GUARDING THE IVORY TOWER: THE DUTY OF THE UNIVERSITY TO DEFEND AND INDEMNIFY FACULTY PUBLICATIONS

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I. INTRODUCTION

Universities and the public alike are quick to condemn professors who misrepresent facts in their research. When Emory University professor Michael Bellesiles was accused of creating "unprofessional and misleading work" in his book regarding possession of firearms in colonial America, he resigned from his position, and his Bancroft Prize was rescinded by Columbia University.[1] The University of Colorado is conducting an ongoing investigation into Professor Ward Churchill's research methods, the result of accusations of plagiarism and fabrications that followed his controversial essay regarding September 11.[2] These examples are not anomalous; it seems that every few months there is another reported accusation of scholarly misconduct.[3] In light of these investigations and sanctions, and the public outrage that accompanied them, it is odd that universities would allow professors to misrepresent their ideas in publications, for fear of legal repercussions. Yet this is exactly the case, since universities require their professors to publish without providing any legal defense or indemnification when lawsuits arise from these publications; rather than face costly litigation, professors are apt to think twice before writing about controversial issues.[4]

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1. Robert F. Worth, *Prize for Book is Taken Back from Historian*, N.Y. TIMES, Dec. 14, 2002, at C4.

2. Kirk Johnson, *University Changes Its Focus In Investigation of Professor*, N.Y. TIMES, Mar. 26, 2005, at A9.

3. *See, e.g.*, Karen W. Arenson, *SUNY Classics Professor is Accused of Plagiarism*, N.Y. TIMES, Feb. 22, 2002, at B1 (professor Louis Roberts of the State University at Albany resigned his chairmanship after being accused of plagiarizing Latin texts); Associated Press, *Former Professor Pleads Guilty in Fraud Case*, N.Y. TIMES, Apr. 5, 2005, at A19 (former medical school professor Eric Poehlman resigned from the University of Vermont after accusations that he fabricated research on menopause); Anthony Faiola & Rick Weiss, *South Korean Panel Debunks Scientist's Stem Cell Claims; Fraud Finding is Another Setback in Cloned Embryo Research*, WASH. POST, Jan. 10, 2006, at A9 (panel investigating a South Korean stem cell scientist concluded that his experiments were largely falsified and he never obtained stem cells from cloned embryos).

4. *See* Scott Jaschik, *Twisting in the Wind*, INSIDE HIGHER ED, Nov. 30, 2005, http://insidehighered.com/news/2005/11/30/liability.

Merle Weiner, a law professor at the University of Oregon, published an article regarding domestic violence in the *University of San Francisco Law Review*.[5] When a party who was referenced in the article for his part in a court case threatened to sue, Weiner turned to the University of Oregon for assistance.[6] Unfortunately, the University refused to provide legal defense for Weiner and instead urged her to request that the journal remove the offending reference.[7] Eventually, the *University of San Francisco Law Review* removed the reference, a decision that was "dictated by in-house counsel."[8] Weiner and other legal scholars contend that the University's refusal to defend her work violated her academic freedom.[9] The University of Oregon stated that its decision was justified because it did not participate in Weiner's relationship with the law review, and Weiner had agreed to indemnify the University of San Francisco against actions arising from the article.[10] On the other hand, Weiner argues that the University required her to publish as a condition of employment, and therefore must provide indemnification.[11]

This article will illustrate that the current legal protections available to professors at public universities are inadequate to guarantee a legal defense or indemnification in suits arising from their scholarly publications. It will argue that a university's requirement that professors publish, coupled with its refusal to provide legal protection, not only endangers academic freedom and the free exchange of ideas but also amounts to a compulsory self-censorship that is prohibited by the First Amendment. This article is limited in purview to public universities, but professors at private universities are similarly exposed to the prohibitive costs of lawsuits arising from their publications.[12] Since this article focuses on the First Amendment violations inherent in a university's refusal to provide legal defense and indemnification, it is limited to universities that are government actors.[13]

I will begin by examining the preliminary questions that must be answered before assessing a university's duty to defend: whether universities in fact require professors to publish, and which publications a university is obligated to defend. I will then provide a background of the contractual and statutory provisions that may require a university to indemnify its professors. In Part III, I will illustrate the First Amendment and academic freedom arguments available to professors,

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See* Mike Musgrove, *Digital-Music Code Crackers Tell All; Scientists Present Paper in D.C. After Months of Legal Threats*, WASH. POST, Aug. 16, 2001, at E3.
13. *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

and describe how these arguments fail to provide a guaranteed right to legal defense. Finally, I will show that it is necessary to reformulate the public university professor's status under the doctrine provided in *Pickering v. Board of Education* in order to compel universities to provide legal defense and avoid serious threats to academic freedom and free inquiry.

II. PRELIMINARY MATTERS

An examination of the public university's duty to defend and indemnify its professors cannot begin without determining certain facts. First, the university surely cannot have a duty to defend its professors if it does not require the professors to publish the works from which the lawsuits arise; therefore, it is necessary to establish that universities do require their professors to publish scholarly works. Next, it is necessary to define the scope of publications for which the university is obligated to provide defense and indemnification.

A. THE REQUIREMENT TO PUBLISH

The University of Oregon denied having any specific requirement that faculty members publish as part of their professorial duties.[14] The University characterized publication as a "general obligation" rather than a "specific assignment."[15] The question, of course, is whether this distinction is accurate, and if so, whether it matters.

The University of Oregon's *Faculty Guide to Promotion and Tenure* states that "the steady, regular expenditure of time and effort in research and creativity in the various disciplines" is a primary basis for evaluation, promotion, and tenure.[16] This is not a unique requirement; the University of California's criteria for appointment and advancement include research and creative work, stating, "There should be evidence that the candidate is continuously and effectively engaged in creative activity of high quality and significance."[17] Similar requirements of scholarly publication and research exist at most public and private universities as prerequisites for appointment, promotion, and retention.[18]

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14. Jaschik, *supra* note 4.

15. *Id.*

16. UNIVERSITY OF OREGON, FACULTY GUIDE TO PROMOTION AND TENURE, http://academicaffairs.uoregon.edu/tenureguide/scholarship.html (last visited Feb. 5, 2006).

17. UNIVERSITY OF CALIFORNIA, ACADEMIC PERSONNEL MANUAL §210 at 6 (July 1, 2005), www.universityofcalifornia.edu/senate/committees/ucaad/apm210.pdf.

18. *See, e.g.*, BOSTON COLLEGE, BYLAWS OF THE TRUSTEES OF BOSTON COLLEGE, http://www.bc.edu/bc_org/avp/acavp/avpofc/Statutes/bylaws.html#ch2sec9 (last visited Feb. 5, 2006) (stating that the responsibilities of the faculty shall include "involvement in scholarly

The University of Oregon does not specifically outline its publishing requirements, and so it may characterize the duty to publish as a "general obligation."[19] It is difficult to understand, however, why a "general obligation" is any less of a requirement than a "specific assignment." Each of these universities' faculty handbooks makes it clear that promotion and retention is based upon publication of research. In effect, publication of scholarly work is a condition of employment.

B. WHAT KIND OF PUBLICATION GIVES RISE TO A DUTY TO DEFEND?

Although this article contends that public universities must provide legal defense in lawsuits arising from professors' scholarly publications, it does not purport to make the university responsible for all manner of publications, regardless of content or context. The need to narrowly define the class of publications that a university must defend is obvious in the example employed by Kevin Oates in *Professor Defend Thyself: The Failure of Universities to Defend and Indemnify Their Faculty.*[20] Oates uses the example of Professor James Fyfe of Temple University to illustrate the injustice caused by universities who refuse to defend their professors.[21] Professor Fyfe was served with a libel complaint in 2001 pursuant to an op-ed piece written by him and published in the *Philadelphia Inquirer*; Temple's University Counsel's office declined Fyfe's request for defense and indemnity in the lawsuit.[22]

The example of Professor Fyfe's experience at Temple University serves Oates' purpose of exposing "the pitfalls created when professors assume that the existence of a defense and indemnity clause in the document governing the terms of employment means that their university will easily come to their defense if a complaint is served."[23] Yet Temple's reason for declining to represent Fyfe in the lawsuit is

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research" and "scholarly publication"); UNIVERSITY OF COLORADO, LAWS OF THE REGENTS APPENDIX A, http://www.cusys.edu/regents/Laws/AppendixA.html (last visited Feb. 5, 2006) (stating that in making appointment, reappointment, tenure and promotion recommendations, evaluators must review the candidate's performance in "the scholarly, creative and/or research work of the candidate"); UNIVERSITY OF MICHIGAN, FACULTY HANDBOOK §5.B, http://www.provost.umich.edu/faculty/handbook/5/5.B.html (last visited Feb. 5, 2006) (stating that the qualifications of members of the faculty "are to be evaluated on the quality of their published and other creative work"); WEST VIRGINIA UNIVERSITY, PROCEDURES FOR ANNUAL FACULTY EVALUATION, PROMOTION AND TENURE 3, http://www.wvu.edu/~acadaff/fac/policies/PTGuidelines06.pdf (last visited Feb. 5, 2006) (stating that faculty responsibilities are defined in terms of activities undertaken in teaching, research and service, and that faculty evaluation is based primarily upon a review of performance in these areas).

19. Jaschik, *supra* note 4.

20. 39 WILLAMETTE L. REV. 1063, 1067-70 (2003).

21. *Id.*

22. *Id.* The Philadelphia police officer's union instituted the lawsuit, alleging libel for Fyfe's suggestion in the piece that a member of the union had the motivation to leak information to the press. *Id.* at 1069.

23. *Id.* at 1070.

compelling: the University reasoned that Fyfe acted in his "'private capacity,' without Temple's authority or permission."[24] If Professor Fyfe's op-ed piece was not required as part of his duties as a professor, and not requested by Temple, his employer, why should the University have a duty to protect Fyfe from lawsuits arising from the piece?

In order to prevent the inequitable situation in which a university is required to defend publications that did not arise from the professor's employment duties, the university's duty to defend professors' publications should be strictly limited to those publications that are required as part of employment.[25] It stands to reason that a university is not obligated to defend professors in lawsuits stemming from publications that the university did not require.[26] Therefore, it is necessary to outline which publications are required and which are not.

The University of California faculty handbook states that publications are considered creative work or research for the purposes of promotion, retention, and appointment when they present new ideas or original scholarly research.[27] This definition of research excludes textbooks, data reports, or other work that is either not scholarly or does not present new and original ideas.[28] For the purposes of this article, this definition will provide the parameters for scholarly publications for which the university must provide legal defense.

III. CONTRACTUAL AND STATUTORY DUTIES

There are several potential sources of defense and indemnification for professors' scholarly works contained in contractual and statutory provisions.[29] This section will explore the indemnification provisions in

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24. *Id.*

25. *See id.* at 1067-70; Jaschik, *supra* note 4. Both Temple University and the University of Oregon indicated that it is reasonable to require a university to provide defense for publications that are part of a professor's duties or assignments as an employee.

26. *See* note 25, *supra*.

27. UNIVERSITY OF CALIFORNIA, *supra* note 17. Similarly, the University of West Virginia defines research for the purposes of faculty promotion and evaluation as involving "the creation and synthesis of knowledge, the creation of new approaches to understanding and explaining phenomena, the development of new insights, the critical appraisal of the past, artistic creation and performance, and the application of knowledge and expertise to address needs in society and in the profession." WEST VIRGINIA UNIVERSITY, FACULTY HANDBOOK §4.3.1, http://www.wvu.edu/~acadaff/fac/Handbook/part4.html (last visited Feb. 5, 2006).

28. UNIVERSITY OF CALIFORNIA, *supra* note 17.

29. *See, e.g.*, FLA. STAT. § 768.28(9) (2005); MASS. GEN. LAW ch. 258, § 9 (2005); N.J. STAT. ANN. § 59:10A-1 (2005); UNIVERSITY OF OREGON, FACULTY HANDBOOK, http://academicaffairs.uoregon.edu/handbook/Chapter03.html (last visited Feb. 5, 2006); THE UNIVERSITY OF VERMONT, OFFICER AND EMPLOYEE INDEMNIFICATION POLICY, http://www.uvm.edu/~riskmgmt/?Page=insurance/idemnificationpolicy.html&SM=insurance/insurance claims_submenu.html (last visited Feb. 5, 2006); CHICAGO-KENT J. INTELL. PROP, SAMPLE PUBLICATION AGREEMENT, http://jip.kentlaw.edu/sample_agreement.htm (last visited Feb. 21, 2006); JOURNAL OF GRAPH ALGORITHMS AND APPLICATIONS, PUBLICATION AGREEMENT,

employment contracts and publication agreements as well as state statutory provisions concerning the indemnification and defense of public employees.

A. DUTY INCURRED THROUGH CONTRACTUAL PROVISIONS

1. UNIVERSITY EMPLOYMENT CONTRACTS

One product of the collective bargaining process for faculty employment is that many universities' employment contracts contain an indemnification clause.[30] At the University of Vermont, for example, the University Indemnification Policy states that the University will provide its employees a legal defense "in connection with the defense or resolution of external civil actions filed...in connection with their performance of University duties."[31] Even the University of Oregon provides a measure of indemnification for its faculty; the University's faculty handbook provides that when a legal action is initiated as a result of "professional activity undertaken within the normal scope of employment," the faculty member may request counsel with the state's Attorney General.[32]

Although at first glance these indemnification provisions appear to provide legal protection for professors, the ambiguity of the "scope of employment" provisions enables universities to exclude professors' publications from coverage.[33] In addition, it is unlikely that an indemnification clause will specify a procedure for determining whether an employee acted within the scope of his or her employment.[34] Kevin Oates provides the example of Professor Fyfe's experience enforcing the collective bargaining agreement at Temple University.[35] Temple's collective bargaining agreement with Professor Fyfe's union stated that the University would indemnify union members in suits arising in connection with their responsibilities at Temple.[36] Still, when Professor

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http://www.cs.brown.edu/publications/jgaa/agreement.html (last visited Feb. 21, 2006); JOURNAL OF SOCIAL WORK VALUES AND ETHICS, PUBLICATION AGREEMENT, http://www.socialworker.com/jswve/content/view/6/29/ (last visited Feb. 21, 2006); UNIVERSITY OF CHICAGO PRESS, PUBLICATION AGREEMENT, http://www.journals.uchicago.edu/GenPubAgree.pdf (last visited Feb. 21, 2006).

30. *See, e.g.*, Oates, *supra* note 20, at 1071-72; UNIVERSITY OF OREGON, FACULTY HANDBOOK, *supra* note 29; THE UNIVERSITY OF VERMONT, *supra* note 29.

31. THE UNIVERSITY OF VERMONT, *supra* note 29.

32. UNIVERSITY OF OREGON, FACULTY HANDBOOK, *supra* note 29.

33. *See* Oates, *supra* note 20, at 1070.

34. *See id.* at 1071.

35. *See id.*

36. *Id.* ("Temple shall maintain coverage to insure bargaining unit members against liability claims or suits (including coverage against libel and slander claims) in connection with their

Fyfe requested assistance from Temple, the University's general counsel responded that his piece was written in a private capacity containing personal thoughts, and it declined to provide any assistance.[37]

Professor Fyfe's publication may not fit into the category of materials that this article argues must be defended by the university, but his circumstances illustrate the fact that even when an indemnification clause exists, a university will likely not consider using it to defend a professor's publications.[38] Temple's reasoning was not that Fyfe's publication was not scholarly, but that it was personal opinion; while the content of journal articles is scholarly, they may also be classified in many instances as personal opinion.[39]

Professors will probably fare no better at convincing courts that scholarly publications fall within the "professional capacity" or "scope of employment" category in an indemnification clause.[40] In many jurisdictions, contractual provisions that indemnify a person against the consequences of his or her own negligence are interpreted strictly, with favor given to the indemnitor.[41] In New York, for example, indemnification provisions are construed in favor of the indemnitee only if "the intent is unmistakable and unequivocal."[42] It is unlikely that an unmistakable intent to indemnify professors in lawsuits arising from the professors' publications will be found in these states when an indemnity provision uses ambiguous "scope of employment" language like that employed by the University of Oregon.[43]

Although most states favor the indemnitor or construe indemnity provisions against the indemnitee, Alabama courts may interpret indemnification provisions differently.[44] According to Alabama law, a court must consider the language of the contract, the identity of the drafter, and the indemnitee's retention of control.[45] Courts are to interpret ambiguous language in an indemnity agreement against the drafter.[46] Since an employment contract for a professor is likely to be drafted by the university, it is possible that a court might interpret the

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responsibilities to Temple or at Temple. All such liability coverage shall be in an amount no less than $1,000,000 per incident.")

37. *Id.* at 1075.

38. *Id.* at 1076.

39. *Id.* at 1075.

40. *See, e.g.*, Caldwell Trucking v. Rexon Technology Corp., 421 F.3d 234, 244 (3rd Cir. 2005); Patton v. TPI Petroleum, Inc., 356 F. Supp. 2d 921, 927 (E.D. Ark. 2005); Freeman v. Witco Corp., 108 F. Supp. 2d 643, 645 (E.D. La. 2000); Harris v. Howard Univ., Inc., 28 F. Supp. 2d 1, 14 (D.D.C. 1998).

41. *See* note 40, *supra*.

42. Williams v. J.P. Morgan & Co., 248 F. Supp. 2d 320, 326 (S.D.N.Y. 2003).

43. *See, e.g., Caldwell*, 421 F.3d at 244; *Patton*, 356 F. Supp. 2d at 927; *Williams*, 248 F. Supp. 2d at 326; *Freeman*, 108 F. Supp. 2d at 645; *Harris*, 28 F. Supp. 2d at 14.

44. *See* Royal Ins. Co. of America v. Whitaker Contracting Corp., 242 F.3d 1035, 1041 (11th Cir. 2001); Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 946 (Ala. 1983).

45. *See Whitaker*, 242 F.3d at 1041; *Brown*, 431 So. 2d at 946.

46. *See Whitaker*, 242 F.3d at 1042; *Brown*, 431 So. 2d at 946.

ambiguous language in the contract in the professor's favor, and find that scholarly publications are within a professor's scope of employment and that any lawsuits arising from them are covered by the indemnification provision. Still, Alabama courts must consider the degree of control that the indemnitee retains over the activity giving rise to liability; the more control retained, the less likely a court is to force the indemnitor to bear responsibility.[47] This consideration makes it less likely that a professor would succeed in convincing a court that his or her employment contract's indemnification provision covers publications, since the professor retains almost all of the control over scholarly works.

In many states, it is highly unlikely that a professor would succeed in enforcing a contractual indemnity provision to receive protection in a lawsuit arising from a scholarly publication.[48] Even if a professor could enforce such a provision in a few states, his or her chance of success is not secure enough to avoid the chilling effect on scholarly work.[49] Therefore, it is necessary to pursue other potential sources of a public university's duty to defend and indemnify.

2. PUBLICATION AGREEMENTS

Another possible source of contractual indemnity and legal defense for professors might be a publication agreement that a professor enters into with a scholarly journal.[50] This avenue, however, seems unlikely. Most academic journals assign the duty to defend and indemnify to the author in the terms of the publication agreement.[51] The *Pierce Law Review*, for example, requires an author to warrant that the article does not infringe upon another's copyright or property rights and is not defamatory or otherwise unlawful, and further states that "[t]he Author will indemnify and hold harmless Franklin Pierce Law Center and the

47. *Whitaker*, 242 F.3d at 1041; *Brown*, 431 So. 2d at 946.

48. *See, e.g.*, Caldwell Trucking v. Rexon Technology Corp., 421 F.3d 234, 244 (3rd Cir. 2005); Patton v. TPI Petroleum, Inc., 356 F. Supp. 2d 921, 927 (E.D. Ark. 2005); Williams v. J.P. Morgan & Co. Inc., 248 F. Supp. 2d 320, 326 (S.D.N.Y. 2003); Freeman v. Witco Corp., 108 F. Supp. 2d 643, 645 (D. La. 2000); Harris v. Howard Univ., Inc., 28 F. Supp. 2d 1, 14 (D.D.C. 1998).

49. *See* Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)); Royal Ins. Co. of America v. Whitaker Contracting Corp., 242 F.3d 1035, 1041 (11th Cir. 2001); Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 946 (Ala. 1983).

50. *See, e.g.*, CHICAGO-KENT J. OF INTELL. PROP., *supra* note 29; JOURNAL OF GRAPH ALGORITHMS AND APPLICATIONS, *supra* note 29; JOURNAL OF SOCIAL WORK VALUES AND ETHICS, *supra* note 29; UNIVERSITY OF CHICAGO PRESS, *supra* note 29; NEW MEXICO LAW REVIEW, PUBLICATION AGREEMENT, lawschool.unm.edu/nmlr/pub-agree.php (last visited Feb. 21, 2006); NORTH CAROLINA STATE UNIVERSITY, ELECTRONIC PUBLICATION AGREEMENT, www.ncsu.edu/meridian/Forms/elec_agr.pdf (last visited Feb. 21, 2006); PIERCE LAW REVIEW, PUBLICATION AGREEMENT, www.lawreview.piercelaw.edu/permissionform.pdf (last visited Feb. 21, 2006).

51. *See* note 50, *supra*.

Law Review, its licensees and distributes, against any damages, losses, or expenses incurred as a result of the Author's breach of any of the above warranties."[52] Similarly, the *Journal of Graph Algorithms and Applications*' publication agreement states that "[t]he Author shall indemnify and continue to indemnify the Editors-in-Chief and Managing Editor of JGAA against any suit, demand, claim or recovery, finally sustained, by reason of any violation of proprietary right or copyright, or any unlawful matter contained in the Paper."[53]

The *University of New Mexico Law Review*'s sample publication agreement does not specifically state that the author must indemnify the Law Review against lawsuits arising from the author's article.[54] Neither does it assign the duty of defense and indemnification to the Law Review.[55] However, the lack of specificity in the *University of New Mexico Law Review*'s agreement does no more to assure professors the ability to pen their ideas free from the threat of expensive litigation than that of the *Pierce Law Review* or the *Journal of Graph Algorithms and Applications*. Only a publication agreement that explicitly assigned the duty to defend and indemnify the publication to the journal or law review instead of the individual professor would succeed in alleviating the chilling effect on academic inquiry that exists when a professor must take into account the possibility of litigation arising from his or her publications. It appears unlikely that many journals, if any at all, are willing to take on this responsibility.[56]

B. DUTY TO DEFEND A PUBLIC EMPLOYEE UNDER STATE STATUTES

At a public university, the duty to defend professors in lawsuits arising from publications may stem from a state statute providing either defense by the attorney general or indemnity.[57] These statutes typically

52. PIERCE LAW REVIEW, *supra* note 50.

53. JOURNAL OF GRAPH ALGORITHMS AND APPLICATIONS, *supra* note 29.

54. NEW MEXICO LAW REVIEW, *supra* note 50.

55. *Id.*

56. *See, e.g.*, note 50, *supra*.

57. *See, e.g.*, FLA. STAT. § 768.28(9)(a) (2005) ("(n)o officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); MASS. GEN. LAW ch. 258, § 9 (2005) ("[p]ublic employers may indemnify public employees, and the commonwealth shall indemnify persons holding office under the constitution, from personal financial loss, all damages and expenses, including legal fees and costs, if any, in an amount not to exceed $ 1,000,000 arising out of any claim, action, award, compromise, settlement or judgment by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law, if such employee or official or holder of office under the constitution at the time of such intentional tort or such act or omission was acting within the scope of his official duties or employment"); N.J. STAT. ANN. § 59:10A-1 (2005) ("[e]xcept as provided in section 2 hereof, the Attorney General

require the state to defend public employees in civil actions arising from an act or omission occurring in "the scope of employment," or "the performance of duty."[58] Many courts determine whether an employee's actions were within the scope of employment under public employee indemnification statutes in the same way that they would under respondeat superior.[59]

In 1995, for example, the Supreme Court of California found that a deputy sheriff who sought indemnity from the county, under the California Tort Claims Act's public employee indemnity provision, for a lawsuit arising from lewd and offensive comments to fellow employees, was not entitled to indemnity because his actions were outside the scope of employment.[60] In that case, the court stated that the phrase "scope of employment" is intended to be interpreted by the same principle used in cases involving actions by third persons against an employer for the torts of an employee, namely, whether the risk was one "that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer."[61]

Similarly, the Massachusetts Supreme Judicial Court stated that when considering the scope of employment under Massachusetts General Laws Chapter 258 Section 9(A), which provides indemnity for police officers, it would apply common law respondeat superior principles.[62] The court went on to describe the respondeat superior test as a consideration of whether the act is within the course of employment and in furtherance of the employer's work, with particular attention paid to "whether the conduct complained of is of the kind the employee is hired to perform, whether it occurs within authorized time and space limits, and whether 'it is motivated, at least in part, by a purpose to serve the employer.'"[63]

Under these interpretations of the scope of employment, it is difficult to say whether a professor's publications would be covered by a state's indemnification provision. The answer would rely heavily on a

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shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment"); N.Y. PUB. OFF. LAW § 17(2)(a) (2005) ("[u]pon compliance by the employee with the provisions of subdivision four of this section, the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties"); OR. REV. STAT. § 30.285(1) (2005) ("The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty").

58. *See* note 57, *supra*.

59. *See, e.g.*, Farmers Ins. Group v. County Of Santa Clara, 906 P. 2d 440, 444 (Cal. 1995); Pinshaw v. Metropolitan Dist. Comm., 524 N.E. 2d 1351, 1356 (Mass. 1988).

60. *Farmers Group*, 906 P. 2d at 444.

61. *Id.* at 447-48 (internal citation omitted).

62. *Pinshaw*, 524 N.E. 2d at 1356.

63. *Id.*

court's conception of the general enterprise undertaken by a university and the work that a professor is hired to perform. Whatever the outcome, the fact that a professor's protection under state indemnification statutes is highly uncertain is enough to cause a chilling effect on the professor's work product.

IV. A CONSTITUTIONAL DUTY TO DEFEND

A. FIRST AMENDMENT PROHIBITIONS ON CENSORSHIP

The University of Oregon's refusal to defend Ms. Weiner may amount to a violation of her First Amendment right to free speech. The Supreme Court has made it evident that Congress may not achieve an unconstitutional restriction on free speech through an otherwise legitimate restraint.[64] In this case, a public university's seemingly legitimate decision not to defend and indemnify forces professors to censor their own work in order to ensure that it will not incite litigation, for fear of the prohibitive cost of mounting a legal defense. This kind of restriction on free speech by the university, a state actor, is at first glance unconstitutional. However, it is necessary to take into account whether a university may further restrict a professor's speech due to his or her status as a public employee.[65]

The Supreme Court has made it clear that a professor, as a public employee, does not relinquish his or her First Amendment rights upon stepping onto the campus.[66] On the other hand, it has acknowledged that, as an employer, the state has the same interests in regulating employee speech as a private employer.[67] The Court developed a test in *Pickering v. Board of Education* to determine whether a public employee's speech should be protected under the First Amendment, balancing the interests of the employee as a citizen in commenting on

64. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 583 (1972) (stating that a state may in general grant or withhold the privilege of teaching in a public school on conditions, but that the Court has rejected that thesis in numerous cases); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (holding that the Postmaster General may not achieve a limitation on freedom of speech by withdrawal of mailing privileges); Am. Communications Ass'n. v. Douds, 339 U.S. 382, 402 (1950) (finding that the withdrawal of access to the National Labor Relations Board for labor organizations who declined to file affidavits disavowing affiliation with the Communist party was an unconstitutional restraint on freedom of speech).

65. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 143-47 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

66. *See* U.S. v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995); *Connick*, 461 U.S. at 143-47; *Pickering*, 391 U.S. at 568.

67. *See Pickering*, 391 U.S. at 568.

matters of public concern and the interests of the state as an employer in promoting efficient public service.[68]

The Supreme Court has subsequently interpreted the *Pickering* test as requiring a threshold inquiry as to whether the employee is speaking as a citizen on a matter of public concern.[69] A court must distinguish this type of speech from speech made "as an employee upon matters only of personal interest."[70] In *Connick v. Myers*, the Court stated that in order to determine whether an employee's speech dealt with a matter of public concern, the court must look at the "content, form, and context of a given statement," and that speech relating to "any matter of political, social, or other concern to the community" should be considered speech on a matter of public concern.[71]

Although the Supreme Court seems to give an explicit test for determining whether an employee speaks as a citizen on a matter of public concern, the lower courts differ on their application of the standard.[72] In particular, appellate courts have struggled with interpreting *Connick*'s distinction between speech as a citizen on matters of public concern and speech as an employee upon matters of private interest.[73] The cause of confusion was whether, under *Pickering* and *Connick*, a public employee could qualify under the threshold test when his or her speech was uttered in the course of fulfillment of his or her employment duties.[74] This issue often arose when a public employee engaged in "whistleblowing," reporting the misconduct of fellow government employees.[75] When appellate courts confronted the question of whether to protect public employee speech uttered in the course of fulfilling employment duties, some chose to apply a per se rule that this

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68. *Id.*

69. *See Connick*, 461 U.S. at 146-48.

70. *Id.* at 147.

71. *Id.* at 146-48.

72. *Compare* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679-80 (6th Cir. 2001), *with* Urofsky v. Gilmore, 216 F.3d 401, 407-09 (4th Cir. 2000).

73. *See Connick*, 461 U.S. at 147. *See also* Ceballos v. Garcetti, 361 F.3d 1168, 1175-78 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473); Rodgers v. Banks, 344 F.3d 587, 598-99 (6th Cir. 2003); Gonzalez v. City of Chicago, 239 F.3d 939, 939-942 (7th Cir. 2002); Baldassare v. New Jersey, 250 F.3d 188, 196-97 (3rd Cir. 2001); Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 366 (5th Cir. 2000); *Urofsky*, 216 F.3d at 407-09; Lewis v. Cowen, 165 F.3d 154, 164-65 (2nd Cir. 1999); Dill v. City of Edmond, 155 F.3d 1193, 1202-03 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996); O'Connor v. Steeves, 994 F.2d 905, 913-15 (1st Cir. 1993).

74. *See Ceballos*, 361 F.3d at 1175-78; *Rodgers*, 344 F.3d at 598-99; *Baldassare*, 250 F.3d at 196-97; *Urofsky*, 216 F.3d at 407-09.

75. *See Ceballos*, 361 F.3d at 1170-72 (involving a deputy district attorney who informed defense counsel that information in a search warrant affidavit was false); *Rodgers*, 344 F.3d at 592-93 (involving a director of quality management who wrote a memo concerning the compromise of patient privacy created by a psychiatrist who moved his office to a patient floor); *Baldassare*, 250 F.3d at 192-94 (concerning an investigator in county prosecutor's office who investigated an automotive scam that implicated other employees in the office); *Dill*, 155 F.3d at 1200-01 (concerning a police officer who voiced his concern that the department's findings of fact in a homicide case may have been false); *Fikes*, 79 F.3d at 1080-81 (involving a police officer who reported misconduct by other officers to the state bureau of investigation).

type of speech is not protected, while others came to an opposite conclusion.[76]

In *Baldassare v. New Jersey*, for example, the Third Circuit rejected the defendant's claim that the plaintiff's whistleblowing speech was not a matter of public concern because it was uttered in the course of his employment duties.[77] The *Baldassare* court discounted the defendant's reliance on an Eleventh Circuit case because the facts were not analogous, and stated that the court declined to distinguish between expression as an employee and as a citizen, but instead focused on the value of the speech itself.[78] Similarly, the Sixth Circuit rejected a per se rule in *Rodgers v. Banks* by overturning the district court's finding that the employee's memo was not on a matter of public concern because it was written in the course of employment.[79] In that case, the court stated that, in accordance with *Connick*, it focused on the point of the speech, as opposed to the role of the speaker.[80]

Several other circuits have impliedly rejected the per se rule; although they did not explicitly discuss it, they each found that an employee spoke on a matter of public concern even though the employee's speech occurred in the course of fulfillment of employment duties.[81] Both the Tenth and the Eleventh Circuits encountered this issue in the context of police officers who revealed misconduct within their departments.[82] The Second Circuit addressed the issue by finding that the speech of a state lottery spokesman who refused to publicly support a change in the lottery system was a matter of public concern.[83]

The Fourth Circuit diverged significantly from the others, by adopting a per se rule that public employee speech is not protected under the First Amendment when it is uttered in the course of fulfillment of employment duties.[84] In *Urofsky v. Gilmore*, the Fourth Circuit interpreted *Connick*'s language as a mandate to examine not only the public or private nature of the language at issue, but also "whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'"[85] The court determined that state university professors' access to research materials on computers owned or leased by the state was within the professors' roles as employees, and therefore

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76. *See Ceballos*, 361 F.3d at 1175-78; *Rodgers*, 344 F.3d at 598-99; *Baldassare*, 250 F.3d at 196-97; *Urofsky*, 216 F.3d at 407-09.

77. *Baldassare*, 250 F.3d at 196-97.

78. *Id.* at 196-97.

79. *Rodgers*, 344 F.3d at 598.

80. *Id. at* 597-99.

81. *See* Lewis v. Cowen, 165 F.3d 154, 164-65 (2nd Cir. 1999); Dill v. City of Edmond, 155 F.3d 1193, 1202-03 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996); O'Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993).

82. *See Dill*, 155 F.3d at 1200-01; *Fikes*, 79 F.3d at 1080-81.

83. *Lewis*, 165 F.3d at 164-65.

84. *See* Urofsky v. Gilmore, 216 F.3d 401, 407-09 (4th Cir. 2000).

85. *Id.* at 407 (quoting Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986)).

could not be speech by a citizen on a matter of public concern.[86] The *Urofsky* court stated that it is necessary to focus on the role of the employee in this way because many public employees' duties involve matters "of vital concern to the public," and the *Pickering* test should not give them "a First Amendment right to dictate to the state how they will do their jobs."[87]

The Supreme Court eventually put an end to the differences of opinion in the lower courts, at least with respect to whistleblower cases. In 2004, the Ninth Circuit faced the issue of whistle-blowing as protected speech under the First Amendment in *Ceballos v. Garcetti*.[88] The court addressed the question of whether a per se rule should be adopted, but rejected both the general per se rule and a more narrow version that would protect all employee public concern speech except that uttered within routine reports or routine job functions.[89] The court focused on the fact that a per se rule would undermine the ability of the public to maintain the integrity of governmental operations by receiving information from whistleblowers.[90] It also noted that a public employee's speech should not be denied First Amendment protection just because he or she reported misconduct to a supervisor rather than bringing the information to the news media.[91] The Supreme Court granted certiorari and issued a decision in May of 2006.[92]

The Supreme Court's decision, *Garcetti v. Ceballos*, considered the facts pertaining to a whistleblower in a public employment setting, but its holding applies much more broadly.[93] 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."[94] The reasoning in the case was firmly based on the case law that preceded it, namely *Pickering* and *Connick*. The *Garcetti* decision pointed to the policies elaborated in *Pickering* and *Connick*, stating that First Amendment protection of public employee speech should be extended in order to promote public employees' ability to enjoy the same liberties in their private lives that any other citizen would, and, at the same time, stating that the government needs to maintain control over its employees in order to fulfill its public services.[95] Consistent with these policies, the Court reasoned, is the determination that restricting the speech of a public employee whose

86. *Urofsky*, 216 F. 3d at 408-409.
87. *Id.* at 407.
88. 361 F.3d 1168, 1175 (9th Cir. 2004).
89. *Id.* at 1175, 1177-78.
90. *See id.* at 1175.
91. *Id.* at 1174.
92. *See* Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).
93. *See id.* at 1960.
94. *Id.* at 1960.
95. *See id.* at 1958-59.

speech fulfills part of his or her employment duties "does not infringe any liberties the employee might have enjoyed as a private citizen."[96]

Garcetti briefly mentioned its applicability to academia at its conclusion. The Court stated that it may be argued that the Court's holding and the traditional employee-speech jurisprudence are ill-suited for problems arising in educational settings, but declined to make any further determination.[97] Still, the case's holding indicates such broad application that it is unclear whether lower courts will choose to apply the *Garcetti* reasoning to public university professors who claim that a university violated their First Amendment free speech rights.[98] It is likely that the Fourth Circuit will continue to apply the per se rule against protection of speech made in the fulfillment of employment duties to public university professors, since the Supreme Court's ruling did not specifically outlaw this.[99] What will happen in the other circuits? Prior to *Garcetti*, the Sixth Circuit construed *Connick* to require analysis only of whether the nature of an employee's speech was public or private.[100] Now that the Court has indicated that constitutional protection is dependent on the context in which the employee speaks, it is impossible to predict how the Sixth Circuit would decide a similar case. Absent a clear mandate from the Supreme Court, it is impossible for a professor to predict whether he or she would be successful in enforcing his or her First Amendment rights.[101] This is not sufficient to alleviate the chilling of academic inquiry that occurs when professors are unsure as to whether they will be exposed to the costs of litigation if their speech is so controversial as to provoke a lawsuit.[102]

B. ACADEMIC FREEDOM

A public university professor may have an even stronger First Amendment claim by invoking his or her right to academic freedom.

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96. *Id.* at 1960.

97. *Id.* at 1962.

98. *See id.* at 1960.

99. *See* Urofsky v. Gilmore, 216 F.3d 401, 407-09 (4th Cir. 2000).

100. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001). In *Hardy*, the court found that a professor's use of vulgar words during a lecture on interpersonal communications was speech on a matter of public concern because the words were "germane to the subject of his lecture on the power and effect of language." The court required only a finding that the subject matter of the professor's lecture was a matter of public concern, and that the offending words were germane to the lecture. *Id.* at 678-80.

101. *See* Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of* Pickering *and* Connick *for Public Higher Education*, 119 ED. LAW REP. 309, 314-15 (1997) (arguing that the ambiguity in the *Pickering* test is enough to chill academic speech).

102. *See id.* at 314-315; Jaschik, *supra* note 4.

The legal doctrine of academic freedom is wholly distinct from the concept that is so often discussed in academia.[103] Scholars have argued that there are important reasons supporting an individual professor's right to academic freedom under the First Amendment, yet this right has not been recognized by all courts.[104] This section will distinguish the legal concept of academic freedom from the professional concept, and it will provide an overview of the various ways in which the courts have treated academic freedom claims.

The concept of academic freedom discussed in academia as "professional academic freedom," refers to the privilege extended by universities to their professors to research, write and teach free from interference by university administration.[105] The concept of professional academic freedom originated in the American Association of University Professors' (AAUP) *Statement of Principles on Academic Freedom and Tenure*, written in response to the termination of Edward Ross at Stanford in 1909 due to Mrs. Leland Stanford's disapproval of his views on the gold standard.[106] The first draft was written in 1915, but the 1940 draft of the AAUP *Statement* laid out the three main tenets of academic freedom: "the freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action."[107] Other organizations have developed their own codes of professional academic freedom, but the AAUP's is often cited, and has served as the model for the codes of academic freedom that are common in university faculty handbooks.[108]

The AAUP *Statement* asserts that university professors are entitled to "full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties."[109] It does not directly address the issue of faculty defense and indemnification, but it stresses the necessity of freedom of research for the advancement of

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103. Robert M. O'Neil, *Academic Freedom: Past, Present and Future, in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL AND ECONOMIC CHALLENGES 90-94 (Philip G. Altbach et al. eds., 1999).

104. *See Urofsky*, 216 F. 3d at 410; Matthew W. Finken, *On 'Institutional' Academic Freedom*, 61 TEX. L. REV. 817, 818 (1983).

105. O'Neil, *supra* note 103, at 90-94.

106. *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS (1990), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm; Candace Kant, *AAUP & Academic Freedom: A History*, THE ALLIANCE, Dec. 2004, at 1.

107. O'Neil, *supra* note 103, at 90-92.

108. *See, e.g.*, BOSTON UNIVERSITY, ACADEMIC FREEDOM (1987), http://www.bu.edu/handbook/policies/ethics/freedom.html; STANFORD UNIVERSITY, POLICY ON ACADEMIC FREEDOM (1998), http://www.stanford.edu/dept/DoR/rph/2-3.html; WESLEYAN UNIVERSITY, STANDARDS OF CONDUCT: STATEMENT ON ACADEMIC FREEDOM, http://www.wesleyan.edu/acaf/policy/sc_academic_freedom.html (last visited Sept. 7, 2005).

109. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 106.

truth.[110] In addition, the AAUP has indicated that in cases like that of Merle Weiner, universities should provide defense for their professors.[111]

The second concept of academic freedom is a legal one, and it is somewhat more difficult to define. The legal concept of academic freedom is born out of the First Amendment and developed primarily through dicta in Supreme Court decisions.[112] Justice Frankfurter's concurrence in *Sweezy v. New Hampshire* is generally considered to be the origin of the legal concept of academic freedom.[113]

In *Sweezy*, the Court found that the contempt conviction of a professor for the refusal to produce lecture notes to the New Hampshire Attorney General, in conjunction with an investigation into Communist activities, was an invasion of the professor's academic freedom liberties.[114] In his concurrence, Justice Frankfurter wrote of the importance of free inquiry at universities: "For a society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."[115] He went on to list the "four essential freedoms of a university," taken from a statement of a conference of senior South African scholars: "[the freedoms] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[116]

The Supreme Court made reference to academic freedom in several subsequent cases, but it has never articulated an exact legal definition of the concept, or how and to whom it should be applied.[117] In *Barenblatt v. United States,* the Court stated that the freedom to teach is a "constitutionally protected domain;"[118] in *Keyishian v. Board of Regents,* it referred to academic freedom as "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[119] Still, *Keyishian* makes it clear that the Court was concerned with the chilling effect of government interference on the free exchange of ideas.[120] In that case, the Court struck down New York's regulations prohibiting treasonable or seditious acts, utterances, and advocacy of the overthrow of government by state

110. *Id.*

111. Jaschik, *supra* note 4.

112. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967); Shelton v. Tucker, 364 U.S. 479, 487-88 (1960); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 261-64 (1957).

113. *See, e.g., supra*.note 112.

114. *Sweezy*, 354 U.S. at 257-62.

115. *Id.* at 262.

116. *Id.* at 263 (quoting a statement of a conference of senior scholars at the University of Cape Town during the Apartheid era).

117. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 237-40 (2000); Shelton, 364 U.S. at 487-88; Wiemann v. Updegraff, 344 U.S. 183, 196-98 (1952).

118. 360 U.S. 109, 112 (1959).

119. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

120. *See id.* at 603-04.

employees, declaring that, in a university setting, the provisions would threaten academic freedom because "the threat of sanctions may deter... almost as potently as the actual application of sanctions."[121]

The lack of a definition of academic freedom at the Supreme Court level has resulted in varying interpretations by lower courts.[122] One significant source of jurisdictional variation is uncertainty regarding to whom the concept of academic freedom applies. The four essential freedoms cited by Justice Frankfurter in *Sweezy* apply only to the university, not the individual professor, yet the holding in *Sweezy* concerned a professor, not a university.[123] In *Regents of the University of Michigan v. Ewing*, the Supreme Court seemed to imply that academic freedom extends to professors as well, but *Grutter v. Bollinger*, decided eighteen years later, discussed academic freedom's application only in context of the university.[124]

The Federal Courts of Appeals have taken widely different stances on the legal protection of academic freedom.[125] The Eighth Circuit, for example, maintains that an independent right to academic freedom under the First Amendment does not exist; it is only a consideration to be weighed in the public employee speech test laid out in *Pickering v. Board of Education*.[126] The Sixth and Fourth Circuits, on the other hand, state that there may be an independent right to academic freedom, but "[t]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the university, not in individual professors."[127] The Seventh Circuit ascribes a right of academic freedom to both the university and the individual professor, but maintains that the professor's conduct is still subject to the *Pickering* test and a public forum analysis.[128]

The varying levels of legal protection for academic freedom under the First Amendment still provide little help for a professor like Merle

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121. *Id.* at 604 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

122. *See, e.g.*, Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219, 284 (3rd Cir. 2004); Omosegbon v. Wells, 335 F.3d 668, 677 (7th Cir. 2003); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679-80 (6th Cir. 2001); Urofsky v. Gilmore, 216 F.3d 401, 408-16 (4th Cir. 2000).

123. *See* Sweezy v. New Hampshire, 354 U.S. 234, 255-64 (1957).

124. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985).

125. *See, e.g.*, Schrier v. Univ. of Colorado, 427 F.3d 1253, 1266 (8th Cir. 2005); Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 593 (6th Cir. 2005); *Omosegbon*, 335 F.3d at 677; *Urofsky*, 216 F.3d at 410 (4th Cir. 2000).

126. *Schrier*, 427 F.3d at 1266.

127. *Johnson-Kurek*, 423 F.3d at 593 (quoting *Urofsky*, 216 F.3d at 410).

128. *Omosegbon*, 335 F.3d at 677 (finding that academic freedom rights were not violated where a professor alleged that department chair tried to prevent him from associating with two other faculty members in the department, and advised that he shift the focus of his community activities to African-American culture).

Weiner.[129] At most, a court like the Seventh or Eighth Circuit will consider academic freedom as a factor in the *Pickering* test, but as illustrated in the previous section, the *Pickering* test does not provide certainty for a professor due to its varied application by the appeals courts.[130]

V. THE SHORTCOMINGS OF *PICKERING*, THE DANGER TO PROFESSORS

The existing avenues through which a university might be bound to defend a professor in a lawsuit arising from scholarly publications are inadequate to prevent the chilling effect on academic research and inquiry that is inevitable when professors are aware that they are susceptible to financially burdensome lawsuits.[131] The fear of repercussions, both legal and political, affect what professors choose to publish; as the Court stated in *Keyishian v. Board of Regents*, "the threat of sanctions may deter...almost as potently as the actual application of sanctions."[132] The most prominent examples of self-censorship took place during the McCarthy Era, when professors shied away from topics that linked them to communism.[133] The chilling effect of the McCarthy Era on academic research affected not only academic integrity, but also foreign policy. For example, there is "considerable speculation" that it was difficult for American policy-makers during that period to obtain information from East Asian Studies departments that may have had an affect on the United States' approach to Vietnam had it been obtained.[134]

Even if the self-censorship incited by a university's refusal to defend professors' publications does not amount to a matter of foreign

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129. *See Schrier*, 427 F. 3d at 1266; *Johnson-Kurek*, 423 F.3d at 593; *Omosegbon*, 335 F. 3d at 677; *Urofsky*, 216 F. 3d at 410; Jaschik, *supra* note 4.

130. *See Schrier*, 427 F.3d at 1266; *Omosegbon*, 335 F.3d at 677. *See also* Ceballos v. Garcetti, 361 F.3d 1168, 1175-78 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473); Rodgers v. Banks, 344 F.3d 587, 598-99 (6th Cir. 2003); Gonzalez v. City of Chicago, 239 F.3d 511, 517-19 (7th Cir. 2002); Baldassare v. New Jersey, 250 F.3d 188, 196-97 (3rd Cir. 2001); Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 366 (5th Cir. 2000); *Urofsky*, 216 F.3d at 407-09; Lewis v. Cowen, 165 F.3d 154, 164-65 (2nd Cir. 1999); Dill v. City of Edmond, 155 F.3d 1193, 1202-03 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996); O'Connor v. Steeves, 994 F.2d 905, 913-15 (1st Cir. 1993).

131. *See* Dyer, *supra* note 101, at 314-15; Jaschik, *supra* note 4. (quoting Merle Weiner, who states that she is more cautious about how she does her job after realizing that the University of Oregon will not defend her in lawsuits).

132. Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

133. *See* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO THE PRESENT 378 (1978) (describing Professor Daniel Boorstin's attempt to solidify his break with the Communist Party by writing a book about Thomas Jefferson); JOHN MCCUMBER, TIME IN THE DITCH: AMERICAN PHILOSOPHY AND THE MCCARTHY ERA 8-14 (2001) (arguing that philosophy professors have eliminated self-reflection from the discipline as a response to attacks and inquiry during the McCarthy era).

134. ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 338 (1986).

policy, it is still significant because it directly affects the academic free inquiry that is essential to the American university. In *Sweezy*, Justice Frankfurter emphasized the importance of free inquiry, speculation and the stimulation of reflection in others to the operation of American society as we know it.[135] As long as universities require professors to publish scholarly works but refuse to defend them in litigation arising from the publications, there will be a detrimental chilling effect on scholarly research and writing that stifles academic progress.[136]

The example of Merle Weiner's struggle with the University of Oregon may not seem to be a high-stakes controversy.[137] Weiner's article concerned child custody suits under international law, and the portions that sparked the threatened lawsuit pertained to court disputes involving such a custody battle.[138] The *University of San Francisco Law Review* was able to remove these brief references from its electronic archive, thereby avoiding a lawsuit.[139] It appears that the removal of these references did not affect the main content, ideas or themes in the article.[140] Yet if universities are permitted to decline representation to professors like Weiner, what happens when the stakes are higher?

The stakes were much higher for Dr. Edward Felten and his colleagues at Princeton University.[141] Dr. Felten's situation embodies three ways in which the stakes may be heightened for a professor in a dispute over his or her publication: first, the offending material is not merely incidental to the publication, but essential; second, the entity threatening the lawsuit is a large and imposing corporation rather than an individual; and third, there is a threat of not only civil but criminal liability.[142]

In 2001, Dr. Felten and several colleagues took part in the Secure Digital Music Initiative (SDMI) Challenge, in which researchers and programmers attempted to defeat the digital music technology that employs "watermarks" to protect digital audio files.[143] The watermark technology is an invisible, inaudible change to an audio file that tells a device whether or not to play a song.[144] Felten and his team rendered the watermarks presented by SDMI for the Challenge undetectable, thereby defeating the security measure.[145]

Felten intended to present his watermark research at the Information Hiding Workshop in Philadelphia. Two weeks prior to the

135. Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957).
136. *See* Jaschik, *supra* note 4.
137. *See id.*
138. *Id.*
139. *Id.*
140. *See id.*
141. *See Tinkerers' Champion*, THE ECONOMIST, June 22, 2002.
142. *See id.*
143. Musgrove, *supra* note 12.
144. *Tinkerers' Champion*, *supra* note 141.
145. *Id.*

conference, however, the Recording Industry Association of America (RIAA), the SDMI Foundation, and Verance—the company that produced one of the watermarks—sent a letter to the researchers threatening a civil lawsuit.[146] The letter also stated that the researchers could be held liable for their actions under the Digital Millenium Copyright Act, which makes it a crime to reveal to the public any information that provides a way to defeat copyright protection systems.[147] Felten and his fellow researchers initially decided not to present their research at the Philadelphia conference, but eventually presented the work at another conference and instituted a lawsuit against RIAA for infringing their civil liberties.[148]

It is not apparent whether Dr. Felten sought legal support from Princeton; he may have decided not to because his efforts at litigation were backed by the Electronic Frontier Foundation of San Francisco.[149] Still, this is a perfect example of the need for university support in lawsuits arising from professors' publications.[150] Felten's case exhibits multiple elements that raise the stakes for professors who are contemplating publishing controversial material.[151] The material that RIAA and SDMI found offensive was not just a single irrelevant reference that could be removed, but was pervasive throughout the research paper; indeed, it was the entire purpose of the paper.[152] In addition, RIAA's member record companies create, manufacture and distribute almost 90% of sound recordings in the United States,[153] and Verance calls itself "a world leader in the development and implementation of technical solutions."[154] These large organizations are more equipped to fund the type of costly litigation that would have ensued from the publication of the paper, and it is unlikely that Felton would have been able to mount an adequate defense to match their resources. Finally, Felton and his fellow researchers faced the threat of criminal liability, which surely would factor into Felton's decision to publish his research.

The SDMI Challenge case is an excellent example of the high-stake elements that force professors to engage in self-censorship, but it is also an example of the kind of research and free inquiry that needs to be

146. Benny Evangelista, *Judges' Rulings Boost Strength of Digital Copyright Law*, S. F. CHRON., Nov. 29, 2001 at B3; Musgrove, *supra* note 12.

147. *See Tinkerers' Champion*, *supra* note 141.

148. Musgrove, *supra* note 12.

149. Evangelista, *supra* note 146. Additionally, Felten was employed at a private university; even if he had requested legal defense from Princeton, it would be outside of the purview of this article. *See id.*

150. *Id.*; Musgrove, *supra* note 12; *See Tinkerers' Champion*, *supra* note 141.

151. *See* Musgrove, *supra* note 12.

152. *See id.*

153. *See* RECORDING INDUSTRY ASSOCIATION OF AMERICA, ABOUT US, http://www.riaa.com/about/default.asp (last visited Feb. 26, 2006).

154. *See* VERANCE, ABOUT VERANCE, http://www.verance.com/corporate/index.html (last visited Feb. 26, 2006).

protected in order to preserve the American university.[155] Felten and his colleagues engaged in a study that could provide invaluable assistance in creating new digital music security devices.[156] To let professors like Felten suppress their ideas for fear of lawsuits from companies who may be acting only to protect their own interests and profits would be a significant blow to the free inquiry, speculation and stimulation of reflection in others that Justice Frankfurter emphasized in *Sweezy*.[157]

The potential detrimental effects of infringement on civil liberties, self-censorship, and civil or criminal liability presented in the examples of Merle Weiner and Edward Felten are simply too great to be ignored. In order to preserve the free marketplace of ideas that is so essential to American democracy, the courts must reexamine the legal sources of a university's duty to defend its professors. In particular, the ambiguity of the *Pickering* balancing test, as interpreted by *Connick*, denies public university professors First Amendment protection in at least one circuit and makes it highly uncertain in others.[158] *Pickering* and its progeny do not take into consideration the unique role of the professor as commentator on matters of public concern.[159] As Edgar Dyer points out, "[In the *Pickering* test t]here are far too many variables. Where is the line between professor and citizen? What context is acceptable? What form is satisfactory? What content is agreeable? What is a matter of public concern? What factors will determine the weightier of the two interests in the balance? This vagueness, in and of itself, is certainly enough to 'chill' speech."[160]

VI. RETHINKING THE *PICKERING* TEST

The previous sections have shown that, whether under a constitutional academic freedom framework or a general First Amendment analysis, the major obstacle to holding public universities responsible for the legal representation of their professors in publication disputes is the *Pickering* test. This is no great barrier, because as it is

155. *See* Evangelista, *supra* note 146; Musgrove, *supra* note 12.

156. Musgrove, *supra* note 12.

157. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957).

158. *See* Connick v. Myers, 461 U.S. 138, 143-47 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). *See also* Ceballos v. Garcetti, 361 F.3d 1168, 1175-78 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473); Rodgers v. Banks, 344 F.3d 587, 598-99 (6th Cir. 2003); Gonzalez v. City of Chicago, 239 F.3d 511, 517-19 (7th Cir. 2002); Baldassare v. New Jersey, 250 F.3d 188, 196-97 (3rd Cir. 2001); Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 366 (5th Cir. 2000); Urofsky v. Gilmore, 216 F.3d 401, 407-09 (4th Cir. 2000); Lewis v. Cowen, 165 F.3d 154, 164-65 (2nd Cir. 1999); Dill v. City of Edmond, 155 F.3d 1193, 1202-03 (10th Cir. 1998); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996); O'Connor v. Steeves, 994 F.2d 905, 913-15 (1st Cir. 1993).

159. *See e.g., supra* note 158.

160. Dyer, *supra* note 101, at 314-15.

currently interpreted, the application of the *Pickering* test to professors who are public employees is inappropriate.[161] The *Pickering* test does not take into account the unique role of the professor as commentator on matters of public concern or the mission and purpose of higher education.[162] The purpose of the balancing test applied in *Pickering* is to ensure that public employees are provided the same First Amendment rights as privately employed individuals, while at the same time allowing the state, as an employer, to efficiently perform its duties through its employees.[163] The balancing of these two interests presupposes that speaking one's mind on a matter of public concern is entirely incompatible with employment tasks. Yet in a university setting, the efficiency of the duties performed by professors is enhanced when they are able to speak freely on matters of public concern.[164]

Although the state generally may limit the speech of public employees speaking within the context of employment, it should not be able to limit the speech of professors when that speech pertains to research because such a limitation would be contrary to the efficient performance of the professors' employment duties.[165] To be clear, this does not mean to suggest that a university may not restrict a professor's speech in other areas, such as performance at faculty meetings or in other traditional employee duties of a more administrative nature.[166] The speech represented in scholarly works, however, is entirely different, because the university and the public expect that it is original work representing the author's critical analysis of a subject, unfettered by his or her employment considerations.[167] These expectations are apparent in the outrage that surfaces when a professor misrepresents or fabricates research.[168]

Several scholars have commented on the injustice caused by the application of the *Pickering* balancing test to professors in their academic duties, and each advocates a way to avoid the application of the existing *Pickering* framework to professors.[169] Edgar Dyer, for example,

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161. *See* Dyer, *supra* note 101, at 314-15; Donna R. Euben, ACADEMIC FREEDOM OF INDIVIDUAL PROFESSORS AND HIGHER EDUCATION INSTITUTIONS: THE CURRENT LEGAL LANDSCAPE (2002) www.aaup.org/Com-a/aeuben.htm.

162. Euben, *supra* note 161.

163. *Pickering*, 391 U.S. at 568.

164. *See* Euben, *supra* note 161 ("[u]nder what circumstances can a faculty member's speech 'disrupt' the educational environment when the mission of educational institutions is to create an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed?").

165. *See id.*

166. *See* Dyer, *supra* note 101, at 320.

167. *See* Arenson, *supra* note 3; Faiola & Weiss, *supra* note 3; Johnson, *supra* note 2; Worth, *supra* note 1.

168. *See, e.g.*, *supra* note 167.

169. *See* Dyer, *supra* note 101, at 320-21; Richard Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Waive?*, 40 WAYNE L. REV. 1, 106 (1993); Christopher Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C.U.L. 669, 703-06 (2001).

proposes protection for the "spoken, written, or artistic expressions of an academician who is engaging in such expression as an academician," who is speaking within his or her field of expertise for the purpose of advancing the truth.[170] Dyer states that in cases where a professor speaks in this capacity, the *Pickering* balancing test should be dismissed, because it would be absurd to balance the pursuit of truth against any institutional interests.[171]

Other scholars take less extreme approaches than Dyer's elimination of the use of the *Pickering* balancing test in academia.[172] Richard Hiers advocates that academic freedom should be weighed on the professors' side in the balancing test, and that universities should have to demonstrate actual harm rather than probable disruption of its efficient operation in order to succeed.[173] Hiers' proposal is problematic, because the progeny of *Pickering* have instituted the matter-of-public-concern as a threshold requirement to the balancing test.[174] This threshold is the very obstacle that defeats professors' First Amendment claims.[175] Stephen Allred achieves the desired result by a simple "return to the standard originally set forth in *Pickering*," eliminating the matter-of-public-concern threshold test.[176]

Dyer and Allred both achieve the result of allowing a professor to obviate the threshold requirement of the *Pickering* balancing test.[177] Yet there is an easier way to remedy the current disconnect between the reality of professors' employment duties and the *Pickering* requirements.[178] Courts can explicitly reject the per se rule denying First Amendment protection to employees for speech made within the fulfillment of employment duties and acknowledge that professors are entitled to First Amendment protection for their utterances in the course of fulfillment of employment duties.[179]

As discussed above, the Supreme Court had a chance to reject the per se rule as it applies to all public employees in *Garcetti v. Ceballos*; however, it did not do so.[180] The Court's decision has not gone unnoticed; it was met with disapproval from different sources for

170. Dyer, *supra* note 101, at 319-20.

171. *Id.* at 321.

172. Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 77 (1988); Hiers, *supra* note 169, at 106-07.

173. Hiers, *supra* note 169, at 106.

174. *See* Connick v. Myers, 461 U.S. 138, 146-47 (1983).

175. *See* text accompanying notes 138-41, *supra*.

176. Allred, *supra* note 172, at 77.

177. *See* Allred, *supra* note 172, at 77; Dyer, *supra* note 101, at 320-21.

178. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1175 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473).

179. *See Ceballos*, 361 F.3d at 1175; Rodgers v. Banks, 344 F.3d 587, 598-99 (6th Cir. 2003); Baldassare v. New Jersey, 250 F.3d 188, 196-97 (3rd Cir. 2001).

180. *See* Garcetti v. Ceballos, 126 S.Ct. 1951, 1960 (2006).

different reasons.[181] Some critics fear the effect the decision will have on the willingness of whistleblowers to come forward,[182] while others have focused on the effect it will have on academe.[183] The decision was not even well-received by the whole Court; Justices Souter, Stevens, Ginsburg, and Breyer dissented in the case.[184] Whether the case was rightly decided in the first place is not the concern of this article, since the Court set aside the question of whether the holding can appropriately be applied to academics.[185] The essential point here is that the *Garcetti* ruling does not take into account the unique role of the academic and is wholly inappropriate for application to public university professors.

Justice Stevens, writing in dissent, identified with precision the essential idea that the majority in *Garcetti* overlooked: "The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[186] The majority's failure to address the possibility of an overlap is at the very heart of its decision.[187] The majority opinion employs a logic that is based in the decisions that precede it, namely *Pickering* and *Connick*.[188] The Court described the underlying public policy in *Pickering* and its progeny as an interest in affording public employees, to the extent possible, the same rights to speak as citizens, to comment upon matters of public concern, as are afforded to employees in the private sector.[189] In applying this logic to the case at hand, the Court seemed to reason that private employees are not allowed to express their views as citizens when carrying out the duties mandated by their private employers, so public employees need not be protected when carrying out employment duties, noting that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[190]

There are two main flaws in this reasoning, identified by Justice Souter in his dissent as general points, that are even more compelling when considered with respect to public university professors.[191] The first flaw is that the majority's reasoning does not consider the fact that

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181. *See* Corey Stephenson, *Concerns that Teachers and Professors Could Be Negatively Impacted from Recent Whistleblowers Case*, VA LAWYERS WEEKLY, June 26, 2006; Linda Greenhouse, *Some Whistleblowers Lose Free Speech Protections*, NY TIMES, May 31, 2006, at A16; Charles Lane, *High Court's Ruling Favors Government*, WASH. POST, May 31, 2006, at A1.

182. *See* Greenhouse, *supra* note 181; Lane, *supra* note 181.

183. *See* Stephenson, *supra* note 181.

184. *Garcetti*, 126 S.Ct. at 1962-76.

185. *See* Garcetti v. Ceballos, 126 S.Ct. 1951, 1962 (2006).. It is important to note that, as discussed in previous sections, the fact that the Court set aside this issue does not preclude the lower courts from applying the *Garcetti* holding to academics.

186. *Id.* at 1963 (Stevens, J., dissenting).

187. *Id.* at 1960-61.

188. *Id.* at 1957-62.

189. *Id.* at 1957. The court notes that citizens who enter public employment must, nevertheless, accept some limitations on their freedom. *Id.* at 1958.

190. *Id.* at 1960.

191. Garcetti v. Ceballos, 126 S.Ct. 1951, 1966-67 (2006) (Souter, J., dissenting).

some citizens give up their ability to express views on a subject as citizens because they are required to speak on those issues in fulfillment of their employment duties, and so restricting their speech in their employment duties does infringe on a liberty that they might have enjoyed as a private citizen.[192] Justice Souter employed this insight in his dissent, suggesting that many public employees choose jobs that involve issues that they hold very dear as citizens.[193] Furthermore, he stated that these citizens who wish to pursue their closely held views on matters of public concern through service to the government are exactly the kind of employees that the government wishes to recruit.[194] Public university professors are good examples of these kinds of citizens. Professors research and write upon matters of public concern that are of importance to them as citizens, and so they give up their opportunity to speak on these matters as citizens in order to fulfill their employment duties. Merle Weiner, for example, could have chosen to work in private practice as a lawyer and write law review articles as a pastime, thereby expressing her views as a citizen.[195] Instead, she became a professor, and her rights as a citizen were subsumed by her duties as an employee.[196] Public universities want to attract professors like Weiner, who truly stand behind the subjects upon which they speak. Yet if her speech is not protected because it is made in fulfillment of job duties, then why would she choose public employment over private practice?

The second flaw in the *Garcetti* reasoning noted by Justice Souter that makes the decision inappropriate for application to public university professors is the assumption that statements by public employees, made in fulfillment of employment duties, are to be treated as the government's own speech. Justice Souter argued that this simply cannot be the case for every public employee, noting that "not everyone working for the government, after all, is hired to speak from a government manifesto."[197] Public university professors routinely speak in fulfillment of their duties without the speech being attributed to the university as its own. Merle Weiner is a perfect example, since her law review article aimed to fulfill a duty to publish, but no one ever claimed that the University of Oregon espoused the views expressed in the article.[198] Indeed, Justice Souter highlighted the fact that the Supreme Court had gone to great lengths to indicate that professors enjoy a right to academic

192. *Id.* at 1957.

193. *Id.* at 1965 (Souter, J., dissenting) ("[a]s for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day").

194. *Id.* at 1966 (Souter, J., dissenting).

195. *See* Jaschik, *supra* note 4.

196. *See id.*

197. *Garcetti*, 126 S.Ct. at 1969 (Souter, J., dissenting).

198. Jaschik, *supra* note 4.

freedom that carries both the right and the responsibility to separate their views from those of their institutions.[199]

A third flaw in the application of the *Garcetti* opinion to public university professors is that these professors do not have the option to express their views in a way which the courts would consider to be speech as citizens rather than speech in fulfillment of employment duties. The *Garcetti* opinion assumes that speech in fulfillment of employment duties is the government's speech, and that public employees are able to speak their minds in other ways that are not in fulfillment of their employment duties.[200] Yet for a public university professor, any scholarly speech made on a matter of public interest will automatically be attributed to his or her employment duties. A professor will still use the title "Professor" or "Doctor" when expressing views as a citizen, because these titles are more than mere job descriptions. They lend credibility, signifying that the individual has not just a fleeting understanding of the concept in question, but rather a perspective that is based on years of hard work and study. Yet, if a professor's work as a citizen is identical to his or her work in fulfillment of employment duties, the professor will never be able to get First Amendment protection for his or her publications, because he or she will not be able to prove to the court that the writing in question was made as a citizen, not as an employee.

The foregoing reasons highlight the inappropriateness of the *Garcetti* holding when applied to public university professors. The Court itself admitted that the opinion may not be appropriate in this arena, yet its refusal to further clarify the status of public university professors' speech left professors in the same uncertain position as before the *Garcetti* case.[201] The holding may result in more courts finding that professors' speech made pursuant to employment duties is not to be protected under the First Amendment, or the courts may continue using the same doctrines described in Section IV.[202] Either way, there remains a chilling effect on professors' speech.

The Court must take up the issue of First Amendment protection of academic speech made pursuant to employment duties. The Court should reject the application of a per se rule to public university professors and instead institute a consideration similar to Dyer's proposal: whether the professor engaged in spoken, written or artistic expressions within his or her field of expertise for the purpose of advancing truth.[203] This test would be in line with the one that Justice Souter's dissent dictates for general application to public employees.[204]

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199. *See* Garcetti v. Ceballos, 126 S.Ct. 1951, 1970 (2006) (Souter, J., dissenting).
200. *Id.* at 1957-61.
201. *Id.* at 1962.
202. *See id.*
203. *See* Dyer, *supra* note 101, at 320.
204. *See Garcetti*, 126 S.Ct. at 1967 (Souter, J., dissenting).

Justice Souter prescribed an adjustment of the *Pickering* balancing test that would only allow the employee who speaks pursuant to job duties to prevail when "he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."[205] The pursuit of truth in all academic fields is of unusual importance to the public as a whole; the Supreme Court pointed out in *Keyishian v. Board of Regents* that academic freedom is "of transcendent value to all of us."[206] In addition, the "high standards of responsibility" that Souter promoted in his test are also included in the test tailored to professors, since any statement that is truly made for the purpose of advancing truth is made in compliance with the highest standards of ethics in academic research.

Under a reformulated *Pickering* test, it is likely that a public university would be obligated to defend and indemnify its professors in lawsuits arising from the professors' publications.[207] If Merle Weiner instituted a lawsuit against the University of Oregon, a court would find that Weiner had engaged in written expression within her field of expertise for the purpose of advancing the truth, and thus Weiner would meet the threshold public concern requirement under the reformulated *Pickering* test. The court could then weigh Weiner's interest in speaking on a matter of public concern against the interest of the University as an employer in promoting efficient public service.[208] In this case, Weiner's interests seem to be aligned with the University's, since one of the major public services provided by the University is the promotion and circulation of original ideas, and this public service is executed more efficiently when the professors are free from burdensome litigation.[209]

It seems that Merle Weiner's interest in speaking on issues of child custody would outweigh (or align with) the University's interest in promoting its efficient public service, but there are certainly circumstances where undertaking the legal defense of a professor's publication would be contrary to the promotion of efficiency at the university.[210] Merle Weiner had reason to believe that she was likely to succeed in the threatened lawsuit, and the content in dispute was accurate.[211] If a professor misrepresented or fabricated the content at issue in a lawsuit, or if the lawsuit would be so costly and time-consuming that it would detract from the public services provided by the university, a court should find that the university's interests outweigh the professor's, and that the university is not obligated to defend the

205. *Id.*

206. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

207. *See generally* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Ceballos v. Garcetti, 361 F.3d 1168, 1175 (9th Cir. 2004).

208. *See generally* note 207 *supra*.

209. *See* Jaschik, *supra* note 4; Euben, *supra* note 161.

210. *See* Jaschik, *supra* note 4.

211. *See id.*

lawsuit.[212] These considerations illustrate the necessity of maintaining the balancing aspect of *Pickering* rather than doing away with the test as a whole, as Dyer advocates.[213]

VII. CONCLUSION

If the Supreme Court were to clarify the *Garcetti* decision by rejecting the application of the per se rule against protecting public employee speech made pursuant to official duties to public university professors, and apply the reformulated *Pickering* balancing test to professors when they speak within their fields of expertise for the purpose of advancing the truth, it is likely that public universities would be obligated to defend and indemnify their professors in lawsuits arising out of their professors' publications.[214] Not only would this provide assistance to those professors who are unlucky enough to become the targets of lawsuits, but it would also alleviate the concerns and chilling effects that professors may experience when deciding to publish material that is controversial or unpopular.[215] Merle Weiner would no longer feel trepidation when publishing controversial research, for the University of Oregon would be compelled to provide legal defense in suits arising from her research,[216] and a professor like Edward Felten could present his research without fear of repercussions by organizations that oppose the release of the information, in the face of criminal statutes that may pose an obstacle.[217]

212. *See* Dyer, *supra* note 101, at 320-21 (arguing that the utmost protection should be given only to expressions made for the purpose of advancing truth).

213. *See id.*

214. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1175 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473).

215. *See* Jaschik, *supra* note 4.

216. *See id.*

217. *See* Evangelista, *supra* note 146; Musgrove, *supra* note 12; *Tinkerers' Champion*, *supra* note 141.