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Watch Your Mouth: Reconciling Free Speech Rights of Coaches at Public Universities after Garcetti v. Ceballos

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Courts have long recognized that the First Amendment Guarantee of free speech may not protect individuals in their capacities as public employees in the same manner that it protects them in their capacity as citizens.[1] Early in our nation's history, Justice Holmes stated that one "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[2] Over time, the Supreme Court has moved away from this line of thought by expanding the rights of public employees and acknowledging that citizens are not deprived of their constitutional rights by "virtue of working for the government."[3] Nevertheless, employees are not guaranteed blanket free speech protection and current trends seem to indicate that their limited free speech rights are continuing to wither.[4] In the 2006 *Garcetti v. Ceballos* decision, the Supreme Court held that public employees may be punished for engaging in otherwise protected speech if that speech is made pursuant to their official duties.[5]

Unsurprisingly, *Garcetti* left many issues open for debate, including whether its holding would be applicable in educational settings.[6] Although there is no clear Supreme Court mandate, a decision rendered by the Fourth Circuit earlier this year indicates that an academic caveat to the *Garcetti* holding exists in regard to public university professors.[7] Assuming the Fourth Circuit is correct and these individuals are guaranteed some sort of constitutional protection, the question

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[1] See McAuliffe v. City of New Bedford, 155 Mass. 216, 220 (1892).
[2] *Id.*
[3] Connick v. Myers, 461 U.S. 138, 147 (1983).
[4] See Garcetti v. Ceballos, 547 U.S. 410 (2006).
[5] *Id.*
[6] *Id.* at 425.
[7] Adams v. Trustees of the University of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011).

then arises as to how far this exception reaches. This comment argues that the educator's exception to *Garcetti* should extend to athletic coaches at public universities.

University coaches, like professors, play a major role in the lives of their student athletes by sharing their extensive knowledge about the sport and its relationship to other aspects of life.[8] University coaches are entrusted with the significant tasks of pursuing championships, molding the talent of some of the nation's most gifted individuals, and imparting upon them lessons in sportsmanship, teamwork, and leadership.[9] Those who have given their professional lives to train young athletes are aware of their responsibilities and refuse to take them lightly.[10] When interviewed about the great Florida State Head Football Coach Bobby Bowden, University of Alabama coach Nick Saben did not harp on Bowden's .756 overall winning percentage or two national titles.[11] Instead, he focused on Bowden's class and love for the people he coached, and further noted, "[a]s [a] coach, you wish maybe someday to be thought of as well as he is, not only in terms of what he accomplished, but the way he did it."[12]

Given the significant role that coaches play in the lives of their student athletes, they should be afforded the same academic free speech protection granted to professors that the Supreme Court suggested in *Garcetti* and the Fourth Circuit announced in *Adams.* Applying *Garcetti* to these individuals will not only be detrimental to the institutions that benefit from their victories, but also to the students who benefit from their wisdom and experiences. This comment illustrates the importance of protecting the free speech rights of university coaches by engaging

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[8] See Andrew Sharp, *Coach enjoys players' growth alongside that of his program,* HESTON COLLEGE (May 11, 2011), https://mail.google.com/mail/?ui=2&shva=1#inbox.
[9] *Id.*
[10] *Football Legend Bobby Bowden LIVE with Bob Baumhower!* PAGE & PALLETTE INC., http://www .pageandpalette.com/event/bobby-bowden (last visited Sept. 19, 2011).
[11] See generally *Id.*; *Player Bio: Bobby Bowden,* SEMINOLES.COM, http://www.seminoles.com/sports/m-footbl/mtt/bowden_bobby01.html (last visited Oct. 31, 2011).
[12] *Football Legend*, *supra* note 10.

in a thorough analysis of the evolution of the public employee free speech doctrine and the importance of academic freedom.

Part II of this comment analyzes the free speech rights enjoyed by public employees, including coaches, before the *Garcetti* decision. Part III discusses the *Garcetti* case in detail and attempts to reconcile it with the concept of academic freedom. Part IV of this comment asserts academic freedom should extend beyond professors to coaches at public universities because they play a pivotal role in molding the lives of some of the most gifted young people in our country. Finally, this comment concludes in Part V,

Part II: Coaches Enjoyed Relatively Significant Free Speech Protection Under the Original Pickering/Connick Analysis.

A. Pickering/Connick Background

Until the late 1950s the employee speech doctrine remained largely unchallenged and the law generally abided by Justice Holmes' early formulation.[13] However, as the Twentieth Century progressed, the Supreme Court began expanding its jurisprudence and granted public employees more protection.[14] While acknowledging certain employee free speech rights, the holdings of *Pickering v. Board. of Education* and *Connick v. Meyers* appreciate that employers have substantial interests in promoting efficiency in the work place.[15] Therefore, employee protection is limited and was initially satisfied only if the claimant satisfies a three-prong test.[16] The three prong test required an employee to prove that the speech in question (1) addressed a matter of public concern, (2) that the employee's right to speech outweighed the employer's interest in

[13] *Connick* 461 U.S at 153.
[14] *Id*.; Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 571-72, (1968).
[15] *Connick* 461 U.S. at 138; *Pickering* 391 US at 568.
[16] TIMOTHY GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS (2d ed. 2011) at 374.

promoting work place efficiency, and (3) that the speech in question was the primary reason for retaliation.[17]

Apart from providing lower courts with these three guidelines, the Supreme Court has not yet articulated precisely what is a matter of public concern.[18] It is sufficient to realize that "mere personal concerns or interests as opposed to those of the employee as a citizen are not matters of public concern."[19] Thus, statements regarding an assassination attempt on a president[20] or proposed tax increases[21] qualify as matters of public concern, but those involving purely in-office procedures[22] do not.

B. Coaches Rights Under a Pickering/Connick Analysis

Even before *Garcetti*, public university coaches, like all other public employees, did not enjoy unlimited free speech regarding their employment. Therefore, if they were retaliated against for an expression of speech, they would have to satisfy the three prongs of the *Pickering/Connick* analysis.[23] Given the amount of attention collegiate athletic programs receive on a national scale, it appears that a coach's speech related to the university, the athletic program, or a school's teams and players would satisfy the public concern prong of the *Pickering/Connick* test.[24] For example, in *Hall v. Ford*, Hall was fired from his position as Athletic Director of the University of the District of Columbia for speaking out against the alleged improprieties of the university's athletic department.[25] The United States Court of Appeals for the District of Columbia upheld his termination under a narrow policy-maker

[17] Id. See *Connick* 461 U.S. at 138; *Pickering* 391 US at 568.
[18] GLYNN, *supra* note 16 at 374-75.
[19] *Id.*
[20] Rankin v. McPherson, 483 U.S. 378 (1987).
[21] *Pickering* 391 US at 474.
[22] *Connick* 461 U.S. at 154.
[23] *See* Glynn, *supra* note 16 at 375.
[24] *See* Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988).
[25] *Id* at 256.

exception to the public employee free speech doctrine, but noted that Hall addressed a matter of public concern when he made negative comments about ineligible players, the changing of student grades, and the conducting of unauthorized practices.[26] The court held that such sports-related expressions are sufficiently public because " [a] substantial segment of the general public would be interested in violations of athletic rules, which would reveal whether the current university administration is mismanaging the athletic program."[27]

Assuming that the DC Circuit is correct and a coach's speech regarding the state of his athletic program at a university satisfies the first part of the *Pickering/Connick* analysis, it would follow that a coach's right to speech about topics such as violation of league rules or policies of the University that would hinder the progress of the program would outweigh the interests of the institution.[28] In *Hall*, the Court dismissed the petitioner's claim under the governmental interest prong of the test only because an Athletic Director qualifies as a "policymaker" and the University has a great interest in maintaining loyalty of individuals at such a high capacity.[29] Because a university coach is not as policy-oriented as an athletic director, his right to speech and interest in controlling his team would probably outweigh the institution's interests in a *Hall*-type analysis.[30] Given the probable satisfaction of the first two prongs of the test, and the assumption that a coach could establish a sufficient nexus between the questioned expression and a retaliatory action, it would appear as if university coaches were granted significant protection under *Pickering* and *Connick* prior to *Garcetti*.

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[26] *Id.* at 257 (citing *Rankin* 483 U.S. at 390(1987)) (Public employers are accorded more deference to fire policymaking employees for engaging in otherwise protected speech because the employer has a sufficiently great interest in maintaining order in the workplace).
[27] *Id.* at 259.
[28] *Id.* at 261.
[29] *Id.* at 265.
[30] *Id.*

Although a coach's speech would satisfy *Pickering* and *Connick* under most circumstances, it is useful to distinguish speech that may receive such protection from speech that almost certainly would not. For instance, a coach who speaks about one of his players, while making prejudicial or racial slurs, would probably not be protected by the First Amendment. In situations such as that, courts have made it clear that only speech that sufficiently touches upon matters of public concern receives protection.[31] Thus, when speech is aimed solely at exploiting the employer,[32] or it is simply "vulgar and indecent.,"[33] the speaker has no right to utter it and to keep his job. In the case of racial slurs about a coach's players, the speech does not contribute to the sorts of public issues the courts wish to protect. Therefore, such a coach would probably not be able to make a successful argument of retaliatory termination if he asserted a First Amendment claim, even though he is technically speaking on matters related to the team and the athletic program.

On the other hand, other sorts of speech would be granted *Pickering/Connick* protection. If a coach spoke out against a blatant violation of NCAA rules, refused to play a less talented relative of a school official, or spoke against bars upon practice techniques that the coach believes instill pivotal values in his players, his speech would probably pass the totality-of-the-circumstances test articulated by the Supreme Court.[34] In these cases, the coach's speech touches upon an issue of public concern and his right to engage in it outweighs the university's interest in preventing it since the coach is not purposefully exploiting his employer.[35] Therefore, before the implementation of *Garcetti*, it seems relatively clear that coaches would have been granted a substantial amount of deference regarding certain speech made about their respective programs.

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[31] City of San Diego, Cal. v. Roe, 543 U.S. 77, 84 (2004); Dible v. City of Chandler, 515 F.3d 918, 927 (9th Cir. 2008)
[32] *Roe 543* U.S. at 84
[33] *Dible* 515 F.3d at 927
[34] *See* Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 574 (1968)
[35] See generally *Hall* 856 F.2d 255 (D.C. Cir. 1988).

Even high-school coaches, who appear to enjoy much less protection than their collegiate counterparts post-*Garcetti*, enjoyed at least some First Amendment protection under *Pickering* and *Connick.*[36] For instance, in *Bowman v. Pulaski County*, the Eighth Circuit found that the involuntary transfer of assistant football coaches after they had spoken out against corporal punishment was unconstitutional.[37] In reaching its conclusion, the court held that the speech of the assistant coaches addressed a matter of public concern because "the question of what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum."[38] Additionally, the coaches' interests outweighed those of the school district since their pertinent expressions did not impede their ability to perform their tasks and instruct the children. [39] Therefore, the court ordered the reinstatement of the coaches to their former positions or jobs that would be equally desirable.[40]

Despite employee victories like the one in *Bowman*, courts were careful to not over-extend the free speech rights of high school coaches.[41] The Tenth Circuit exemplified this when it held that the school district had not violated the rights of head football coach Ron Lancaster by firing him for statements he made regarding his one-game suspension.[42] The high school refused to disclose the reason for the coach's suspension.[43] When the local newspaper asked Lancaster why he thought he had been suspended, he said that "no one has given us an explanation" about it.[44] Lancaster asserted that this comment to the newspaper ultimately lead to his termination.[45]

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[36] Bowman v. Pulaski County Special Sch. Dist., 773 F.2d 640 (8th Cir. 1983).
[37] *Id.* at 645.
[38] *Bowman*, 773 F.2d at 643.
[39] *Id.* at 644.
[40] *Id.* at 645.
[41] Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228 (10th Cir. 1998); Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996); Brayton v. Monson Pub. Sch., 950 F. Supp. 33 (D. Mass. 1997).
[42] *Lancaster*, 149 F.3d at 1233.
[43] *Id.*
[44] *Id.* at 1232.
[45] *Id.*

According to the Tenth Circuit, Lancaster could not recover even if the speech in question lead to his dismissal because it merely involved procedures that were internal to the high school and it did not qualify as a matter of public concern.[46] Unfortunately for public school coaches, the *Bowman* decision was indicative of the direction the Court would eventually turn to limit the rights of public employees.[47]

Part III: Although the *Garcetti* Decision Severely Limited Employee Rights, It Does Not Apply to the Academic World.

A. Background of *Garcetti*

The 2006 Supreme Court decision, *Garcetti v. Ceballos* further restricted the rights of public employees and indicated a huge shift back to the Court's original jurisprudence according very high deference to employers.[48] In *Garcetti*, Ceballos, a Los Angeles Deputy District Attorney was fired for submitting a memorandum suggesting that the state dismiss a case due to government misconduct.[49] Ceballos became aware of the alleged misconduct after a defense attorney contacted him regarding a potential flaw in search warrant executed against his client.[50] Ceballos investigated the matter and discovered that the state utilized an affidavit laden with misrepresentations to obtain the warrant.[51] Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies.[52] He then relayed his findings to his supervisors and followed up by preparing two separate disposition memoranda.[53] The

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[46] *Id.*
[47] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).
[48] *Id.*; GLYNN, *supra* note 16 at 388.
[49] *Garcetti*, 457 U.S. at 410.
[50] *Id.* at 413-414.
[51] *Id.* 414.
[52] *Id.*
[53] *Id.*

memos articulated Ceballos' concerns over the misrepresentations and his recommendation that the state dismiss the case. [54]

After taking a series of retaliatory actions against Ceballos for statements made in the memoranda, the District Attorney eventually fired him.[55] Ceballos promptly filed suit alleging a breach of his First Amendment right to free speech.[56] The District Attorney argued that the First Amendment did not apply to the scenario at hand because it did not protect inter-office memoranda.[57] The Ninth Circuit agreed with Ceballos and the Supreme Court subsequently granted certiorari. [58]

The Supreme Court reversed the Ninth Circuit, holding that Ceballos was not protected.[59] In its decision, the Court noted that in each of the situations where it upheld a public employee's right to free speech, the individual was acting in his capacity as a citizen, not as an employee.[60] The fact that Ceballos issued his memoranda as a Deputy District Attorney distinguished him from that protected class of people.[61] In the ruling against Ceballos, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[62] This recently articulated "official duties" prong practically cripples the already limited protection public employees enjoyed under the

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[54] *Id.*
[55] *Garcetti*, 457 U.S. at 415.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 415-16.
[59] *Id.* at 425.
[60] *Id.* at 420.
[61] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
[62] *Id.*

Pickering/Connick analysis and allows employers to engage in retaliatory action that was previously prohibited.[63]

Nevertheless, the Court acknowledged that *Garcetti* may not apply to all types of public employees and was careful to note that it may not apply to the academic setting.[64] In his dissent, Justice Souter argued that the Court's decision could be detrimental because it would in effect destroy the academic freedom accorded to those who educate the nation's youth.[65] However, the majority addressed Justice Souter's concern by explicitly stating that it "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."[66] In the absence of a clear mandate, the fate of academic freedom remains uncertain. However, recent developments in the Fourth Circuit indicate that academic freedom may not be subject to *Garcetti*, at least in regards to university professors.[67]

B. The Principle of Academic Freedom is Crucial to the Development of Our Nation's Youth

As early as the beginning of the twentieth century, our nation realized that the concept of academic freedom is essential to the functioning of a public university.[68] In 1915, the American Association of University Professors asserted this principle and articulated its elements, noting that "[a]cademic freedom comprises freedom of inquiry and research; freedom of teaching within

[63] GLYNN, *supra* note 16 at 388.
[64] *Garcetti*, 547 U.S. at 425..
[65] *Id.* at 429 (Souter, J. Dissenting).
[66] *Id.* at 425.
[67] Adams v. Trustees of the University of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011)
[68] Darryn Cathryn Beckstrom, Reconciling the Public Employee Speech Doctrine and Academic Speech After Garcetti v. Ceballos, 94 MINN. L. REV. 1202, 1218 (2010).

the university or college; and freedom of extramural utterance and action."[69] The Supreme Court began to acknowledge this freedom in the 1920s with its decisions in *Meyer v. Nebraska* and *Bartels v. Iowa* by holding that statutes banning the teaching of foreign languages were unconstitutional.[70] Since those seminal cases, the law regarding academic freedom has been expanded in some regards[71] and restricted in others.[72]

Although it is not readily apparent at all stages of education, academic freedom seems most robust in the public university setting.[73] In *Sweezy v. New Hampshire*, the Supreme Court addressed the necessity of academic freedom in universities because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[74] The Court elaborated on this position in *Grutter v. Bollinger*, by explaining that it has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[75] The unique importance of the university environment is pivotal to the analysis, since the Court expressly noted in *Parents Involved v. Seattle Sch. Dist.* that secondary schools are not entitled to assert some of the same sorts of interests that universities are entitled to claim.[76] These precedents demonstrate that it is highly unlikely that the Supreme Court desired for *Garcetti* to practically destroy the free speech

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[69] *Id.* (citing Am. Ass'n of Univ. Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure 292 (1915), available at http:// www.aaup.org/NR/rdonl yres/A6520A9D-0A9A-47B3-B550C006B5B224E7/0/1915Declaration.pdf.).
[70] Alison E. Price, Understanding the Free Speech Rights of Public School Coaches, 18 SETON HALL J. SPORTS & ENT. L. 209, 219 (2008) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).
[71] *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (discussing the importance of academic freedom in a University setting.).
[72] *See* Evans-Marshall v. Bd of Educ, of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332 (6th Cir. 2010).
[73] Beckstrom, *supra* note 68 at 1219; Sweezy 354 U.S. at 250.
[74] *Sweezy*, 354 U.S. at 250.
[75] Breckstorm, *supra* note 68 at 1220 (citing Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).
[76] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).

protection that courts have recognized for over a half-century.[77] Rather, the Court's reluctance to issue a clear directive on the issue of academic speech pursuant to official duties merely demonstrates that the issue was not ripe to be definitively resolved.

At least one circuit has interpreted the Court's failure to explicitly deny an academic caveat to *Garcetti* as evidence of the Court's support for such an exemption.[78] In *Adams v. Trustees of the University of North Carolina-Wilmington*, the Fourth Circuit held that the university violated the constitutional right of Associate Professor Michael S. Adams by failing to promote him after he had engaged in unfavorable speech.[79] Adams, a criminology professor, alleged that the University did not promote him because of his speeches, articles, and books related to his outspoken Christian/conservative views.[80] In the initial ruling, the district court relied on *Garcetti*, holding that the speeches, articles and books were sufficiently related to Adams' professional capacity as a professor and not to his capacity as a private citizen.[81] The district court noted that Adams had listed these articles and speeches on his application for promotion, and by doing so he conceded that they were aspects of his professional duties.[82]

The Fourth Circuit reversed, acknowledging that, although employers have a heightened interest in controlling the speech of their employees, that principle was inapplicable here.[83] Because Adams' speech was clearly protected by the First Amendment at the time of presentment, it cannot lose its protected status after Adams referenced it in his application.[84] Furthermore, the Circuit Court focused on the plain language in *Garcetti,* which indicated that

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[77] See *Id.*; *Sweezy*, 354 U.S. at 250.
[78] Adams v. Trustees of the University of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011)
[79] *Id*. at 565.
[80] *Id.* at 554.
[81] *Id.* at 561.
[82] *Id,*
[83] Id. at 562.
[84] *Adams*, 640 F.3d at 562

professors and other academics may be entitled to more First Amendment protection than other categories of employees.[85] A professor's speech may be subject to limitations regarding administrative or clerical duties, but it is protected when discussing academic issues related to public concern.[86]

Apart from voicing its support for the academic caveat to *Garcetti*, the Fourth Circuit also circumvented the issue slightly by indicating that Adams' speech may not have been part of his official duties.[87] In his majority opinion Judge Agee stated, "Adams's speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields."[88] These "general concepts" are related to individuals' capacities as private citizens, and are subject to First Amendment protection."[89]

Scholarly commentary regarding *Adams* indicated a strong belief that the case was destined for the Supreme Court.[90] However, several months after the decision, the parties did not present the Court with a petition for certiorari.[91] It is quite likely that the Fourth Circuit's alternate holding, stating that Adams was not speaking in his capacity as a professor, and thus *Garcetti* is inapplicable, deemed the issue unworthy of the Court's consideration. The Court could have simply relied on this reasoning, affirmed the Fourth Circuit, and declined to issue a ruling on the broader implications of *Garcetti*. But, given the role that professors play in modern society, it would appear as though any scholarly speech could be tied to a professor's professional duties,

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[85] *Id.* at 563.
[86] *Id.* at 564.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Paul Secunda, *4th Cir: Garcetti Does Not Apply in Higher Education Setting,* WORKPLACE PROF. BLOG (Apr. 7. 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/04/4th-cir-garcetti-does-not-apply-in-higher-education-setting.html.
[91] *Adams*, 640 F.3d 550.

and the parties of *Adams* should have petitioned the Court to utilize this opportunity to issue a mandate regarding academic speech in the public university setting.[92] Nevertheless, this comment is not aimed at predicting the Court's treatment of *Adams* or similar cases. Therefore, the rest of the argument will adopt the position alluded to in *Garcetti* and articulated by the Fourth Circuit that professors enjoy more First Amendment free speech rights than other types of public employees due to the unique importance of universities in the lives of the nation's youth.[93]

Despite the possible protection allotted to those who work in academics at a public university, recent rulings in the Sixth[94] and Third[95] circuits indicate that any free speech rights in regards to expressions made during the performance of official academic duties do not extend to lower institutions. In *Evans-Marshall v. Bd. of Ed.*, the Sixth Circuit held that *Garcetti* applies to the in-class curricular speech of high school teachers.[96] The plaintiff, Evans-Marshall, was fired from her position as a high school English teacher for assigning controversial books as mandatory reading.[97] Parents of students were outraged and demanded the school district release Evans-Marshall after discovering that she assigned literature such as Herman Hesse's *Siddhartha,* Ray Bradbury's *Fahrenheit* 451, and Harper Lee's *To Kill a Mockingbird,* and showed a movie adaptation of *Romeo and Juliet,* which is rated PG-13.[98] Despite claims that she was entitled to constitutional protection, the Sixth Circuit ruled in accordance with *Garcetti*,

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[92] *See Adams*, 640 F.3d. at 563; Secunda, *supra.* note 90
[93] *See* Grutter v. Bollinger, 539 U.S. 306, (2003); Sweezy v. New Hampshire, 354 U.S. 234 (1957).
[94] Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332 (6th Cir. 2010).
[95] Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 160 (3d Cir. 2008)
[96] *Evans-Marshall*, 624 F.3d at 344.
[97] *Id.* at 335.
[98] *Id*.

holding that the speech in question was made pursuant to official duties, and Evans-Marshall was not entitled to constitutional protection.[99]

Similar to *Garcetti*, the *Evans-Marshall* court found the application of *Pickering/Connick* balancing to be irrelevant because Evans-Marshall was engaging in speech pursuant to her official duties as a public school teacher.[100] For this reason, Professor Paul Secunda asserts that the *Evans-Marshall* decision is "absurd."[101] Although he recognizes that children in secondary schools are highly impressionable and there must be some sort of discretion used in determining a curriculum, Professor Secunda holds that the court is wrong to deny teachers in these institutions all of their First Amendment free speech protection.[102] In the absence of meaningful *Pickering/Connick* balancing, Secunda believes that the *Evans-Marshall* decision is unduly drastic and is a terrible loss for teachers around the country.[103]

Professor Secunda's unfavorable view of the *Evans-Marshall* decision may be correct, but it is not impossible to reconcile it with the Fourth Circuit's decision in *Adams*. When reading the two cases together, those who work in the university setting are granted more protection than those at lower-level institutions.[104] This principle is consistent with the Supreme Court's repeated willingness to give more deference to those asserting constitutional rights in a university setting than to similar claims arising under different circumstances.[105]

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[99] *Id.* at 344.
[100] *Id.* at 340.
[101] Paul Secunda, *Garcetti v. Pubic School Teachers: Garcetti Wins and We All Lose,* Workplace Prof. Blog (Oct. 22, 2010), http://lawprofessors.typepad.com/laborprof_blog/2010/week42/index.html.
[102] *Id.*
[103] *Id.*
[104] *Evans-Marshall*, 624 F.3d 332; *Adams*, 640 F.3d 550
[105] *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

The Third Circuit's ruling in *Borden v. Sch. District* gives further credence to the notion that primary and secondary school employees do not enjoy much First Amendment protection by adopting standards similar to those announced in *Evans-Marshall*.[106] There, the Court rejected high school football coach Borden's First Amendment claim by holding that the school district did not violate his rights by firing him for saying prayers before games and bowing his head to show respect to his peers.[107] Although the Court did not analyze the case specifically under *Garcetti*, it mentioned that Coach Borden's claim would be precluded if the "official duties" limitation applied under these circumstances.[108]

The Third Circuit did not address the claim under the *Garcetti* guidelines due to the Supreme Court's refusal to issue a mandate about the possible academic caveat.[109] However, reaching its ruling against the coach, it made note "that a teacher's in-class conduct is not protected speech."[110] Furthermore, in a footnote, the court outlined how it would have ruled if it were appropriate to apply a *Garcetti* analysis.[111] It stated that, even if *Garcetti* did not apply to the educational setting, Borden would not be entitled to any sort of protection since his expressions did not address an issue of public concern since they only related to his interactions with his players.[112] The Court went on to argue that if the expressions were classified as an issue of public concern, and *Garcetti* does apply to the educational setting, it would still preclude recovery because Coach Borden was engaging in his official duties of leading his team as a coach and not as a private citizen.[113]

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[106] Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 168-9 (3d Cir. 2008)
[107] *Id.* at 184-85.
[108] *Id.* at n.13.
[109] *Id.*
[110] *Id.* at 172.
[111] *Id.* at n. 13.
[112] *Id.*
[113] *Borden*, 523 F.3d at n. 13.

Despite purporting to acknowledge the possibility of an "academic freedom" exemption to the "official duties" analysis, the Third Circuit is clearly unsympathetic to the free speech rights of those employed as coaches and teachers at secondary schools.[114] In her comment arguing that the Third Circuit should apply a more deferential analysis in cases like *Borden*, Allison Price argues that coaches should be granted greater First Amendment protection than other public employees.[115] Ms. Price acknowledges that "applying *Garcetti* to a coach's instructional speech is dangerous" because communications with and about his athletes are part of a coach's official duties.[116] Thus, coaches would hardly ever be eligible for free speech protection despite the pivotal role they play in instilling values in the players on their team.[117]

Although notable, cases like *Grutter* and *Parents Involved* show that Ms. Price's observations may be inappropriate for an analysis of cases stemming from secondary schools.[118] Apart from *Borden*, *Evans-Marshall* also demonstrates that the Circuits are reluctant to recognize an academic caveat for employees at public high schools.[119] Conversely, case law and scholarly commentary acknowledge the unique importance given to the free flow of information from instructor to pupil in a university setting, and suggest that Ms. Price's general theory that coaches should receive more Constitutional protection is more credible when applied to the university setting.[120]

In her comment in the Minnesota Law Review, Reconciling the Public Employee Speech Doctrine and Academic Speech After Garcetti v. Ceballos, Ms. Beckstrom, holds that the

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[114] *Id.* at 172.
[115] Price, *supra* note 70.
[116] *Id.* at 254
[117] *Id.*
[118] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).
[119] *Evans-Marshall*, 624 F.3d 332.
[120] See *Grutter*,539 U.S. 306*; Sweezy*, 354 U.S. 234; Adams v. Trustees of the University of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011). Beckstrom *supra* note 68

government has less of an interest in restricting the speech of academics than it does in restricting the speech of other public employees.[121] Unlike other public employees, universities do not hire coaches and professors "to promote a specific government interest."[122] Public universities do not generally exercise control over a professor's curriculum or a coach's methods "the way a traditional public employer exercises control over its employees.[123] In this regard, it would seem that academics fall outside the articulated purpose of *Garcetti* to protect the employer from the possibility that the employee's speech is consistent with the government's positions. [124] Therefore, coaches and professors at public universities should not be subject to the same limitations as other employees when speaking pursuant to their official duties on matters of public concern.

C. Coaches are Not Subject to the "Captive Audience" Limitation of First Amendment Free Speech.

Citizens are entitled to First Amendment free exercise of speech unless the expression invades substantial privacy interests in an intolerable manner.[125] Although it may be weak, this sort of "captive audience" argument may be made to deny coaches their right to free speech because to be on the team, players are subject to the thoughts of their coaches. In the university setting, players are particularly subject to a coach's views because many of them are attending the institution on athletic scholarships.[126] These students have less of an option to voice their opinions against their coaches or to quit the team because doing so could result in them losing their scholarships and perhaps an opportunity to receive a quality education. However, the

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[121] Beckstrom, *supra* note 68 at 1227.
[122] *Id.*
[123] *Id.*
[124] *See* Garcetti v. Ceballos, 547 U.S. 410; 421 (2006); *Id.*
[125] Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975)
[126] See *College Athletic Scholarship – College Recruiting Information*, NCSA, http://www.ncsasports.org/College-Athletic-Scholarships (last visited October 30, 2011).

Supreme Court has interpreted the "captive audience" restriction quite narrowly, and it would seem that it would not be appropriate to apply to the athletic spectrum.[127]

In *Rowan v. U.S. Post Office Dept.,* the Court explained that the captive audience restriction applies in scenarios where an individual is inescapably captive.[128] There, the Court held that an individual is entitled to the utmost amount of privacy in his own home and the state may allow him to expressly ban unwanted mail.[129] Although the Court recognized that sending mail as a means of advertising is a dominant feature of our society that should not be destroyed, an individual has a right to explicitly request that certain mail not enter his home. [130] The Court likened such behavior to forcing an individual to permit trespassers into his home, or barring him from changing a television station.[131] It recognized that mail is subject to free speech protections, but when explicitly unwanted mail intolerably invades the substantial privacy interests of an individual, the state has a substantial interest in protecting a captive audience. Thus, the court upheld the law permitting individuals to ban certain unwanted items of mail against a First Amendment challenge.

Despite recognizing this limitation on free speech, the Court was careful to not extend it unnecessarily.[132] In *Erznoznik v. City of Jacksonville,* the Court invalidated a state law banning the showing of movies that contained nudity at a drive-in theater where such nudity was possibly visible to passers-by.[133] The Court realized that the unfortunate reality is that many things

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[127] See *Erznoznik*, 422 U.S at 209-11; Rowan v. U.S. Post Office Dept., 397 U.S. 728, 736. (1970)
[128] *Rowan*, 397 U.S. at 736.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Erznoznik*, 422 U.S at 210.
[133] *Id. at 217.*

citizens encounter on a daily basis offend others' political and moral sensibilities.[134] But, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.[135] Rather, absent [narrow] circumstances…the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities by averting [his] eyes."[136] The Court went on to note that an individual may not engage in otherwise protected speech if it is calculated to offend the sensibilities on an unwanted audience."[137] However, the drive-in theater did not aim at offending the unwilling.[138] Rather it would have preferred if the unwilling could not have seen the screen since they did not pay for tickets.[139] Therefore, the restriction on speech is inapplicable in this case.[140]

The above examples indicate that it is unlikely that the captive audience exception to free speech would be a problem for coaches.[141] Athletes are not inescapably captive since they choose to play a specific sport and in many situations choose a university based on the reputation of its head coach.[142] Unless proponents of the captive audience argument could prove that the coach's speech was "calculated to offend the sensibilities on an unwanted audience," their speech should be protected against this limitation.[143] It is probable that this limitation does not

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[134] *Id.* at 209.
[135] *Id. at 210*.
[136] *Id.* (internal citations omitted).
[137] *Id.* at n. 6
[138] Erznoznik, 422 U.S. at n. 6.
[139] *Id.*
[140] *Id.*
[141] See *Id.* at 210; Rowan v. U.S. Post Office Dept., 397 U.S. 728, 736. (1970).
[142] *Choosing a College Because of the Coach*, ATHETICRECRUITINGMENTOR.COM, http://athleticrecruitingmentor.com/ChoosingaCollegeBecauseoftheCoach.aspx (last visited Oct. 28, 2011).
[143] See *Erznoznik*, at n. 6

typically apply to coaches since it is unlikely that they would aim to offend their players while speaking pursuant to their official duties.[144]

Part IV: An Application of Relevant Case Law Indicates That Coaches at Public Universities Should Not be Subject to the *Garcetti* Limitations.

A. Coaches Receive Protection When Speaking in Their Capacities as Private Citizens

Like professors, coaches may be viewed as symbols of the university while they are in public.[145] However, whatever *Garcetti* means for coaches, it clearly has no effect on their free speech rights when they are not speaking as part of their official duties.[146] Saint Louis University (SLU) men's basketball coach Rick Majerus was in the spotlight for a brief period in 2008 for statements he made while attending a Hillary Clinton rally regarding his support for pro-choice and stem cell research.[147] SLU, a private Jesuit institution that has substantially more power as an employer to terminate its employees than a public institution, did not retaliate against the coach.[148] In the interview, Majerus acknowledged he was not there as a representative of the university, but nevertheless identified himself as the university's basketball coach.[149] Among the chatter over the rights of a university employee, SLU took no formal action, asserting "Coach Rick Majerus' comments were his own personal views, and he was not speaking for Saint Louis University. The comments were made at a non-university event and he was not there as a university representative."[150]

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[144] See *Football Legend*, *supra* note 11; Price, *supra* note 69 at 254.
[145] See Paul Steinbeck, College Coach's Airing of Personal Beliefs Sparks Debate About Rights of Institutions and Employees, ATHLETIC BUSINESS (Mar. 2008) http://athleticbusiness.com/articles/article.aspx?articl eid=1729&zoneid=8.
[146] See Generally Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 571-72, (1968).
[147] Steinbeck, *supra* note 145.
[148] *Id.*
[149] *Id.*
[150] *Id.*

Although he does not work for a public employer, if Majerus did work for a public university that took formal action against him for his statement, it appears that his statements would be protected.[151] By speaking about policies related to a presidential election, Majerus' statements clearly address an issue of public concern.[152] Next, Majerus' free speech interests probably outweigh any employment-based interests that the university could articulate. A public university may have some interest in keeping its employees from speaking out in political matters. However, it is highly unlikely that Majerus' views on stem cell research would negatively impact his ability to effectively lead his team.[153] Therefore, under a Pre-*Garcetti* analysis, coaches at public institutions would have been clearly protected for making these sorts of expressions.

Expressions like Coach Majerus' also fall into the narrow category of speech protected despite the holding of *Garcetti*. It would be difficult to make an argument that speech related to a presidential campaign and stem cell research could be made pursuant to his official duties. Additionally, Majerus explicitly stated that he was not acting or speaking as a representative of the university.[154] When the speech is not contingent on the individual's capacity as an employee, and it is made as a citizen on a matter of public concern, employees are generally entitled to First Amendment Protection.[155]

B. Coaches are entitled to Free Speech Protection when speaking pursuant to their official duties.

[151] Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983).; *Pickering* 391 U.S. 563.
[152] *See* Rankin v. McPherson, 483 U.S. 378, 389 (1987). (Speech asserting that the plaintiff had wished the assassination attempt on President Regan was successful was sufficient to satisfy the "public concern" prong.).
[153] *See* Bowman v. Pulaski County Special Sch. Dist., 773 F.2d 640 (8th Cir. 1983).
[154] Steinbeck, *supra* note 145.
[155] *Garcetti*, 547 U.S at 421.

Applying a *Garcetti*-type analysis to collegiate coaches is unnecessary and detrimental to collegiate athletics and the students who participate in them. Presumably, individuals are hired as coaches because they have demonstrated an expertise in their field and the university hopes to gain from that expertise. As experts, it follows that coaches should be given freedom to control their teams in the manner they choose within reason. By examining a set of hypothetical examples, it becomes clear which areas of a coach's speech deserve protection, which ones do not, and reasons why the courts should ensure such protection remains.

The example of Coach Majerus involves a scenario so far removed from a coach's official duties that a Garcetti issue would hardly arise.[156] However, different scenarios could involve closer questions of when a coach's speech invokes a *Garcetti* question. Consider a coach who speaks out against a campus policy of adding more trees to the university quad. The coach's speech relates to a university policy, but it is in no way part of his duties to speak or concern himself with the horticulture practices of the university. Therefore, this speech would not even trigger a *Garcetti* analysis because the coach did not speak pursuant to his official duties. Additionally, he may have no free speech protection in this scenario because commenting about trees on the quad appears to be more of an internal complaint like the one at issue in *Connick.*[157] Unless an individual is an alumnus or has a child in attendance at the university, it is highly unlikely that the public would be concerned about the amount of trees on the quad. The speech in question here deals solely with the internal policies of the institution and should be handled privately among the school's officials. Since it does not touch public concern, nor does it deal with the coach's official duties, this speech should be given no protection.[158]

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[156] Steinbeck, *supra* note 145.
[157] *Connick* 461 U.S at 143.
[158] See *Garcetti*, 547 U.S at 421.

On the other hand, speech regarding the coach's teaching style does enter the *Garcetti* framework. For example, a basketball coach's decision to run a high paced offense over a slow paced one is his decision to make. As the university hired the coach for his expertise in basketball, these are the types of decisions that he should be autonomous in making and should not have to worry about being reprimanded because less qualified administrators disagree with his judgment. However, it would seem as if this is the exact sort of speech that *Garcetti* would prohibit. Under *Hall*, the speech regarding the offense would probably satisfy the public concern prong since athletics receive a great deal of media coverage in the newspapers and on television.[159] Conversely, the coach here is speaking pursuant to his official duties, thus *Garcetti* would permit the university to fire him if they do not like his approach to how he chooses to conduct his offense.[160]

A coach's only hope to protect this sort of speech is by asserting the proposed *Adams* academic caveat.[161] Admittedly, at first glance, offensive plays or defensive blocking schemes do not seem to be what the Fourth Circuit imagined when it considered the possible academic caveat. Nevertheless, coaches, like professors, should be entitled to the freedom to teach in a particular way. Not only are coaches implementing methods they believe will benefit the university with victories, but they are instilling values in their players that will last them a lifetime.

In a recent interview, North Carolina head basketball coach Roy Williams alluded to the life-lessons he is imparting on the young athletes that play for him.[162] Coach Williams spoke about how his freshmen are growing as players by taking leadership on the court, and how he rewarded

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[159] Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988).
[160] *Garcetti*, 547 U.S at 421
[161] Adams v. Trustees of the University of North Carolina-Wilmington, 640 F.3d 550, 564 (4th Cir. 2011)
[162] Greg Williams, Monday Roy Williams Quotes, INSIDE CAROLINA, (Jan. 2012) http://north carolina.scout.com/2/1153702.html.

the hustle and determination of another player by adding him to the starting line-up and giving him more playing time. [163] Qualities like determination, leadership, and proper work ethic are lessons that these players will benefit from throughout their lives. Arguably, it is likely that the students who play for a great coach like Coach Williams will utilize the lessons they learned under his guidance more than those learned in certain lecture halls. Through this lens, coaches must be free to pursue the type of offense, defense, and practice styles they believe to be the most successful without the fear of outside interference.

Like the "trees on the quad" scenario, one may argue that the issues over managing team dichotomy could perhaps fall under an inter-office dispute, barred by *Connick*.[164] However, unlike the number of trees the university chooses to plant, a coach's methods of teaching usually touch on public concern since often times millions of individuals follow these decisions and the progress of their favorite team. Therefore, decisions reflecting a university coach's area of expertise that implement values upon his student-athletes should be free from official reprimand and not subject to *Garcetti* restrictions.

One final scenario that I will explore is a coach's speech in regards to refusing to comply with policies implemented by the university that contradict NCAA policy. Here, a coach's right to speech should be most protected and not subject to *Garcetti*. For instance, if a university implements a policy to give out illegal scholarships to certain individuals, or to contravene NCAA guidelines by providing its players with monetary rewards, a coach should not need to worry about losing his job for disagreeing with the flawed policies. Even at the high school level, courts have acknowledged that coaches speaking out against illicit practices by the

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[163] *Id.*

[164] Connick v. Myers, 461 U.S. 138, 143 (1983).

institution are entitled to First Amendment protection.[165] Therefore, when engaging in this sort of speech, *Garcetti* should not even enter the realm of discussion and courts should be interested in promoting the compliance of positive regulations.

Part V: Conclusion

If coaches are not accorded these freedoms, it would be disastrous to our student athletes, who would be robbed of the opportunity to benefit from the knowledge of some of the brightest and most successful individuals in the university community. This comment does not attempt to make the argument that coaches should be insulated from being fired at all times. When a coach does not perform to expectations, or he does not provide for satisfactory records or recruitments year after year, he should be fired for his inadequacies. This article additionally does not allege that all coaches and all speech should be guaranteed to the limited protection articulated in *Pickering* and *Connick*. However, when a college coach is speaking on matters of public concern related to his official duties of managing his team or about policies relating to the sports program, he should be afforded the protection *Adams* suggests that university professors enjoy.[166]

Applying a *Garcetti* analysis to the academic realm is beyond the purpose the Supreme Court envisioned for its holding.[167] Unlike other types of public employees, professors and coaches are not hired to promote government ideas.[168] They are hired to convey their views and impart the nation's youth with knowledge they have acquired over several years of intense studying and

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[165] Bowman v. Pulaski County Special Sch. Dist., 773 F.2d 640, 643 (8th Cir. 1983)
[166] *Adams*, 640 F.3d at 564.
[167] Beckstrom, *supra* note 68 at 1227
[168] *Id.*

preparation, with the hopes of eventually leaving their impact on the lives of those who were fortunate enough to benefit from their instruction[169]

[169] See Generally *Id.*