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## Civility and Academic Freedom after Salaita

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### Abstract

The 2014 unhiring of Professor Steven Salaita by the University of Illinois raises at least three distinct issues: (1) the right of faculty to speak out in public on matters of public concern; (2) the academic freedom of academic departments to make academic decisions; and (3) the role of civility in education. After differentiating the third issue from the first two, we extend the discussion to other recent cases involving civility in education. The cases range from overt coercion to implicit threats and subtle pressures. We explain that uncivil speech is generally protected by the First Amendment but that this is generally not so within educational contexts. Even where censorship of uncivil speech is legally permissible, however, such censorship is not required and is a serious threat to academic freedom. Educators can promote civility without censorship by modeling and urging mutual respect, engaging students in serious argumentation, and evaluating the academic quality of their arguments.

In October 2013 the University of Illinois at Urbana-Champaign (UIUC) offered Professor Steven Salaita a faculty position in its American Indian Studies program. Following usual procedures, the offer was made by the UIUC College of Liberal Arts and Sciences on the basis of the program faculty's academic evaluation of Salaita's academic record, which included a history of excellent teaching.

Professor Salaita promptly accepted the offer. Over the next nine months he resigned from his previous position, made arrangements for his family to move, received notification of his fall 2014 teaching assignment, and ordered books for his courses.<sup>1</sup>

Then on August 1, 2014, UIUC Chancellor Phyllis Wise abruptly overrode the department's academic decision on the basis of her own expert administrative analysis of Professor Salaita's tweets about Israel during its assault on Gaza. She determined from these that he would be a bad teacher.

How did she reach this conclusion? The decision to rescind Professor Salaita's offer long after he accepted it was based, the Chancellor explained in an August 22 mass e-mail to the university community, on a standard of civility that holds for all: "What we cannot and will not tolerate at the University of Illinois are personal and disrespectful words or actions that demean and abuse either viewpoints themselves or those who express them."<sup>2</sup>

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In other words, you can politely disagree with the Ku Klux Klan, but be careful not to demean any of their viewpoints. If this standard were applied consistently, there would probably be no one left to teach (or learn) at the University of Illinois. Is there anyone who hasn't "demeaned" a "viewpoint"? But of course the standard is not applied consistently, nor could it be.

On August 24, 2014, American Indian Studies, which had arranged in fall 2013 to hire Professor Salaita and now was scrambling to cover his fall 2014 classes at the last minute, voted no confidence in the Chancellor. It wrote that Professor Salaita's hire

had been properly vetted by the unit and approved by the college through standard academic procedures. This process culminated in the signing of a good-faith contract between Prof. Salaita and [the] college, and only awaited customary rubber-stamp approval by the UIUC Board of Trustees.

In clear disregard of basic principles of shared governance and unit autonomy, and without basic courtesy and respect for collegiality, Chancellor Wise did not consult American Indian Studies nor the college before making her decision.<sup>3</sup>

Many others have also expressed their dismay at what UIUC has done, and some have decided to boycott it. No one knows how all this will play out. But we should distinguish three issues.

First, there is the legal question of whether UIUC has violated the First Amendment, which protects the rights of public employees to free speech outside the employment context, especially on matters of public concern. Professor Salaita appears to have a strong case that UIUC violated his constitutional right to free speech.

Second, the Chancellor has failed to respect the academic freedom of the American Indian Studies program, which was charged with making exactly the sort of academic judgments it made throughout this process. The Chancellor's unjustified rejection of a legitimate academic decision in the College of Liberal Arts and Sciences undermines UIUC's academic integrity.

Finally, there are the free speech rights of all employees and students at UIUC. The Chancellor's mass e-mail set a vague standard of civility that applies to all. This includes speech by faculty and students in all academic contexts and is thus a serious infringement on academic freedom throughout the university.

It is the last issue that concerns us here. In the next two sections we consider other recent cases involving civility in education. We then examine the scope and limits of First Amendment protection in educational contexts. Finally, we argue that, regardless of how one interprets the First Amendment, incivility is best addressed without censorship.

### **Civility as the New Face of Coercion**

Besides the punitive "unhiring" of Dr. Steven Salaita for his uncivil tweets, other instances exist in which colleges or universities have punished or threatened to punish faculty for uncivil speech not only in the course of their duties but also for their communications in social media as private citizens.

#### ***The Kansas Board of Regents and Professor David W. Guth***

University of Kansas associate professor David W. Guth, in response to the shootings at the Washington, DC, Navy Yard on September 16, 2013, sent the following tweet: "#NavyYard Shooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you."<sup>4</sup> Several Kansas state legislators called on the university to fire Guth. Other Kansas legislators stated that they

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would refuse to fund future budget proposals for the university. The Kansas State Rifle Association demanded that Guth “be fired immediately.”<sup>5</sup> The reaction by the university was swift. Several days after Guth posted his tweet, Chancellor Bernadette Gray-Little placed Guth on “indefinite administrative leave pending a review of the entire situation.”<sup>6</sup> Later the same day, Andy Tompkins, president and chief executive officer of the Kansas Board of Regents, issued a statement that expressed the “disgust and offense” of the Kansas Board of Regents at Guth's tweet.<sup>7</sup>

Not only did the Kansas Board of Regents (KBOR) not defend its own faculty member who was expressing his political opinion as a private citizen and was thus protected by the First Amendment, but it also went on to capitulate to the conservative legislative pressure of the state by formulating a social media policy so egregious that it eliminated freedom of speech for all faculty. It prohibited any faculty communication—on pain of suspension, dismissal, or termination from employment—that was “contrary to the best interests of the university,” or that “[impaired] discipline by superiors or harmony among coworkers” or that had a “detrimental impact on close working relationships for which personal loyalty and confidence are necessary” or that impeded “the performance of the speaker's official duties” or that interfered “with the regular operation of the university” or that “otherwise adversely . . . [affected] the university's ability to effectively provide services.”<sup>8</sup> As the AAUP statement on the KBOR social media policy has indicated, the policy was “developed without faculty participation—indeed, in apparent defiance of faculty appeals for consultation.”<sup>9</sup>

In effect, this is what an American university looks like when it has succumbed to the pressures of anti-intellectual interest groups and legislators, as well as an ideological blindness bent on reducing higher education to nothing but a corporate model. It has, in essence, become a university that fits more closely to the Chinese model of higher education than the American one. Corporate reformers of higher education perhaps are impressed with the way “China's schools may excel at infusing students with strong skills,” but as Michael Shuman has pointed out, those schools “have been widely criticized for failing to foster the creative thinking crucial to innovative research.”<sup>10</sup>

Although the KBOR relented and revised its social media policy, the policy as a whole remained essentially unchanged because the board still retained the right to suspend or fire employees for social media statements deemed “contrary to the best interests of the employer.”<sup>11</sup> Public relations now trump academic freedom; protecting the corporate brand of the university has become more important than protecting the freedoms that secure the creative soul of the university, that is, the freedom to teach, learn, and conduct research. Fred Logan, chairman of the KBOR, claimed that the revised policy “would actually strengthen free speech,” and Helen Van Etten, another board member, stated that “we don't want to damage [Kansas universities'] brands and we don't want the universities to impair their academic freedom either. So there's a happy medium here.”<sup>12</sup> The statements by Logan and Van Etten cannot have it both ways and thus are either disingenuous or willfully ignorant. There is no happy medium here.

It is clear the KBOR assumed that the Supreme Court case *Garcetti v. Ceballos* applied to higher education, a claim that the highest court left as an open question in its 2006 decision. Even if *Garcetti* were to apply to higher education, Professor Guth's tweet did not occur while he was performing his duties at the university and thus should not even have been under consideration. Guth was tweeting as a private citizen, and his tweets were protected by the First Amendment. The university had no business punishing him by putting him on administrative leave. Dan Colson's point in his recent AAUP *Journal of Academic Freedom* article is well taken. This is no time for timidity: “We should not accept KBOR's authority to monitor our social media usage or to discipline us for that usage; we should not tolerate any effort to abridge academic freedom, to devalue tenure, or to circumvent shared governance.”<sup>13</sup>

Lest readers think that the phrase “the Fight for Higher Education” in the title of Colson's article is hyperbole, we refer them to Susan Kruth's excellent piece entitled “Professors' Rights to Free Speech at Risk

Nationwide” for a more extensive list of punitive measures taken by colleges and universities against faculty. In addition to Professors Salaita and Guth, Kruth has referenced four cases (Professors Francis Schmidt at Bergen Community College, Patti Adler at the University of Colorado at Boulder, Jamie Price at Appalachian State University, and Suzanne Sisley at the University of Arizona) that involved placing a faculty member on administrative or unpaid leave, forcing the discontinuance of a course, or terminating his or her employment.<sup>14</sup>

### ***Bergen Community College and Professor Francis Schmidt***

What set off administrators in the case of Professor Francis Schmidt, who teaches art and three-dimensional animation at Bergen Community College (BCC), was the picture he posted of his young daughter wearing a *Game of Thrones* T-shirt that bore the following quotation from the show: “I will take what is mine with fire and blood.”<sup>15</sup> The T-shirt covers the girl well below her knees as she makes a kind of yoga pose that lifts her back off the floor by holding herself up using her hands and feet (what is referred to as a back bridge). A BCC dean who was on the list of Schmidt's social media contacts received the photo. As Greg Lukianoff explains in his *Huffington Post* article, “The dean found this picture of a child doing yoga so terror-inducing that she reported him to other BCC administrators.”<sup>16</sup>

Incredibly, the other administrators agreed. The photo was not just uncivil and offensive; rather, Schmidt's posting of the photo “posed a danger to the school community.”<sup>17</sup> As Lukianoff remarked in almost utter disbelief, “The administrators argued that the 'fire' mentioned on the T-shirt 'could be a kind of proxy for 'AK-47s.'”<sup>18</sup> This is a striking example of Dick Cheney's one-percent solution finding a home in a community college: if there's a one-percent chance that the word *fire* means AK-47s, then the school has the right to immediately suspend Schmidt. And this is what they did, that is, suspend him without pay. To add insult to injury, he also had to agree to submit to a psychiatric evaluation.<sup>19</sup>

In the meantime, after the Foundation for Individual Rights helped connect Schmidt to legal counsel, BCC director of human resources Patti Bonomolo admitted in a letter to Schmidt that the college “may have lacked basis” for punishing him and thus “potentially violated” his “constitutional rights.”<sup>20</sup> Schmidt has pursued this by filing a grievance against BCC “for denying him a sabbatical and other unfair employment practices.”<sup>21</sup>

### ***President Eric J. Barron and Pennsylvania State University***

A case that involved subtle coercion without explicitly calling for it was the open letter posted on the Pennsylvania State University website on September 5, 2014, from university president Eric J. Barron. It was addressed to all friends of the university. The open letter was titled “A message from the leadership at Penn State.”<sup>22</sup> The one-page letter was signed by eighty-four signatories, whose names take up four and a half pages. The first signature is that of Barron, but he signed as a member of the President's Council along with the other members. Other groups include the Academic Leadership Council; the Faculty Senate's Advisory Committee to the President; the University Staff Advisory Council Executive Officers; and, finally, members of the student leadership. Next to the title of each group, the word *unanimous* is included in parentheses. Apparently, no group that had less than unanimous agreement among its members is listed. The list easily gives the false impression that the entire leadership of the university agreed with the president in his call for civility in the aftermath of the Jerry Sandusky sex scandal and the extremely divisive measures taken by the university regents.<sup>23</sup>

In the letter Barron outlines the issue in the following way: “The question is whether a lack of civility in discussing these issues will create a deeper divide, one that alters the remarkable bond that exists between all those who are part of the Penn State community.”<sup>24</sup> Examples followed: “Consider just a few examples that you may have also come across—the alumnus who says he lost his best friend over his opinion of the Freeh report; the alumni trustee candidate that faced dozens of unkind comments; the long time donor of time and

treasure who no longer feels welcome.”<sup>25</sup> The first example cited by the president is not an example of incivility; rather, it is an example of a fundamental difference of opinion over the Freeh report. The falling out of best friends may have involved incivility, but none is mentioned. In the second example, no mention is made of the effect of the “unkind comments” on the alumni trustee candidate, so there is no way of knowing whether the unkind comments caused a deeper divide. In the last example no mention is made of how incivility may have caused the “long time donor” to feel unwelcome. Thus, the president's message may have more to do with a concern over the lack of loyalty to the university than a concern over a lack of civility.

Clearly, there are deep wounds at Penn State that perhaps only time will heal, but to call for civility because “the leaders of your University at every level, from the administration, faculty, staff, and students, are unanimous in deploring the erosion of civility” without also addressing the injustices that may be fueling the incivility simply makes the president's plea into an argument from authority or popular appeal. The message is clear: get with the program of civility or you may find yourself a *persona non grata*.

Indeed, this is the same president who, while head of Florida State University, argued for accepting the \$1.5 million grant from the Charles G. Koch Charitable Foundation for funding new hires in economics. The question was whether the foundation's advisory board could veto a hire that the faculty had agreed upon. Barron argued that allowing the advisory board to veto such a hire was not a case of “thwarting academic freedom” because the faculty could still proceed with the hiring, but they would not be able to use the foundation's money.<sup>26</sup> A special faculty panel produced a report, which found that there were “numerous instances in which the language in the agreement left the university vulnerable to 'undue outside influence.' In addition, the report called on the university not to make similar agreements in the future.”<sup>27</sup>

When these incidents of overt and implied coercion in relation to civility are put into the broader context of the assault on public education by corporate reformers, there is an even greater sense of urgency for action. Diane Ravitch has convincingly shown in her recent book *Reign of Error: The Hoax of the Privatization Movement and the Danger to America's Public Schools* that corporate reformers are more interested in privatizing public education than improving the educational system. Surely the time has come for higher education to unite in a national effort to defend academic freedom.

## Policing Civility without Direct Coercion

### *President Roderick J. McDavis and the “Bucket of Blood”*

On August 21, 2014, Ohio University president Roderick J. McDavis accepted an ice bucket challenge and bravely endured the experience of having a large bucket of ice and water poured over his head. The ice bucket challenge is part of a campaign to raise awareness of and money for the fight against amyotrophic lateral sclerosis (ALS, or Lou Gehrig's disease). McDavis then invited Megan Marzec, the student senate president, to participate in the same challenge.<sup>28</sup>

Marzec accepted. However, rather than recording the act of having a bucket of ice and water poured over her head, she recorded a video on September 2, 2014, in which she wore a pink t-shirt that said “Ohio U Divest From Israel.”<sup>29</sup> After thanking the president for his ice bucket challenge, she poured a bucket of fake blood over her head and stated the following: “As Student Senate president I am sending a message of student concern of the genocide in Gaza and the occupation of Palestine by the Israeli state. I'm urging you, and OU, to divest and cut all ties with academic and other Israeli businesses and institutions.”<sup>30</sup> She went on to say in the video that “this bucket of blood symbolizes the thousands of displaced and murdered Palestinians, atrocities which OU is directly complacent in your cultural and economic support of the Israeli state.”<sup>31</sup>

The day after Marzec posted her video, the university responded, saying that Marzec had “altered the original spirit” of the challenge and that “her actions do not reflect the position of Ohio University or President McDavis.”<sup>32</sup> The university did at least “recognize the rights of individual students to speak out on matters of public concern” but then distanced itself from Marzec's actions by making it clear “that the message shared today by her is not an institutional position or a belief held by President McDavis.”<sup>33</sup>

The next day (September 4), President McDavis sent a message to the university community in which he quoted the above university statement and added three paragraphs. In those paragraphs, he stressed that he took “great pride in the fact that Ohio University is a community that tackles hard issues head-on” and that the “conflict in Israel and Gaza is no exception. But the manner in which we conduct ourselves as we exercise our right to free speech is of utmost importance.”<sup>34</sup> The last sentence appears to shake a cautionary finger at Marzec and anyone else who wants to exercise his or her right to free speech. Why cautionary? Because McDavis believes that the members of the university community “are a university family” and that they “should respect one another.”<sup>35</sup> However, the respect that family members have for each other should not exclude speech that at times may be uncivil or even disruptive. McDavis ended his message with a call for civility: “And when we engage in difficult dialogue on issues such as this, we must do so with civility and a deep appreciation for the diverse and resilient international community in which we live.”<sup>36</sup>

On September 10, forty-eight faculty members signed an open letter in support of Megan Marzec's right to hold the views that she espoused and the right to express them in the manner that she did.<sup>37</sup> On the same day, four students who were members of Bobcats for Israel were arrested by campus police for disrupting a Student Senate meeting.<sup>38</sup> The faculty open letter stated not only that invocations of civility too often function “to silence dissent and debate on issues of current concern” but also that “Marzec's challenge does not undermine 'civility.'”<sup>39</sup> Indeed, her action was placed in the context of “a long and honorable tradition” of nonviolent protest, such as “draft-card burnings, lunch-counter sit-ins, and even self-immolations.”<sup>40</sup>

On September 12, in the aftermath of these events, McDavis sent another letter addressed to students, colleagues, and friends that opened with the following statement: “The events of the past week have been very difficult for many members of our community as well as our alumni and friends.”<sup>41</sup> He went on to say that they had “witnessed how engaged [the] students are and how deeply they commit themselves to issues that are important to them.”<sup>42</sup> McDavis at least seemed to acknowledge the student controversy and, indirectly, the disruptive senate meeting. However, he made no mention of the faculty's open letter, the numerous death threats that Marzec had received, or the arrest of the four student members of Bobcats for Israel. McDavis continued to emphasize the need for “providing a learning environment that respects and encourages free speech, thoughtful discussion of important issues, and the opinions of others.”<sup>43</sup> He also mentioned that the vice president of the Student Senate and the president of the Jewish fraternity Alpha Epsilon Pi had met in a conversation to “promote healing, create a supportive climate, and foster a safe space on campus.”<sup>44</sup> McDavis ended his message with a statement that has not been widely publicized: “As we move forward, Ohio University remains committed to free speech *and* civility, interrelated concepts that provide the foundation of the academic freedoms that we value.”<sup>45</sup>

By including the italicized *and* between *free speech* and *civility*, McDavis has emphasized the fact that free speech should be interrelated with civility. If academic freedom is based on the interrelationship between free speech and civility, then free speech must be connected to civility in order to express itself. The fact of the matter is that although civility should be encouraged, it is not a condition for the exercise of free speech. As Evan Goldstein has stated in an opinion piece for *The Gavel* at Boston College, “Regnant civility produces a bullshit academic community, which demands, as an implicit price of doing business, a promise not to threaten social, economic and political prevailing orthodoxies.”<sup>46</sup> Goldstein continues, “It is bullshit to pretend we are participating in an uncensored exchange of ideas when certain ideas are systematically targeted for exclusion.”<sup>47</sup>

### *Chancellor Nicholas B. Dirks and the Free Speech Movement at UC Berkeley*

These observations are applicable as well to the second controversial case involving noncoercive civility, this time at the University of California, Berkeley, birthplace of the Free Speech Movement. On September 5, 2014, only days after Marzec dumped a bucket of fake blood on her head, Chancellor Nicholas Dirks sent an e-mail to faculty, staff, and students on civility and free speech. The message was sent in honor of the fiftieth anniversary of the Free Speech Movement. However, rather than having a subject line that mentioned the anniversary of the movement, which began in the fall of 1964, Dirks showed, perhaps, a lack of sensitivity by labeling the subject line of his e-mail “Civility and Free Speech,” thereby seemingly emphasizing civility over free speech.<sup>748</sup>

In his opening remarks, Dirks acknowledges the fiftieth anniversary of the Free Speech Movement by saying that it “made the right to free expression of ideas a signature issue for [the University of California, Berkeley,] and indeed for universities around the world.”<sup>749</sup> As he honors “this turning point in our history”—that is, when the Free Speech Movement made Berkeley “a symbol and embodiment” of the ideal of free speech—he turns to the issue of how free speech can thrive.<sup>750</sup> For Dirks, it's not enough for free speech to be tolerated, because tolerated speech is not necessarily meaningful speech. To be meaningful, speech must be “heard, listened to, engaged and debated.”<sup>751</sup> But when free speech is connected to divisive issues that are “controversial and capable of arousing strong feelings,” he seems to question the commitment to free speech because that commitment “can lead to division and divisiveness that undermine a community's foundation.”<sup>752</sup> Perhaps Dirks did not recall that Edwin W. Pauley, a regent of UC Berkeley in the 1960s, saw the speeches of the Free Speech Movement as divisive simply because they challenged university authority. Moreover, J. Edgar Hoover was more than willing to provide Pauley with political dirt on faculty members and regents in order to smear Clark Kerr, then President of the University of California.<sup>753</sup>

In what seems like almost an attempt to undo what the Free Speech Movement has accomplished, Dirks, near the end of his e-mail, states the following: “Simply put, courteousness and respect in words and deeds are basic preconditions to any meaningful exchange of ideas. In this sense, free speech and civility are two sides of a single coin—the coin of open and democratic society.”<sup>754</sup> The Board of Directors of the Free Speech Archives and the 50th Anniversary Organizing Committee responded by sending a joint letter to Dirks in which they point out that he seemed “to miss the central point” of the movement, which was about the “right to political advocacy on campus.”<sup>755</sup> To make sure their point was clear, they go on to say that “it is precisely the right to speech on subjects that are divisive, controversial, and capable of arousing strong feelings that we fought for in 1964.”<sup>756</sup>

Dirks's e-mail was also admonished by other groups, including the Council of University of California Faculty Associations and the California Scholars for Academic Freedom. Anita Levy, associate secretary of the AAUP, was astonished: “That the university which gave rise to the free speech movement should celebrate it by embracing the notion of civility is patently absurd.”<sup>757</sup> A week after his first e-mail message, Dirks sent a second one explaining to the university community that the reason for the “Civility and Free Speech” subject line was the fact that it had become something of a tradition every fall to issue “statements concerning the virtue of civility on campus.”<sup>758</sup> He goes on to reaffirm the university's “unflinching commitment to free speech” and explains that he did not mean to suggest “any constraint on freedom of speech,” nor did he mean “to compromise in any way our commitment to academic freedom as defined by [the University of California, Berkeley,] and the American Association of University Professors.”<sup>759</sup> Dirks's clarification of his first e-mail and reaffirmation of academic freedom laid the controversy to rest.

The controversy itself, however, and the inherent tension between free speech and civility will perhaps never cease. The question is, why do top-level administrators in higher education, when faced with the choice between defending free speech or defending civility, overwhelmingly defend civility? In addition, most administrators in defending civility do not even perceive a possible conflict with academic freedom. In a

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survey developed by the editors of *Inside Higher Ed* in consultation with Gallup, data were collected from 624 provosts, or officials having an equivalent title. Not only did a large majority of provosts “believe that civility is a legitimate criterion in hiring and evaluating faculty members,” but when asked whether discussions of civility raised questions about academic freedom, “only 2 percent [of provosts] said 'always' and 16 percent said 'a great deal.’”<sup>60</sup> Most provosts either are not familiar with the importance of academic freedom for higher education or are not willing to defend it in the face of outraged groups or an outraged community.

### Does the First Amendment Protect Uncivil Speech?

Nowhere does the question of civility come up more than with respect to issues of Israel and Palestine. A November 2014 letter focusing on these issues provided university officials with excellent legal advice on free speech. The bottom line is this: political speech, regardless of its civility, is protected by the First Amendment.<sup>61</sup>

The letter, sent November 4, 2014, to more than 140 universities, is signed by seven attorneys and officers representing the Center for Constitutional Rights, the National Lawyers Guild, Palestine Solidarity Legal Support, Advancing Justice, and the Council on American-Islamic Relations. The letter makes two points. First, the expression of political views does not violate the civil rights of those who object to those views. Second, the First Amendment protects speech regardless of its “civility.”

The letter begins by noting the present context:

Recently, expression about Israel, Palestine, and the United States’ role in the Middle East has been a flashpoint for university administrators who have been asked to condemn certain viewpoints, monitor student expression or activism, and in some cases, to censor or punish students or faculty based on their opinions about these issues. (1)

Acknowledging the challenge posed by “the deeply-held beliefs and passions of students, faculty, and community members,” the letter urges,

We hope your university—through its policies, public statements, and actions—will treat freedom of speech not as a burden or a legal limitation, but rather, as a foundational value that enables searching scholarship and democratic governance. (2)

The letter then puts its first point as follows: “Expression of political viewpoints, standing alone, is not ‘harassment’ and does not create a ‘hostile educational environment’ under Title VI of the Civil Rights Act of 1964” (2). The US Department of Education’s Office for Civil Rights, the letter notes, has received multiple complaints alleging that “expression criticizing the state of Israel or advocating for Palestinian human rights . . . creates a ‘hostile educational environment’ for Jewish students” (2). To date, however, “no such complaint has been sustained or found to have legal merit.”

The letter provides several illustrations, including challenges to creative forms of activism involving the use of mock checkpoints or mock eviction notices. With regard to the First Amendment protection of political speech, the letter concludes,

No doubt, harassment or intimidation of any student on the basis of race, color, or national origin triggers Title VI obligations. However, as the U.S. Department of Education has stated, mere expression of political viewpoints, whether through pamphlets, theater, demonstrations, or otherwise, does not, standing alone, give rise to a Title VI violation simply because some may find it offensive. (4)



The second of the letter's two major points is presented even more succinctly than the first: "There is no 'civility' exception to the First Amendment" (4). The letter refers to the case of Professor Salaita and several subsequent controversies about civility. It also recalls a case in which members of the San Francisco State University College Republicans stomped on flags of Hamas and Hezbollah. Other students complained that this was not "civil" because the flags depict the Arabic word for *God*, leading to an investigation of whether the student organization violated the student code of conduct. The case ultimately landed in federal court and resulted in a 2007 ruling that the protections of the First Amendment are not limited to

forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. . . . [The university's] requirement "to be civil to one another" [unconstitutionally threatens the freedom] to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. (5)

The concept of civility, warns the letter, is "vague and highly subjective" (4). Because it is so "elastic," it is readily employed "selectively" to silence political views deemed objectionable (5). Regardless of who is silenced, requirements of civility threaten anyone with a passionate view.

Universities, concludes the November 2014 letter, must uphold "the paramount ideals of freedom of speech and academic freedom . . . even in the face of great public outcry" (6). Regardless of the First Amendment, this is good academic advice for all academic institutions. There is more to be said, however. The letter is correct that, in general, uncivil speech is protected by the First Amendment. Unfortunately, a careful reading of the legal precedents makes it clear that this does not generally hold within educational contexts, though higher education may, or may not, be an exception.

As a general matter of First Amendment law, you needn't be civil to be protected by the First Amendment. Government censorship or punishment of speech on the basis of what is deemed a lack of civility generally violates the First Amendment. Education, however, has been repeatedly identified by the courts as a special context in which standard principles of free speech cannot apply. Teachers and researchers operating within the scope of their academic responsibilities cannot assume that they are protected by the First Amendment. Student speech outside the academic context is fully protected by the First Amendment, but student speech within the academic context has no such protection. Professor Salaita's tweets were likely protected by the First Amendment because he was speaking in the public domain about matters of public interest, but the First Amendment would provide much less protection for comments made in class.

The Supreme Court addressed the question of civility in education in *Bethel v. Fraser* (1986).<sup>62</sup> The case originated with a one-minute speech at a high school assembly in which a student described a candidate he supported for student government office:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So please vote for Jeff Kuhlman, as he'll never come [long pause] between us and the best our school can be. (687)

The audience was amused, and the candidate was elected. School officials were not amused; they penalized the speaker, whose subsequent lawsuit eventually reached the Supreme Court. Ruling for the school, the court concluded that public schools are legitimately concerned with "the habits and manners of civility." Regardless

of the First Amendment, they have the authority to set standards of civility and to punish speech that violates those standards.

*Bethel v. Fraser* involved high school students. But that was just the start. In *Hazelwood v. Kuhlmeier* (1988) the Supreme Court extended the rationale of *Bethel v. Fraser* to conclude that when the government functions as an educator it is largely free of First Amendment constraints. In *Garvetti v. Ceballos* (2006) it ruled that when the government functions as an employer it is free to regulate the speech of its employees, as is any other employer.<sup>63</sup> When public employees are doing their jobs, in other words, they are not protected by the First Amendment. The First Amendment applies only to public speech on one's own time. Many courts have applied *Hazelwood* and *Garvetti* to higher education, though some have balked at doing so, and the Supreme Court has left the question open.

In contrast, outside of educational contexts, the Supreme Court has strongly supported the First Amendment rights of minors. Most recently, in *Brown v. Entertainment Merchants Association* (2011), it struck down, on First Amendment grounds, a law limiting the access of minors to violent video games, which were more than just "uncivil."<sup>64</sup> The important distinction in applying the First Amendment in education, then, is not between children and adults or between high schools and colleges or between students and faculty. The major distinction is between curricular and personal speech. Students of all ages, and faculty in their free time, are strongly protected by the First Amendment in their public comments and media participation. Within classrooms and curricula, however, no one at any level of education should count on the First Amendment.

*Fraser*, *Hazelwood*, and *Garvetti* were all wrongly decided, in our judgment. But these cases are established law, and it would be foolish to pretend otherwise.

### What Should We Do?

Nothing in any Supreme Court decision requires censorship of uncivil speech. Educational institutions are free to promote civility and may, in some cases, be expected or even required to do so. This does not, however, require censorship. On the contrary, there is a deep paradox in promoting civility through censorship. Censorship fails to respect the freedom of others to hold and express beliefs of their own and thus fails to respect them as persons. Far from promoting civility, censorship is itself uncivil.

How, then, to promote civility? One way is to engage students in academic discussion. Teachers can and should promote civil discussion without censoring or punishing uncivil speech. They can be models of civility, can urge and remind students to respect each other, can engage students in serious argumentation, and can evaluate the quality of the students' arguments. None of this requires censorship, and all of it promotes civility.

There will always be uncivil speech, or at least speech deemed uncivil by some. Such speech among students is often deplored by their peers, in which case there may be no need to intervene. In other cases, teachers may choose to challenge uncivil modes of expression, as well as unjustified claims; there is no need for censorship or punishment, but academic evaluation of a student's contribution to intellectual exchange is appropriate. Part of what students must learn is how to express themselves and engage in discussion without needlessly offending others.

As surely as there will always be controversy about what gets said, there will always be efforts to prevent or punish what are deemed to be uncivil ideas or modes of expression. We should not assume that if academic freedom is threatened, the First Amendment will come to its rescue. Rather than rely on wishful thinking about constitutional law, educators at all levels must clarify and explain the academic basis for academic freedom and promote policies that protect that freedom for all.<sup>65</sup> The National Council of Teachers

of English, for example, adopted a statement on academic freedom in 2014.<sup>66</sup> Having such a policy in place is much better than trying to craft one in the midst of controversy.

So let's all be civil, even to those who fail to meet our standards of civility, and uncompromising in the defense of academic freedom.

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