a First Amendment violation.

The court's analysis begins with several quotations from *Pickering*, discussing a public employee's right to speak on matters of legitimate public concern. In contrast to *Urofsky*, no consideration was given as to whether the speech was made as an employee citizen, or solely as employee. (However, it can be presumed that an instructor's comments made during an in-class discussion are made as employee.) The court found, in distinguishing this case from *Bonnell*, that the speech was of public concern and protected because, although the speech contained profanity, it was germane to the discussion at hand. The court then moved on to balance Hardy's protected speech against the College's interests in regulating that speech. In brief, the court found no evidence that Hardy's speech impaired the institution's efficiency,[48] undermined its stated educational mission,[49] or disrupted school operations and enrollment.[50] Overall,

[47] *Hardy*, *supra* note 6, at 675.
[48] *Hardy*, *supra* note 6, at 681.
[49] *Hardy*, *supra* note 6, at 682.

the *Hardy* court focused primarily upon the content of the speech at hand in apparent deference to the traditions of affording academic freedom to controversial speech when it promotes matters of public concern such as education.

By contrast, *Urofsky* involved a First Amendment issue where six professors challenged a Virginia statute which prohibited state employees from accessing sexually explicit material on any computer owned or leased by the state, without prior written consent. In this case, the court began by making the threshold determination of "whether the speech is made primarily in the [employee's] role as citizen or primarily in his role as employee."[51] The *Urofsky* court also noted that "the [Supreme] court [has] distinguished between speaking as a citizen and as an employee, and [has] focused on speech as a citizen as that for which constitutional protection is afforded."[52] From these threshold questions relating to the status of the speaker, the court found that these professors were acting within their status as state employees, and refused to perform any further analysis upon the issue of whether the Act in question violated their First Amendment rights. To quote the court: "the speech at issue here - - access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties - - is clearly made in the employee's role as employee" and thus deferred to the broad power of the government to regulate as employer.[53]

The impact of this decision upon treating professorial speech as employee speech is significant. For instance, if Hardy's status was determined to be that of an employee in

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[50] *Hardy, supra* note 6, at 682.
[51] *Urofsky, supra* note 5, at 407 (quoting *Terrell v University of Texas Sys. Police*, 792 F.2d 1360, at 1362 (5th Cir., 1986).
[52] *Urofsky, supra* note 5, at 407 (quoting *DiMeglio v Haines*, 45 F.3d 790, at 805 (4th Cir., 1995).

the classroom, then there would be little to stand in the way of his speech being regulated by the College, regardless of whether or not it were germane to a legitimate educational purpose in the public interest.[54]

A second claim made by the professors in *Urofsky* involved the allegation that the Virginia Act violated First Amendment rights to academic freedom, and not merely speech. Even more unsettling than the decision on the free speech issue is the court's ruling that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors."[55] This language could validate the suspicion that academic freedom in the United States is largely an illusion. It may be true that not all academics take advantage of the academic freedoms that do exist, or research and publish works after the point of getting tenure. But for those who do, the holding in *Urofsky* offers little more than the promise of a chilled academic atmosphere in which the independence of intellectual academic freedom may be subordinated by the institution, arguing its interest in efficient administration of its employees and the entire campus. In this regard, *Urofsky* epitomizes the extent that courts have moved away from affording the type of deference to academic freedom that was made during the time of *Pickering*. In *Keyishian v Board of Regents*, the Supreme Court recognized that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent

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[53] *Urofsky, supra* note 5, 408-9.

[54] In a dissenting opinion, one of the judges on the *Urofsky* bench cited a contradictory 4th Circuit decision ruling that the role of the speaker does not dictate First Amendment free speech analysis. *Piver v Pender County Board of Education*, 835 F.2d 1076 (4th Cir., 1987) (finding that speech made under the status of employee was protected because it touched upon a "matter in which the community . . . was vitally interested." 835 F.2d, at 1080).

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."[56] It would appear that the majority in *Urofsky* has failed to live up to the spirit of *Keyishian*.

Part IV

Conclusion

In looking back at the string of cases from *Pickering* to *Bonnell*, it is immediately apparent that the balance to be struck between protecting the professorial right to free speech, and an educational institution's responsibility to protect the learning environment, is a delicate one. However, it is also apparent that the protections afforded academic freedom and free speech have also generally shifted over this period from protecting the academic to that of the institution. For instance, *Pickering* upheld a teacher's right to criticize a school board in public. By contrast, the more recent decision in *Waters* upheld the government's right to terminate a nurse's employment for negative comments made to another nurse inside the establishment of the workplace. Likewise in *Connick*, a state attorney's termination was upheld even though the speech in question stayed "in-house" and could more than likely be considered an important public matter. To a certain extent, the decisions handed down from *Pickering* to *Bonnell* reflect a winnowing down of the rights to free speech for professors and state employees under the guise of institutional administrative efficiency. While it is important for an educational

[55] *Urofsky, supra* note 5, at 411.

institution to protect the learning environment from sexual harassment and discrimination, it is also important to recognize that such gains should not be made solely at the expense of the right to free speech and academic freedom as illustrated by *Urofsky*.

In turning to *Urofsky* and *Hardy*, it is readily evident that the two holdings are not easily reconcilable. In a sense, the two could be characterized as offering a fork in the road. *Hardy*, on the one hand, seems to represent a throw-back to the spirit of *Keyiashian* in which academic freedom is upheld as a transcendent value, and speech is judged upon the value of its content. By contrast, *Urofsky* seems to represent a hard-line extension of the holdings leading up to *Bonnell* in which academic freedom is ultimately co-opted by the needs of the institution in regulating its professors [read: employees], and in which speech is protected based upon the status of its speaker rather than its content. If these two cases can be characterized as offering a fork in the road, then one can only hope that *Urofsky* will become the road less taken. As a matter of public concern in the interests of free speech and academic freedom, that would make all the difference.

[56] *Keyishian v Board of Regents* 385 U.S. 589, at 603 (1967).

NOTE: The authors highly recommend Robert M. O'Neil's fine book *Free Speech in the College Community*, (Bloomington: Indiana University Press, 1997) which includes, in Chapter II, an excellent discussion of "The Outspoken University Professor."