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COMMENTARY

Repercussions of incivility and hostile expressions in academia: A legal perspective

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Three major types of hostile acts in the workplace have attracted the attention of researchers—namely, incivility, harassment, and bullying:

- *Incivility* is conceived of as low-intensity, interpersonal, deviant behavior. Offenders direct their scorn at targeted individuals, doubting their judgment, and addressing them in unprofessional terms with rudeness and disrespect (Anderson & Pearson, 1999). Cortina, Kabat-Farr, Leskinen, Huerta, and Magley (2013) reported the results of a survey questionnaire that consisted of one-item manifestations of incivility such as "shouted at you," "ignored or failed to speak to you," and "accused you of incompetence." Reportedly, when targeted individuals are subjected to these incivilities over an extended period, this leads to low job satisfaction, increased withdrawal from work, and intent to leave (Cortina, Magley, Williams, & Langhout, 2001; Mackey, Bishoff, Daniels, Hochwarter, & Ferris, 2019).
- *Harassment* encompasses systematic and repeated unethical acts that make recipients experience helplessness, as they feel unable to prevent, counter, or terminate these victimizing acts. Harassment manifests in various forms, such as defamation of character, excessive monitoring of work performance, and unreasonable criticism. Specifically, harassment can affect the target person's mental and physical health (Lee, Kim, Shin, & Lee, 2016).
- *Workplace bullying* comprises negative verbal and nonverbal behaviors repeated over an extended period. Following Lee and Lim (2019), bullying consists of one or more of the following behaviors: intentionally and persistently offending and insulting; socially excluding; deliberate, frequent emotional abuse; humiliation in private or public; ignoring the target person; gossiping; and spreading rumors. The literature documents empirical evidence of the devastating effects of bullying on target individuals, including high levels of stress and anxiety; sleep difficulties; depression; and suicidal thoughts (Lipinski & Crothers, 2013).

Seen on a continuum of increased, systematic, offensive behavior, we would attest, along with Cortina et al. (2013), that all three behaviors are forms of "modern discrimination." Indeed, the case law concerning First Amendment restrictions on freedom of speech tends to refer to all three categories collectively. For the sake of the literature review, we will do likewise. Moreover, we will extend the notion of incivility to expressions of hostility on the part of employees toward management and the organizations they serve, beyond the narrow confines of interpersonal confrontations within the work setting to the public sphere. In such instances, the First Amendment rights of employees to free speech are called into question.

We turn our attention to the tension that exists between efforts to reduce incivilities in academic institutions and attempts to uphold "valued forms of speech" (Cortina, Cortina, & Cortina,

2019, p. 360). From an examination of the jurisprudential aspects of free speech ("academic freedom") in the workplace, Cortina et al. (2019) conclude that the courts rightly tend to follow the case of *Pickering v. Board of Education of Township H.S. Dist. 205* (1968; hereafter *Pickering*) and not the case of *Garcetti v. Ceballos* (2006; hereafter *Garcetti*).

The *Pickering* case involved a schoolteacher who was dismissed from his position by the Board of Education for sending a letter to a newspaper that criticized the Board's allocation of school funds. Justice Marshall ruled that in the absence of "proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment" (p. 574). It was further noted that the teacher's statements could not have impeded the proper performance of daily duties in the classroom or have interfered with the regular operation of the schools generally.

The *Garcetti* case dealt with a district attorney, Richard Ceballos, who claimed that he had been passed up for promotion for criticizing the legitimacy of a warrant in a case he supervised. The court in *Garcetti* made a distinction between a situation in which statements of the public employees are made pursuant to their employment and a case in which statements are made as private citizens. It ruled: "When a public employee speaks pursuant to employment responsibilities ... there is no relevant analog to speech by citizens who are not government employees" (p. 12). The court held that Ceballo's memo was conceived pursuant to his official responsibilities, such that managerial discipline was allowed.

There are two essential differences between the rulings of *Pickering* and *Garcetti*. First, the former dealt with a high school teacher, the latter with an attorney. Second, the *Pickering* case refers to statements that do not have a bearing on the daily work of a teacher, whereas the *Garcetti* case relates to statements that are made pursuant to employment. The two cases do not contradict each other; they concern different facts—*Garcetti* dealing with statements that are directly work related and *Pickering* with statements that are indirectly work related.

In the *Pickering* case, the U.S. Supreme Court developed two tests for a public employe0e to establish a claim against an employer for a First Amendment breach. First, the employee spoke as "a citizen" on "a matter of public concern." Second, the employee's First Amendment interests outweigh the government employer's legitimate interests (the "balancing test"). Employing this two-part balancing test, we would like to delve into several legal aspects of Cortina et al.'s (2019) focal article.

The first test: Speaking as "a matter of public concern" or "as a citizen"

This test questions whether the employee spoke as "a matter of public concern" or "as a citizen."

Part A: "A matter of public concern"

In evaluating whether the statements in question qualify as a "matter of public concern," the court in the *Pickering* case examined their accuracy and ruled that, "[t]his case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties" (p. 573). It further noted: "The question whether a school system requires additional funds is a matter of legitimate public concern" (p. 571).

Cortina et al. (2019) reviewed the jurisprudential approach toward incivilities yet refrained from referring to the express case law on the matter. Notably, the Supreme Court has held consistently that vulgar or racially offensive expression does *not* constitute a matter of public concern, regardless of the speaker's intent or the context of the situation (Hoofnagle, 2001). Indeed, in *Waters v. Churchill* (1994), the court ruled that the State has an "indisputable right to prohibit its employees from using profanity or abusive language." In *Martin v. Parrish* (1986), the Fifth Circuit held that a publicly employed college teacher is not constitutionally protected in

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the instance of abusive use of profanity in the classroom, due to the students constituting a captive audience.

Of more significance, both the majority and minority judges in *Garcetti v. Ceballos* (2006) concurred regarding the malice of incivilities, whether or not they occurred in the academic arena, and they excluded such offensive utterances from the protection of the First Amendment. Cortina et al. (2019) referred heavily to the dissenting opinion of Judge Souter. However, they omitted the judge's specific opinion concerning incivility—namely that, "[t]he majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service." Dissenting Justice Stevens concurred, noting that "[a] supervisor may take corrective action when such speech is 'inflammatory or misguided.'" The other dissenting judge, Justice Breyer, noted: "Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection . . . . The First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests." Justice Kennedy ruled that if an employee's superiors thought the appellant's articulations were inflammatory or misguided, the superiors were authorized to discipline him.

Based on the *Pickering* requirements and a more in-depth analysis of *Garcetti v. Ceballos* (2006), the resounding conclusion from these examples is that the rights of public employees to use foul language (as instances of free speech) are restricted. Federal employees who express grievances against their organizations in a derisive manner destroy the validity of their arguments as being of public concern and negate their opportunity to establish a claim against their employer for First Amendment breach.

Part B: "As a citizen"

The *Pickering* case concerns statements made as a citizen that were not directed toward any person with whom the appellant would typically be in contact in the course of his daily work as a teacher. Hence, the court concluded: "No question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here" (p. 570).

In *Garcetti v. Ceballos* (2006), the majority held that when public employees make statements linked to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. It further emphasized the importance of "affording government employers sufficient discretion to manage their operations."

In *Garcetti v. Ceballos* (2006), the majority's opinion expressly left open the application of its ruling concerning "speech related to scholarship or teaching." Cortina et al. (2019) referred heavily to the *obiter dictum* (i.e., marginally or unrelated issues) of Judge Souter in *Garcetti v. Ceballos*, who expressed concern for academic freedom under the new ruling of the majority opinion. Cortina et al. then referred to two cases, *Gorum v. Sessoms* (2009) and *Demers v. Austin* (2014). Our reading of those two rulings leads us to the conclusion that these lower judicial instances differed regarding the differential application of *Garcetti v. Ceballos* (2006) to academia. In *Gorum v. Sessoms* (2009), the Court of Appeals applied the *Garcetti* reasoning on the issue of academic freedom of speech—namely, that Gorum violated a key part of the academic code and this justified his termination, notwithstanding the standard protections of tenure. In contrast, in *Demers v. Austin* (2014), the Ninth Circuit ruled that *Garcetti* does not apply to teaching and academic writing that is performed pursuant to the official duties of the professor, whereas *Pickering* does apply.

We conclude that lower courts tend to follow *Pickering*, rather than *Garcetti*, on the issue of academic freedom and the First Amendment.

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The second test: "The balancing test"

The (*Pickering*) balancing test requires a judge "to arrive at a balance between the interests of the teacher, as a citizen ... and the interest of the State, as an employer" (*Pickering*, p. 564).

Academic freedom is not only about freedom of speech; academic freedom is also about institutional autonomy. Article 4 of the International Covenant on Economic, Social and Cultural Rights (1966) confers academic autonomy upon academic institutions by referring to the liberty of governing bodies to direct the actions of educational institutions. This notion was stressed in the landmark case of *Sweezy v. New Hampshire* (1957), which included the following "essential freedom": "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation" (p. 263). In *Connick v. Myers* (1983), the court ruled that for the employee to be protected, "the employee's interest in expressing herself/himself on this matter must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (p. 568).

In this context, we would like to draw attention to additional relevant cases. A majority opinion of the Supreme Court in *Waters v. Churchill* (1994) ruled that the government could fire an employee based on a reasonable evaluation that the employee's speech "will cause disruption." In *Jeffries v. Harleston* (1995), City University of New York (CUNY) Professor Leonard Jeffries delivered an off-campus speech on the school curriculum that contained racist and anti-Semitic claims. The majority of CUNY's Board of Trustees voted to limit his term as department chair to one year because they foresaw his speech would harm the university. The Second Circuit ruled that the decision was based on a reasonable prediction that the speech would disrupt university operations and that, following his official dismissal, Professor Jeffries would not suffer a deprivation of his rights before his mandate ended.

The balancing test refers to factors other than strict disciplinary issues. Specifically, in *Rankin v. McPherson* (1987), the court took into consideration the fact that the utterance at stake impaired harmony among coworkers and had a detrimental effect on their close working relationships. Similarly, in *Martin v. Parrish* (1986), the Fifth Circuit brought into consideration, as part of the balancing test, the interests of the audience in question and those of the public. Notably, the court ruled that the feelings of the audience, and not only the rights of the speaker, should be taken into consideration.

We conclude from this account that a complete review of the jurisprudential literature indicates that lower judicial courts are split regarding the applicability of the *Garcetti v. Ceballos* case to academia. However, there is little, if any, dispute over the opinion that incivility in the academic sphere, as reflected by verbal pronouncements and public statements, is not speech protected by the First Amendment.

Discussion: The Salaita controversy

Cortina et al. (2019) implied that Steven Salaita's tweets were constitutionally protected and that Salaita should not have been terminated. We will examine Salaita's utterances and then apply the legal analysis.

Salaita's numerous contested tweets include the following: "Zionists, take responsibility: if your dream of an ethnocratic Israel is worth the murder of children, just f***ing own it already"; "Will you condemn Hamas? No. Why not? Because Hamas isn't the one incinerating children, you disingenuous prick"; "Israeli independence equals sustenance of the European eugenic logic made famous by Hitler."

As indicated, for those incivilities to receive a constitutional shield, they must comply with the following three elements. First, regarding "a matter of public concern," there is no dispute that Salaita's tweets were inflammatory, uncivil, and discriminatory. Like any other work environment,

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universities need civility in the workplace. Therefore, they have the indisputable right to prohibit their employees from using profanity or abusive language and may take corrective action. Second, regarding "official duties," Cortina et al. (2019) have reviewed at length the split over *Garcetti*'s application to academia. However, this dispute is irrelevant to the Salaita case, as there is no claim that he tweeted in official duty. Third is "the balancing test." The test refers to both the interests of the teacher, as a citizen, and the interests of the state or the university as an employer. Salaita's discriminatory and abusive language certainly does not facilitate the creation of an atmosphere that is most conducive to speculation, experiment, and creativity. Jewish students, in particular, were likely to have felt unease on encountering Salaita in classrooms and meetings. Hence, Salaita's termination was not only justifiable from the perspective of the institution's autonomy; it was also a necessary step in securing the academic freedom of the students and faculty.

Conclusions

Demanding of academics respectful, courteous, and responsible expression is an indispensable aspect of the university's autonomy and part of the academics' duty and responsibility. In analyzing the First Amendment protection of an academic, regard should be paid to the utterance at stake. A careful examination of the three elements of expression—incivility, harassment, and workplace bullying—leads us to understand that these three phenomena increase in order of intensity and negativity. As we move from one element to another on the continuum, the hostility becomes more potent and leads to increasingly severe adverse outcomes (both qualitative and quantitative) in terms of mental health, physical health, work behavior, and work attitudes. Critically, in our opinion, these stressors are likely to lead to mental health problems similar to those observed concerning people's real or perceived fears of crime (Jackson & Stafford, 2009).

Although freedom of expression is an indispensable part of academic freedom, its exercise must not infringe upon the rights, feelings, and health of fellow scholars and students. A balanced application of academic freedom should lead to an ecosystem of reciprocal respect. In questioning the constitutional shield of academic incivility, the following elements should be taken into consideration: its nature and context; the number of potential students and faculty likely to be offended; and its possible accumulative effect, coupled with similar incivilities on the subject.

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