NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

EDUCATION LAW

Published by the NCBA's Education Law Section Section Vol. 22, No. 3 June 2010 www.ncbar.org

Academic Freedom

Checks and Balances

by William Joseph Austin, Jr.

"Academic Freedom" is an elusive phrase, yet the liberty of thought claimed by educators is vitally important to a free society. This article will discuss several facets of an important tradition that means different things to different people. The law that has evolved around it is a virtual system of checks and balances among the stakeholders in our educational system. Finally, the article will provide a brief update on application of ***Garcetti v. Ceballos*** *to cases that involve professors in public universities.*

Academic Freedom and the Role of Student, Teacher, and Institution

Underlying the concept of "Academic Freedom" is the First Amendment. According to Justice Lewis Powell, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed a special concern of the First Amendment." **Regents of the University of California v. Bakke**, 438 U.S. 265, 312 (1978). The First Amendment, which applies to the states through the Fourteenth Amendment, protects the freedom of speech from governmental abridgement. Not yet embracing Academic Freedom as "a specifically enumerated constitutional right," the case law still invokes the First Amendment time and again when confronting issues of education and the acquisition of knowledge in the classroom.

Defining Academic Freedom then is problematic times two. In American jurisprudence it rests on the First Amendment, which itself has the quality of Vedic hymn. Otherwise its sources lie in tradition and custom. There is also the question, to whom does it belong?

The distinguishing features of Academic Freedom form up around the tradition that schools and educators should enjoy a degree of autonomy from governmental, religious, and societal pressures. *See* M. Edwards, et al. *Freedom of Speech in the Public Workplace* 129 (1988), citing T. Leas & C. Russo, "Waters v. Churchill: Autonomy for the Academy or Freedom for the Individual?", 93 *Ed. Law Rep.* 1099 (1994).

In 1940, the American Association of University Professors and the Association of American Colleges issued a Statement of Principles on Academic Freedom and Tenure, which would afford teachers individualized rights in research and classroom teaching:

> Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other duties; [and] . . .
> Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

This credo was placed in a larger context, a statement of the ideal of higher education:

> Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes.

In the case of **Plyler v. Doe**, 457 U.S. 202, 221 (1982) (emphasis supplied below), the Supreme Court mapped out a place for this ideal as it functions in public education:

> Public education is not a "right" granted to individuals by the Constitution. [citation omitted] But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. "*The American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.*" [citation omitted] We have recognized "the public schools as a most vital civic institution for the *preservation of a democratic system of government*," [citation omitted] "and as the primary vehicle for transmitting the values on which our society rests." [citation omitted] "As pointed out early in our

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history, some degree of education is necessary to *prepare citizens to participate effectively and intelligently in our open political system* if we are to preserve freedom and independence." [citation omitted] And these historic "perceptions of the public schools and inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." [citation omitted] In addition, education provides the basic tools by which individuals might lead economically productive lives to the *benefit of us all*. In sum, education has a fundamental role in maintaining the fabric of our society.

Application of these traditions and principles has been complicated by the competing claims laid on them by the cast of characters. One interpretation is that Academic Freedom insulates the institution itself from interference by the state. That is, academic institutions may freely determine, on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study. *See* **Sweezy v. New Hampshire**, 354 U.S. 234, 255 (1957) ("the four essential freedoms" of the university). That proposition is fine as far as it goes.

Individual educators have also invoked Academic Freedom as protection against administrative or political interference. Through it, the individual educator seeks shelter for personal decisions of what to teach, in-class remarks, and intramural speech, the latter sometimes referring to criticism of colleagues, administrators, and policies within the academic community. As we shall see, the perceived safe harbor is often as full of mines as Haiphong.

Also in the mix is the student's right to receive and express ideas in school. For example, the plurality opinion in **Board of Education, Island Trees Union v. Pico**, 457 U.S. 853 (1982), would not allow the school board to remove books from the school library. Once placed there, the school board did not have discretion to remove books, such as *Slaughterhouse Five*, if the intent was to deny students access to ideas with which the members of the school board disagreed. 457 U.S. at 868 - 872.

But there is also sympathy for the school board. A dissenter in **Pico** suggested that the locally elected school board not only may determine educational policy, but with impunity might remove books from the shelf of the school library which it previously allowed to be placed there. 457 U.S. at 893 894 (Powell, J., dissenting).

There is much to sort through. Freedom of speech is conventionally understood as a personal right. Therefore, Academic Freedom as protection for the individual educator might appear to take precedence. But courts are generally deferential to the institution when confronted with competing interests, whether from the outside or within. One court put it this way:

> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harm.

Dorsett v. Board of Trustees for State Colleges & Universities, 940 F.2d 121, 123 (5th Cir. 1991). That passage lights up the reality that judicial resources will not be spent liberally to second guess school decisions.

Likewise, the student who seeks to litigate over academic issues may receive a cold shoulder in court. In **Board of Curators v. Horowitz**, 435 U.S. 78 (1978), the question was whether a medical student had a constitutionally protectable property interest in continued academic enrollment. The Supreme Court's opinion, though focusing on the impropriety of judicial review, nevertheless implied more:

> The decision to dismiss [the medical student] rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper

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The Chair's Comments

A Word from Mike Delafield


Mike Delafield

As those of you who were in attendance know, the section's CLE and Annual Meeting, held on April 23, 2010, was a great success. **Kara Grice Acree** and **David Sullivan**, our CLE committee chairs, put together an interesting, informative, and entertaining program. **Sean Doyle, Jr.**, the senior counsel with LabCorp and a psychologist, gave an enlightening ethics presentation discussing the relationship between job dissatisfaction and depression among attorneys, and what can be done to find more fulfillment in your work. **Tom Colclough**, the Raleigh area office director for the EEOC, engaged in a panel discussion with NCSU attorney **Sarah Lannom** about the recent changes to the Americans with Disabilities Act and the impact the changes will have on employment issues for public schools and universities. Attorney **Lee Rosen** and the NCBA Director of the Center for Practice Management **Erik Mazzone** presented 60 technology tips for attorneys in 60 minutes, touching on everything from web applications to help you get organized to free online file conversion to something called the Forgotten Attachment Detector, an application that warns you when you forget to attach a document to an e-mail. **Brian Shaw**'s annual case law update included the very latest decisions Federal and state decisions on issues pertaining to education law. **Q. Shanté Martin**, general counsel for the North Carolina Community College System, discussed the 2009 amendments to the Federal Education Rights and Privacy Act. Finally, **John L. Sarratt**, a partner with Harris, Winfield, Sarratt & Hodges, and **Stacey A. Phipps**, former chief of staff and general counsel for State Treasurer **Richard Moore**, shared the stories of their struggles with alcoholism and depression, and of the assistance they received through involvement with the State Bar Lawyer Assistance programs, FRIENDS and PALS (for more information on these confidential assistance programs, you can visit the North Carolina State Bar website at *www.ncbar.com*).

As **Luke Largess** and **John Gresham** were proud to announce at our Annual Meeting, **Tom Stern** is the recipient of the Section's 2010 Distinguished Service Award. Tom's tireless dedication to protecting the rights of educators is certainly worthy of recognition, as is his commitment to this section. A gentleman and a scholar in the truest sense, Tom is a pleasure to work with and to know. Congratulations, Tom, on this well-deserved honor!

I would like to thank all of you who have supported the section over the past year, especially those of you who have taken time out of your hectic schedules to chair or to serve on a committee. I have always been impressed by the dedication and enthusiasm of our members, and I appreciate all of the hard work that is done behind the scenes to advance the Section's initiatives. One such program, our LIFT conference for teachers, is scheduled for Aug. 9-10, 2010, at the Bar Center in Cary. For more information on this valuable conference, you can download an informational brochure, which includes registration information, from the section's website, *http://educationlaw.ncbar.org*.

Thank you for allowing me the opportunity to lead this great section for the past year. Thanks especially to Julie Fink, our N.C. Bar staff liaison, for all of her support and assistance throughout my tenure as chair. I am proud to hand the reins over to **Julia Hoke**, who I know will do a terrific job as section chair for 2010-11, and I hope that you all continue to contribute to the strength and success of the Education Law Section. ■

Guilford County Board Chairman Receives Leadership Award

Nominated by his colleagues, Guilford County Board of Education Chairman Alan Duncan was selected as a recipient of a 2010 Leadership Medal awarded by Leadership Greensboro.

Duncan, a highly regarded attorney at Smith Moore Leatherwood, has quietly and humbly served Guilford County Schools (GCS) for the last 10 years, working in a leadership capacity as the Board Chairman for the last eight years. He was recognized Tuesday at the annual Leadership Greensboro dinner.

An advocate of equal opportunities for all students, Duncan's support, compassion and level-headed approach has helped GCS become a national leader in innovative educational programs and initiatives. As a result, his leadership and support from fellow board members have generated higher test scores and lower dropout rates, a feat that is often a challenge for diverse and complex districts.


Duncan

Leadership Medals are presented to individuals who demonstrate exemplary leadership, positively affecting the citizens and community of Greensboro and Guilford County. Each year, Leadership Greensboro seeks candidates who are servant leaders, empower others, understand the power of vision and are change agents. ■

> grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.
>
> Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles -- educator, adviser, friend, and, at times, parent-substitute" . . .. We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.
>
> **Horowitz**, 435 U.S. at 90.

Following the lead of the Supreme Court, the Fourth Circuit consistently has refrained from interfering with the authority vested in school officials to drop a student from the rolls for failure to attain a prescribed scholastic rating. *See, e.g.*, **Henson v. Honor Committee**, 719 F.2d 69 (4th Cir. 1983); **Sandlin v. Johnson**, 643 F.2d 1027 (4th Cir. 1981); **Clark v. Whiting**, 607 F.2d 634 (4th Cir. 1979). Accordingly, decisions by educational authorities which turn on evaluation of the academic performance of a student are peculiarly within the expertise of educators and particularly inappropriate for judicial review.

Three critical cases: Wieman, Keyishian and Tinker

Three cases decided by the United States Supreme Court over the course of the refractory '50's and '60's add insight and substance to the larger debate. Pertaining to First Amendment protection for teachers is the case of **Wieman v. Updegraff**, 344 U.S. 183 (1952). The Supreme Court there held that a loyalty oath statutorily prescribed for all state officers and employees in Oklahoma was invalid. A qualification for employment, the oath would have required the faculty and staff of a state college to deny that they had been members of subversive organizations. Some of the college employees refused to take the oath and challenged the statute. The Supreme Court struck it down as a violation of the Due Process Clause in the Fourteenth Amendment.

Concurring opinions added that the statute also violated the First Amendment. Justice Frankfurter wrote that it was an "unwarranted inhibition upon the free spirit of teachers" that had "an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice." 344 U.S. at 195. Justice Frankfurter continued:

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. . . . [Teachers] must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by a national or state government.
>
> The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power.
>
> 344 U.S. at 196-7.

In the case of **Keyishian v. Board of Regents**, 385 U.S. 589 (1967), the Supreme Court held that New York statutes and regulations which required the removal of college faculty members for seditious utterances, banned state employment of any person advocating or distributing materials which advocated a forceful overthrow of the government, and made Communist Party membership prima facie evidence of disqualification for employment unconstitutionally abridged the freedom of association protected by the First Amendment. The statutes and regulations were attacked by faculty members of the State University of New York. Striking down the offending laws, the majority opinion stated:

> Our 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.
>
> 385 U.S. at 603.

The case of **Tinker v. Des Moines Independent Community School District**, 393 U.S. 503 (1969), completes the trifecta in this part of the analysis. The year of decision was one of transition. In June of 1969 Chief Justice Earl Warren retired and President Nixon appointed Hon. Warren Burger to take his place. Thus, **Tinker**, which was decided in February of 1969, was one of the last hurrahs of the Warren Court.

The challenge in **Tinker** was made on behalf of students who were punished for protesting the Vietnam War by wearing black armbands to school. Nevertheless, the majority opinion at least three times placed teachers and students on equal footing with respect to the exercise of free speech. *See* 393 U.S. at 506. What the Supreme Court precisely held in **Tinker** was that suppressing the students' display of the black armbands in school violated their First Amendment rights. The court did recognize the school's need to prescribe and control conduct. That is, the Constitution permits reasonable, carefully restricted regulation of speech-connected activities. In **Tinker**, however, there was no evidence that the school or any class was disrupted by violence or the imminent threat of disruptive behavior. After affirming the students' First Amendment rights in the classroom and on campus, the majority opinion did express the following qualification:

> But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of

speech.

Tinker, 393 U.S. at 741.

An interesting feature of **Tinker** is the dissenting opinion of Justice Black, duly regarded as a great champion of First Amendment rights. Nevertheless, in **Tinker** he made a distinction between regulating the content of speech, which, in Justice Black's view, neither the State nor Federal Government had authority to do; and, on the other hand, regulating the time and place for the exercise of the students' right to free speech, which Justice Black took to be within the ambit of school control. Justice Black, who would have allowed the school to ban the black armbands and to discipline the students who violated the prohibition, concluded as follows:

> I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Tinker, 393 U.S. at 526.

Justice Harlan, also dissenting, wrote in a separate opinion:

> [S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns--for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

393 U.S. at 526.

At least in subtext these cases not only recognize intrinsic worth in each divergent interest, but also the need to adjust the differences when in conflict. Taken together they teach tolerance for expressive behavior until it threatens discipline and good order. The court will not sit idly to watch the institution's very reason for existence jeopardized.

That stance would surely leave room to effectuate the Miltonic dictum, "I cannot praise a fugitive and cloistered virtue," yet difficult questions remained. At what point does one individual's free expression impermissibly create a net loss in the public good to which the freedom is intended to contribute? Is the teacher a free agent in terms of the right of expression, or constrained by virtue of public employment? And, if so, to what end?

Applying the "Balancing Test"

The Supreme Court subsequently worked out an analytical means of handling these cases. Its component parts were anticipated in many respects in the cases discussed ante. Sometimes called the Pickering/Connick Test, or the Pickering Balancing Test, it takes its name from one or both cases, **Connick v. Myers**, 461 U.S. 138 (1983); and **Pickering v. Board of Ed.**, 391 U.S. 563 (1968), in which the United States Supreme Court constructed the model for working out tough questions.

By these or any other name, the test applies to a fact pattern in which the actions of the public employer allegedly infringe upon the public employee's First Amendment rights, in contrast to loyalty oath and subversion cases such as **Wieman** and **Keyishian**, which involved direct attempts by the state legislatures to control "who may teach." Much ink has already been spilled about these cases, one involving an assistant prosecutor (Myers), the other a teacher (Pickering). The sequential list of questions that must be addressed when applying the Pickering Balancing Test may be more helpful to the present purpose:

> Did the employee speak out on a matter of public concern? If the answer is "no" the case is over, employer wins. If the answer to this question is "yes" proceed to the next question.
>
> If so, did the employee's expression compromise the public employer's ability to maintain efficient delivery of public service? If the answer to this question is "yes" then the case is over, employer wins. If the answer is "no" proceed to the next question.
>
> If not, can it be said that "but for" the employee's expressions on a matter of public concern he or she would not have suffered the injury or damage dealt by the employer? If the answer to this question is "yes" employee wins. If the answer is "no" the employer wins.

The Supreme Court defined the task as seeking a balance between the interest of the employee in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. **Connick v. Myers**, 461 U.S. at 142; **Pickering**, 391 U.S. at 568. The test recognizes that the public employee retains rights "as a citizen" of the United States; and also that the governmental employer does have a legitimate albeit constrained interest in regulating the speech of its employees. **Connick v. Myers**, 461 U.S. at 140; **Pickering**, 391 U.S. at 568.

Thus, a key element is the public employer's interest "in promoting the efficiency of the public services it performs through its employees," **Pickering**, 391 U.S. at 568, which must be balanced against "the interests of the [employee], as a citizen, in commenting upon matters of public concern," **Connick**, 461 U.S. at 140. Just as the governmental employer's right is circumscribed, so is the employee's, and the question whether the employee has gone too far "must be determined by the content, form and context of a given statement, as revealed by the whole record." **Connick**, 461 U.S. at 147-48.

That the test is getting applied presupposes that the public employer has subjected the employee to some unfortunate job action, typically disciplinary in nature. The third question in the test, which incorporates the "but for" standard, is designed to determine whether there is truly a causal connection between employee speech and employer job action. If the employer would have taken the same action due to employee misconduct or some other reason, then the employee's First Amendment rights have not been violated.

Adverse actions against teachers have been upheld, for example, where a teacher failed to comply with school standards in issuing grades; a high school biology teacher taught scientific theories of his own choosing; a high school teacher showed an R-rated movie to her class; a teacher continued to use profane language in the classroom after several warnings; and a psychologist failed to

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report that a student had been involved in a sexual encounter with a male teacher. *See* M. Edwards, et al., *Freedom of Speech in the Public Workplace, supra*, at 134.

Public school teachers have successfully invoked their First Amendment rights, for example, a teacher's use of role-playing to teach the history of post-Civil War Reconstruction was protected speech; a teacher could not be disciplined for assigning a magazine article that contained an obscenity where the teacher explained the word and why the author had included it; and an English teacher who allowed her high school students to use profanity in their poems and plays engaged in protected speech. *Id*. at 133.

Furthermore, even in the case of protected speech, disruption or the threat of harm, whether to the institution, the public service it renders, or relationships of those who work there, justifies action by the public employer. Insubordination, belligerence toward co-workers, or other harmful behavior in the guise of free speech is not entitled to protection. Nor does the public employer have to wait for demonstrable ill effects. Apprehension of disruption is sufficient reason to take action against the employee if the employer's prediction of disturbance in a sufficient degree is reasonable, **Waters v. Churchill**, 511 U.S. 661, 673 (1994), thus disruption is in the eye of the judicial beholder.

Application in the Fourth Circuit

Although application of the Pickering Balancing Test in the context of classroom utterances by an instructor has been criticized, and, indeed, attempts have been made to formulate a different test in such cases, Fourth Circuit case law indicates that the Pickering Balancing Test is applied in this jurisdiction. Emblematic is the majority opinion in the case of **Boring v. Buncombe County Bd. of Ed.**, 136 F.3d 364 (1998) (en banc). The plaintiff in that case was a high school drama teacher who selected a controversial play to be performed by students in a state competition. The play depicted mature subject matter. As a warm up, it was performed for an English class in the high school. A parent of one of the students complained to the school principal. The drama teacher was transferred at the end of the school year, an action she challenged on First Amendment grounds.

A majority of the Fourth Circuit held that the drama teacher's selection of the play did not present a matter of public concern. It was part of the school curriculum in which the administration had a legitimate pedagogical interest and right to control. Quoting its opinion in an earlier case which involved transfer of a public employee who had advised some affected citizens on the merits of a zoning dispute contrary to the instructions of his employer, the Fourth Circuit stated:

> "A government employer, no less than a private employer, is entitled to insist upon the legitimate, day-to-day decisions of the office without fear of reprisals in the form of lawsuits from disgruntled subordinates who believe that they know better than their superiors how to manage office affairs."
>
> 136 F.3d at 369, quoting **DiMeglio v. Haines**, 45 F.3d 790, 806 (4th Cir. 1995).

The majority opinion continued:

> We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum . . ..
>
> Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.
>
> 136 F.3d at 370-371.

A concurring opinion added that "the curricular choices of the schools should be presumptively their own." 136 F.3d at 371. A separate concurring opinion would judge the proposition as "unassailable":

> I agree fully with the unassailable conclusion of the majority that the First Amendment does not require school boards to allow individual teachers in the Nation's elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views.
>
> 136 F.3d at 372 (Luttig, J., concurring).

Invocation of Justice Frankfurter's name in the majority opinion is particularly noteworthy. An interesting exercise at this point might be to re-read the language from Justice Frankfurter's concurring opinion in **Wieman**, quoted above in this paper, and assay how much "free play" and "free spirit" may be left in teachers' free speech.

Seven judges of the Fourth Circuit dissented in **Boring**. The dissenting judges reached the conclusion that selection of the play and the controversy it created were indeed matters of public concern. One dissenting judge stated that the case was about a school principal and school board who targeted the teacher "as a scapegoat and used her to shield them from the 'heat' of the negative outcry resulting from the performance of [the play]." 136 F.3d at 30 (Hamilton, J., dissenting).

Another dissent stated:

> School administrators must and do have final authority over curriculum decisions. But that authority is not wholly unfettered. Like all other state officials, they must obey the Constitution. . . . thus, teachers' in-class speech retains some, albeit limited, First Amendment protection.
>
> 136 F.3d at 375 (Motz, J., dissenting).

The majority, by holding that the play was not a matter of public concern, never had to reach the second question in the Pickering Balancing Test, which is where the real balancing occurs, viz. the interest of the teacher versus the school's efficiency interest. Arguably, the school had an uphill climb on that issue inasmuch as the negative reaction to the play apparently came from the parent of a single student. Otherwise, the reported opinion bespeaks no palpable disruption or imminent threat of disorder in the school, its

drama department, or the English class where the play was presented. The agon was between the principal and a teacher about the propriety of a play.

The opinion of a U.S. District Judge in Virginia provides additional insight as it works its way through the entire Pickering Balancing Test. **Scallet v. Rosenblum**, 911 F. Supp. 999 (W.D. Va. 1996), was decided prior to publication of the Fourth Circuit's opinion in **Boring**. The result in **Scallet** is also unfavorable to the teacher, but the judge who made the decision took a broader view of what classroom expression might be considered a matter of public concern.

In **Scallet**, the plaintiff was a non-tenured instructor at the UVA graduate business school. He alleged that nonrenewal of his teaching contract was in retaliation for his candor on issues of "diversity"and, therefore, violated the First Amendment. The plaintiff alleged that the defendants nonrenewed his contract based on speech which fell into three categories: (i) content of his classroom discussions, in which he addressed such matters as "power relationships" in corporate organization and showed the movie "Roger and Me"; (ii) comments he made at faculty meetings where he expressed the view that materials used in class should reflect the experiences of women and minorities in the workplace; and (iii) articles and a cartoon he posted on the wall outside of his office.

Nonrenewal was defended on the ground that the plaintiff's behavior made it impossible for other members of the faculty to work with him. There was evidence that the plaintiff bullied some female instructors. There was even evidence that female students "dreaded" the plaintiff's classes because he made them feel uncomfortable and because his use of profanity interfered with their ability to focus on the materials. Furthermore, it was the defendants' contention that the plaintiff's classroom discussions disrupted effective delivery of the course he taught.

The judge who decided the case expressed reservation about applying Pickering/Connick to expressions in graduate school "since the test does not explicitly account for the robust tradition of academic freedom in those quarters." 911 F. Supp. at 1011. Nevertheless, the judge decided that without clear guidance to the contrary from a higher court the Pickering test that should be applied and he did so assiduously. As to the first category of complaints, content of the plaintiff's classroom expressions, the judge held that classroom speech is indeed a matter of public concern. The plaintiff, "as an educator, routinely and necessarily discusses issues of public concern when speaking as an employee. Indeed, it is a part of his educational mandate." 911 F. Supp. at 1013. Going further, the judge stated that "the First Amendment is routinely implicated in the classroom, both at the university level and below." 911 F. Supp. at 1014.

The judge did draw a line, however, stating that "not all classroom speech implicates matters of public concern." 911 F. Supp. at 1014. For example, recapping the facts and decisions reached in some other reported cases, the judge reiterated that neither the use of racial epithets nor cursing in the classroom would be protected under the First Amendment. *Id.*

The judge concluded that the plaintiff's classroom discussions concerning diversity related to a "core issue of public concern." 911 F. Supp. at 1014. However, the judge recognized that the school as an institution had a powerful interest in the content of its curriculum and coordination of content in required courses. Id. at 1015. The judge then applied the balancing test and concluded that the plaintiff's in-class speech did disrupt the school's pedagogical mission. 911 F. Supp. at 1016. By not adhering to the materials which were used by instructors in other sections the plaintiff created disruption, hampered the school's ability to deliver the course to its students effectively, and created divisions within the faculty. The plaintiff's in-class speech was not protected by the First Amendment. 911 F. Supp. at 1017.

The judge did conclude that the plaintiff's expressions at the faculty meetings, where he advocated diversity, were protected under the First Amendment. The defendants argued that it was not the content of the speech, but the plaintiff's confrontational style of speaking was the problem. According to the judge, the defendants' argument on this issue had to be analyzed at the third level of the Pickering Balancing Test.

Before getting to that stage, the judge addressed the third category of expressive behavior, the issue of the cartoon and articles posted near the plaintiff's door. These materials included a "Guide to Non-Sexist Language" plus a Doonesbury cartoon spoofing the prevalence of dual-track education for boys and girls and an article concerning business and the environment. The judge concluded that these materials were protected forms of expression and not sufficiently disruptive to the school. Consequently, the posted articles and cartoon also had to be evaluated at the third level of the Pickering Balancing Test.

Applying the "but for" causation test, the judge concluded that the plaintiff's contract would have been nonrenewed regardless of the comments at faculty meetings and the materials posted at his door. Plaintiff's obnoxious behavior toward his colleagues, bordering in some cases on sexual harassment, together with the disruption he caused in delivery of the course material, created insurmountable problems effectively forcing the defendants to deny his renewal. 911 F. Supp. at 1020. The plaintiff's refusal to adhere to the school's vision of the proper content and method of teaching his course, together with poor working relations with other faculty members, were the motivating factors for nonrenewing his employment. Therefore, the defendants' action did not violate the plaintiff's First Amendment rights, a decision affirmed by the Fourth Circuit, 106 F. 3d 391 (1997).

The Supreme Court's decision in the case of **Garcetti v. Ceballos**, 547 U.S. 410 (2006) is the latest landmark decision concerning the First Amendment rights of public employees. In that case, a deputy district attorney complained of retaliation after he criticized a search warrant obtained by a deputy sheriff in a criminal case. The Supreme Court held that public employees who make statements pursuant to their official duties are not speaking as citizens for First Amendment purposes and are not insulated from employer discipline for their communications in the course of public employment. 547 U.S. at 418.

In dissent, Justice Souter questioned whether the majority opinion meant to imperil First Amendment protection of academic freedom in public colleges and universities. 547 U.S. at 438. The majority opinion by Justice Kennedy rejoined, "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." Id. at 425.

The Fourth Circuit opinion in the case of **Urofsky v. Gilmore**, 216 F.3d 401 (4th Cir. 2000) anticipated the holding in Garcetti in one respect and then went on to answer the question subsequently left open in **Garcetti**.

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In **Urofsky**, the Fourth Circuit held that regulation of access to sexually explicit material placed on professors employed by various public colleges and universities, in their capacity as employees on computers owned or leased by the state, was consistent with the First Amendment. 216 F.3d at 404.

According to the majority opinion in **Urofsky**:

> This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. . . . .
>
> It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. [Citations omitted.]
>
> **Urofsky**, 216 F.3d at 407 - 409.

The opinion then went on to conclude that a professor has no constitutionally-protected right of "academic freedom" other than the First Amendment rights to which every citizen is entitled. 216 F.3d at 409. The opinion reasoned that the right to academic freedom inheres in the institution not in the individual professor. *Id.* The opinion then dissected the Supreme Court opinions from bygone years that appeared to contain contrary language, concluding:

> The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self governance in academic affairs.
>
> 216 F.3d at 412.

Subsequent post-**Garcetti** circuit decisions have gone the way of **Urofsky** in result without going as far on the question of who is entitled to Academic Freedom. *See* **Gorum v. Sessoms**, 561 F.3d 179 (3d Cir. 2009); and **Renken v. Gregory**, 541 F.3d 769 (7th Cir. 2008). Another case, **Hong v. Grant**, 516 F.Supp. 2d 1158 (C.D. Cal. 2007), in which a university professor claiming reprisal for his criticism of departmental administrative practices, is on appeal to the Ninth Circuit. The district judge below rejected the professor's claim, reasoning that his statements were in the course of official duties, not classroom instruction or professional research, and therefore barred on authority of **Garcetti**, 516 F.Supp. 2d at 1165 1170.

For the moment then the landscape of Academic Freedom may appear bleak for teachers in public institutions. Nevertheless, **Garcetti** assuredly does not foreclose protection for "speech related to scholarship or teaching" in addition to protection for the teacher's right to speak out, as a citizen, on matters of public concern. What if the history curriculum dictated teaching that Stalin was a great benefactor of mankind, or that John C. Calhoun's nullification theory was the proper interpretation of the U.S. Constitution, or that the Holocaust never happened? Surely there would be a remedy in the case of a history teacher disciplined for saying, "Not so!" The harder question is what to do in behalf of the teacher who takes the hardline affirmative stance on any one of those propositions in the classroom. We can hypothesize similar cases at both extremes and all manner of cases in between. Justice Kennedy, therefore, made the wise move in **Garcetti** to defer rendering a legal opinion that did not need to be decided that day.

In summary, it does appear that the constitutional decisions which have precedential force in North Carolina presently hold to the notion that in the case of **Educator v. Institution** there is a presumption in favor of the latter over the individual. Moreover, the threshold of disruption that may cause otherwise protected speech to lose its constitutional shield is relatively low. The institution then is afforded leeway with respect to answering the question of who may teach in case of disagreement over the what and how, a sharp sword over the teacher's head to be sure. Future cases may nevertheless change the trajectory.

Conclusion

The law that has developed around the tradition of Academic Freedom offers something for everyone. School administrators, teachers, students, and school boards can all draw upon some judicial doctrine or sympathetic utterance that protects or advances a particular interest in the right circumstances. Consequently, the definition of "Academic Freedom" in our jurisprudence resists tidy definition but instead has the texture of democracy, i.e., checks and balances. If one interest gets too far out, another can pull it back. Although not a creation by design, Montesquieu might still recognize his model. ■

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King/Hardy v. Beaufort County Board of Education

Does Leandro Apply to Long-Term Suspensions?

by Trey Allen & Bob Kennedy

On Mar. 22, 2010, the North Carolina Supreme Court heard oral argument in cases brought by Beaufort County students Viktoria King and Jessica Hardy. The two cases ask the high court to decide whether the public education provisions of the North Carolina Constitution, as interpreted by **Leandro v. State**, 346 N.C. 336, 488 S.E.2d 249 (1997), generally require local school boards to provide alternative education for students suspended in excess of 10 school days. Put differently, the question is whether **Leandro** challenges to long-term suspensions warrant strict scrutiny – rather than rational basis review – when alternative education has not been offered. A ruling for King and Hardy would place new limits on the disciplinary authority of school districts and force them to increase funding for alternative education in a period of strained budgets.

Background

On Jan. 18, 2008, multiple fights broke out as students were being dismissed from Southside High School ("SHS") in Beaufort County. One fight involved tenth grade students King and Hardy ("plaintiffs"). Their altercation was captured on video by a classmate and later posted on YouTube. It took several SHS personnel to separate the plaintiffs.

The SHS principal immediately suspended the plaintiffs for 10 school days. Pursuant to Subsection 115C-391(c) of the General Statutes, he also recommended that plaintiffs remain suspended for the rest of the 2007-2008 academic year. *See* N.C.G.S. § 115C-391(c) (authorizing a principal, with the superintendent's approval, to suspend a student for more than 10 school days for willful violations of the local school board's conduct policies). The superintendent approved the principal's long-term suspension recommendations. Neither plaintiff was assigned to the school district's alternative school while suspended. (Although local school districts are statutorily required to establish alternative education programs, those programs are not solely or even primarily for suspended students, and Subsection 115C-47(32a) gives districts broad discretion in deciding when to offer them to suspended students.)

Like many other school districts, Beaufort County Schools ("BCS") has a two-tiered process for long-term suspension appeals. The initial evidentiary hearing is conducted by a panel of administrators. The student may present evidence, cross-exam the school's witnesses, and be represented by legal counsel. If the panel upholds suspension, the student may appeal to the Beaufort County Board of Education ("Board"), which typically relies on the record compiled at the administrative hearing. The student may have an attorney at a Board-level hearing as well.

The plaintiffs appealed pursuant to BCS policy, and an administrative panel heard their appeals. Instead of appealing directly to the Board after their suspensions were upheld, however, plaintiffs filed suit in superior court. Their complaints alleged: (1) that the school district had violated the state constitution by not offering the plaintiffs alternative education during their long-term suspensions; and (2) that Subsection 115C-391(c) unconstitutionally permits long-term suspensions without alternative education. In support of their claims, the plaintiffs relied on **Leandro**, which holds that public school students have a "fundamental right" to the opportunity for sound basic education. According to the plaintiffs, by classifying the state education right as "fundamental," **Leandro** mandates strict scrutiny for long-term suspensions without alternative education. Thus, in their view, long-term suspension without alternative education is constitutionally permissible only if narrowly tailored to promote a compelling government interest. Of course, the plaintiffs further maintained that their punishments could not survive strict scrutiny.

The plaintiffs appealed their suspensions to the Board while their first set of lawsuits was pending. As part of their appeals, the plaintiffs argued that the administrative panel had violated their due process rights by considering the YouTube fight video without formally introducing it into evidence. In order to cure any potential due process shortcomings, the Board voted to conduct its hearings de novo, allowing both school officials and the plaintiffs to submit evidence not in the record produced by the administrative panel. Significantly, as they had done at their administrative hearings, the plaintiffs admitted to fighting each other in violation of BCS policy. The Board thereafter voted to uphold their long-term suspensions.

In light of the Board's actions, the plaintiffs next filed petitions for judicial review in superior court pursuant to Subsection 115C-391(e). (Subsection 115C-391(e) allows a student to obtain superior court review of a long-term suspension under the relevant provisions of the Administrative Procedure Act. In such cases, the superior court functions as an appellate tribunal, and its review is confined to the record of the school board hearing.)

The petitions raised essentially the same Leandro claims as the plaintiffs' initial lawsuits, along with several procedural due process claims. Among other things, the petitions alleged that due process was violated when: (1) the administrative panel considered the YouTube video and other evidence without informing the plaintiffs on the record of its intent to do so; and (2) the administrative panel hearings were not conducted within the first 10 school days of the plaintiffs' respective suspensions.

Finding no merit in the plaintiffs' **Leandro** claims, the superior court dismissed the initial lawsuits in response to the Board's motions to dismiss. Subsequently, having reviewed the record of the Board hearings, the court affirmed the plaintiffs' long-term suspensions and denied the petitions for

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judicial review. The plaintiffs appealed the superior court's rulings in both sets of cases to the North Carolina Court of Appeals.

The Court of Appeals Weighs In

On Oct. 20, 2009, a divided panel of the Court of Appeals upheld the dismissal of the plaintiffs' initial lawsuits. **King v. Beaufort County Bd. of Educ.**, ____ N.C. App. ____, 683 S.E.2d 767 (2009) (hereinafter "King I"); **Hardy v. Beaufort County Bd. of Educ.**, ____ N.C. App. ____, 683 S.E.2d 774 (2009) (hereinafter "**Hardy I**"). The majority did not regard **Leandro** as controlling, largely because **Leandro** was not a student suspension case: "The problems addressed [in **Leandro**] were limited to the quality of education in the context of school financing and did not address in any way the subject of school discipline." **King I**, ____ N.C. App. at ____, 683 S.E.2d at 770; **Hardy I**, ____ N.C. App. at ____, 683 S.E.2d at 777.

Having concluded that **Leandro** was not on point, the majority turned for guidance to the most pertinent in a line of cases holding that state constitutional challenges to long-term suspensions are subject to the rational basis test. Specifically, the majority determined that it was bound by **In re Jackson**, 84 N.C. App. 167, 352 S.E.2d 449 (1987). Although it predates **Leandro**, **Jackson** explicitly rejects the notion that alternative education is constitutionally required for students suspended in excess of 10 school days. 84 N.C. App. at 176, 352 S.E.2d at 455 ("The public schools have no affirmative duty [under the North Carolina Constitution] to provide an alternative educational program for suspended students in the absence of a legislative mandate.").

More generally, as the majority noted approvingly in **King I** and **Hardy I**, the **Jackson** opinion asserts that "[r]easonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior." *Id.* at 176, 352 S.E.2d at 455, *quoted in* **King I**, ____ N.C. App. at ____, 683 S.E.2d at 770, *and* **Hardy I**, ____ N.C. App. at ____, 683 S.E.2d at 777. Thus, in **King I** and **Hardy I**, the long-term suspensions imposed for violating the district's reasonable prohibition on school violence denied the plaintiffs the right to fight at school, not the right to educational opportunity. *See* **King I**, ____ N.C. App. at ____, 683 S.E.2d at 770; **Hardy I**, ____ N.C. App. at ____, 683 S.E.2d at 777.

The majority also expressed an unwillingness to substitute its judgment for that of the North Carolina General Assembly in student discipline matters. Observing that the General Assembly has legislated extensively in the areas of student suspension and alternative education, the majority concluded: "The Legislature has clearly considered the issue of alternative education for [suspended] students[,] and it did not choose to make access to alternative education mandatory. We have no authority to question this judgment." **King I**, ____ N.C. App. at ____, 683 S.E.2d at 771; **Hardy I**, ____ N.C. App. at ____, 683 S.E.2d at 778. (The majority did not rule on the direct constitutional challenge to Subsection 115C-391(c) because the plaintiffs had abandoned that issue on appeal.)

The dissent endorsed the plaintiffs' view that **Leandro** altered the constitutional landscape for long-term suspensions. In particular, the dissent would have held that **Leandro** implicitly overruled **Jackson** and other rational-basis-test precedents by recognizing a "fundamental right" to educational opportunity. **King I**, ____ N.C. App. at ____, 683 S.E.2d at 773 (Geer, J., dissenting) ("Because Jackson used a rational basis test to evaluate . . . a [long-term] suspension, I do not believe its holding can control in this case. Instead, we should be applying the strict scrutiny standard set out in **Leandro**."). Consistent with this reading of **Leandro**, the dissent would have reversed the superior court's dismissal of the plaintiffs' constitutional claims. *Id.* at ____, 683 S.E.2d at 774 (Geer, J., dissenting); **Hardy I**, ____ N.C. App. at ____, 683 S.E.2d at 779 (Geer, J., dissenting).

As was their right, the plaintiffs appealed **King I** and **Hardy I** to the Supreme Court based on the dissent. In the interim, another Court of Appeals panel issued an opinion unanimously upholding the superior court's denial of the plaintiffs' petitions for judicial review. **Hardy v. Beaufort County Bd. of Educ.**, ____ N.C. App. ____, 685 S.E.2d 550 (2009) (hereinafter "**King/Hardy II**"). (Unlike **King I** and **Hardy I**, the petition appeals were consolidated at the Court of Appeals.)

The second panel first concluded that the petitions' **Leandro** claims were barred by the resolution of those very same claims in the plaintiffs' initial lawsuits. Turning to the petitions' due process allegations, the panel explained that, "[i]n order to establish a denial of due process, a student must show substantial prejudice from the allegedly inadequate procedure." *Id.* at ____, 685 S.E.2d at 554 (internal quotation marks omitted). Because the plaintiffs had repeatedly admitted their guilt, the Court of Appeals held that no due process violations could be substantiated. *Id.* at ____, 685 S.E.2d at 555 ("A procedural due process denial cannot be established when the student admits guilt because prejudice cannot be shown."). The appellate court further opined that, even had the plaintiffs not conceded guilt, "there [was] no evidence that correction of these alleged [due process] violations would have produced a more favorable outcome." *Id.* The plaintiffs received what the court described as "ample opportunities to argue for mitigation of their punishment in . . . hearings before the [administrative] panel and the Board;" consequently, they could not show "unfair or mistaken exclusion from the educational process." *Id.* (internal quotation marks omitted).

The plaintiffs did not request Supreme Court review of **King/Hardy II**, which now binds the Court of Appeals and all lower courts. It is not known when the Supreme Court will issue opinions or orders in **King I** and **Hardy I**.

Significance of the King/ Hardy Cases

King/Hardy II all but forecloses procedural due process objections to long-term suspensions when students admit guilt. Moreover, it strongly suggests that due process deficiencies in an initial suspension hearing can be cured through a de novo proceeding before the school board. Though significant, **King/Hardy II** adopts due process principles which have been applied to long-term suspensions in other jurisdictions.

The Supreme Court's disposition of **King I** and **Hardy I** could have a seismic impact on state constitutional challenges to long-term suspensions, especially if the high court rejects **Jackson** and other rational-basis-test precedents. Under current case law, a student's long-term suspension for willful misconduct survives judicial review so long as it

is rationally related to a legitimate government interest, regardless of whether alternative education was offered. The rational basis test's deferential nature affords the General Assembly and local school districts maximum constitutional flexibility in determining when student misconduct justifies long-term suspension without alternative education. Were the Supreme Court to hold that long-term suspensions rate strict scrutiny, this discretion would be seriously circumscribed, and the judiciary would be continually asked to second-guess the policy judgments of those officials directly responsible for maintaining safe and orderly schools. (It seems clear that such a holding would also effectively – if not expressly – invalidate Subsection 115C-391(c), which grants school districts the wide latitude in student suspension matters that the plaintiffs find unacceptable.)

Finally, a ruling for the plaintiffs could expose cash-strapped school districts to more fiscal hardship. While each school district is obliged to have an alternative education program, the state provides negligible funding to that end. School districts must for the most part pull alternative education funding together from a variety of sources. Assuming a heightened standard of review for long-term suspensions would force districts to increase alternative school enrollment, the cost of operating those programs could rise substantially. An unfunded judicial mandate of this sort could not come at a worse time. ■

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