

# ACADEMIC FREEDOM AS A FUNDAMENTAL HUMAN RIGHT IN AMERICAN JURISPRUDENCE AND THE IMPOSITION OF "BALANCE" ON ACADEMIC DISCOURSE ABOUT THE PALESTINIAN-ISRAELI CONFLICT

*Rima Najjar Kapitan*<sup>1</sup>

## Introduction

To accost a grieving parent at his/her son's funeral with signs that read, "God Hates Fags," "You're going to hell," and "Thank God for dead soldiers" is constitutionally protected speech. But is it protected speech for a professor at a public university to voice concern that his administration is misusing grant funds? To engage in scholarship that rigorously questions a powerful Harvard professor's endorsement of a colonial military state? To present films on a college campus that colleagues view as too "bleeding edge," "heavy handed," "didactic" and "beyond the cultural and intellectual grasp" of the student body? If such questions are left to the current members of the United States Supreme Court, proponents of academic freedom have reason to be apprehensive.

Some of the Court's recent First Amendment jurisprudence threatens to exempt a wide range of academic discourse from constitutional protection. This article highlights the far from inevitable but ominous possible consequence of the *Garcetti* case and its progeny: that professors teaching in public universities may no longer have recourse to free speech protections if the speech they are seeking to protect is promulgated in the scope of their employment duties. One contingent that stands to be most affected by such a threat is the community of professors who, as part of their scholarly and teaching activities, oppose Israeli and US policy in the Middle East. As other authors within this special issue illustrate, professors who seek to speak and write about Palestine/Israel in a way that challenges the academic orthodoxy must often do so at the risk of exclusion from the academic community.

I argue for a human rights-based concept of academic freedom that removes academic speech from the exclusive realm of employment relationship and restores

---

Rima Najjar Kapitan is an Attorney at Law with Kapitan Law Office, Ltd, Chicago, Illinois.

its status as one of our nation's most cherished and fundamental rights. Education and equal access to education have long been viewed, correctly, as fundamental values and pillars of our democratic structure. That positioning should be recognized in our jurisprudence, not merely our political rhetoric.

I will argue that a human rights-based conception of academic freedom requires a whole-hearted rejection of the proposition that academic speech be filtered through such vacuous and easily abused notions as "balance" and "objectivity," which are often used to suppress academic speech about Palestine/Israel in particular. I also suggest that litigation of particular academic freedom cases would be strengthened by awareness of the broader societal context in which speech is promulgated. Speech does not occur in a vacuum, and the way in which the First Amendment is used to protect or exclude speech should be evaluated in light of the historical context and the power relations of a particular situation.

As a jurisprudential constitutional matter, academic freedom in the United States is currently quite vulnerable. The 2006 *Garcetti* case dealt a powerful blow to government employees' access to First Amendment rights. It 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" (*Garcetti*, 2006: 421; emphasis added). The Court specifically declined to address whether this rule applied in the academic context but implied that academic cases would be analyzed somewhat differently (425). However, Justice Souter expressed profound worry that the Court's ruling would clear the way for abandoning academic speech protections that have occupied a "special niche" in our constitutional tradition (*Garcetti*, 2006: 438-439 (Souter, J., dissenting), quoting *Grutter*, 2003: 329).

His worry has so far been realized; several lower courts interpreted *Garcetti* to mean that professors who speak within the course of their job duties cannot assert First Amendment claims. Whatever "special niche" the Court carved out for universities by the time of the *Garcetti* ruling, that niche's existence was already vulnerable because of a tendency of the courts to defer to academic administrations. As the AAUP's Committee A points out, there were arguably hints of such a ruling even before *Garcetti* (O'Neil et al., 2009: 78-79).

For example, in a Seventh Circuit Court of Appeals opinion decided before *Garcetti*, the court declined to examine whether the non-tenured professor's speech rights had been violated because his activities were related to "the performance of his duties as an employee of the university and a member of the department" (*Omosogbon* 2003: 677).<sup>2</sup> It ruled that as a matter of law, a department chair's statement that a professor should avoid associating with certain members of the

department and devote more time to community activities involving African-American, as opposed to African, culture, did not implicate the First Amendment (676-677). The court explicitly rejected the notion that academic freedom had any special standing, writing, "Because academic freedom rights must ultimately flow from the First Amendment, claims of their violation are subject to all the usual tests that apply to assertions of First Amendment rights" (*ibid.*).

In doing so, the Court deferred to the university administration, emphasizing that "[o]ne dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference" (676). The principle that academic freedom prioritizes judicial deference to institutions, has been repeatedly cited in court cases dealing with universities and schools (*Urofsky*, 2000: 410; *Chemerinsky*, 2004: 36). It was perhaps most equivocally stated by the Fourth Circuit in the *Urofsky* case, which held, "Our review of the law... leads us to conclude that to 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..." (*Urofsky*, 2000: 410).

The effect of these rulings is that academic institutions can interfere with impunity with professors' teaching, scholarship, research activities, and even community activities, without their actions even coming within the scope of the First Amendment.

Post-*Garcetti* academic freedom cases followed suit. *Hong v. Grant*, a California district court case, held that a professor's speech protesting certain practices within the university, including over-reliance on adjuncts, was not entitled to First Amendment protection (*Hong*, 2007: 1158). It held, "an employee's official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer's objectives," and that essentially everything a professor does in the academic realm, including teaching, research, administrative and personnel functions were performed subject to the employment relationship and therefore outside the scope of what the First Amendment can protect (1166).

Finally, in *Renken v. Gregory*, an engineering professor disagreed with his dean about administration of a National Science Foundation (NSF) grant, including the fact that in his view, the dean contravened NSF regulations with regard to matching funds for the grant (*Renken*, 2008: 771). The Seventh Circuit held that because his complaints were made while he was carrying out his job duties as a university professor, they were not protected (775).

This analysis is similar to the deference courts give to corporations and other institutions in the employment law context. Courts hesitate to act as "super-personnel departments" unless it is clear that employment decisions are based on improper

considerations, such as discrimination or retaliation for whistleblowing (see e.g.: *Hutson*, 1995: 781). The *Garcetti* case goes much further than these employment cases, however, and holds that *even when* an employment action is motivated by an improper purpose, such as the desire to suppress a particular political perspective, that employment action is none of the court's business as long as the speech at issue is spoken in the course of the employee's duties. This deference to academic institutions as employers is symptomatic of the increasing corporatization of higher education generally (see: Schrecker, 2010a; Johnson et al., 2003).

It is unquestionably necessary for any serious notion of academic freedom that the concept be analyzed under a different framework than that which the *Garcetti* case provides.

### **Framing Academic Freedom in a Human Rights Discourse**

One of the most important reasons the *Garcetti* opinion is wrong to remove academic speech from the protections accorded to public speech is that academic speech implicates the fundamental human right of education. If courts are permitted to interfere with employment decisions when fundamental rights such as freedom from racial discrimination are at issue (see e.g.: *Rutherford*, 2006: 373), they should be permitted to interfere when the rights to free speech and education are implicated. Thinking about education as a human right would help protect academic freedom because it may prevent deference to university administrators from becoming the predominant value during the analysis about whether academic speech even comes within the purview of the First Amendment. It would force courts to change the focus of the analysis from the interests of employers to the role professors play in maintaining the integrity of our democratic society. Professors are not merely employees, but members of the society with rights to contribute to academic dialogue, a right which stems in part from their important role as conveyors of ideas to students and the general public.

A human rights conception of academic freedom would recognize education as central to the health and viability of our social and political system, and professors' right to free speech as one of its foremost protectors (Rajagopal, 2003). The result would hopefully be that the prospect of institutional interference with professors' speech is a serious enough concern that universities would not be able to circumvent a First Amendment analysis simply by invoking the employment relationship.

However, the Supreme Court expressed unwillingness to recognize education as a fundamental right in a 1973 case, *San Antonio Independent School District v. Rodriguez*, in which a group of Mexican-American parents attempted to challenge property-tax based educational funding on the basis that it violated the equal protection rights of poor students (*San Antonio*, 1973: 4-5). The court held that

although education was an important public service, it was not one of the fundamental rights guaranteed by the constitution, and therefore the school financing scheme need only be examined by the most deferential method of judicial scrutiny (39). The *Rodriguez* doctrine is long-overdue for reconsideration, however, as it is in discord with some of our nation's most cherished values as well as historical federal, state and international law (see *San Antonio*, 1973: 70-71 (Marshall, J., dissenting)).

The recognition of education as a fundamental right is not an entirely foreign one for our courts (*Tayyari*, 1980: 1378-1379).<sup>3</sup> In fact, there are hints of our government's recognition of education's centrality (on the state and federal levels) to our society dating back to before its founding, and some of those decisions involved academic freedom concerns.

One of the most eloquent arguments in favor of viewing education as a fundamental right is recorded in a California Supreme Court opinion from 1971 which tackles the same issue (the property-tax method of financing the educational system) that inspired the *Rodriguez* Court to declare that education was not a fundamental right two years later. The *Serrano v. Priest* opinion emphasizes the centrality of education to the achievement of other civil rights, and reads in part:

education is a unique influence on a child's development as a citizen and his participation in political and community life.... education is the lifeline of both the individual and society.... Voting has been regarded as a fundamental right because it is preservative of other basic civil and political rights.... At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities. (*Serrano*, 1971: 605-608) (internal quotations removed)

Since the California *Serrano* decision, several state constitutions and state supreme court cases have explicitly recognized education as a fundamental right (Black, 2010). In addition, a subsequent pre-*Rodriguez* federal district court endorsed the California Court's reasoning in holding education to be a fundamental right under the federal constitution as well (*Van Dusartz*, 1971: 870-875). Much earlier, Thomas Jefferson made an explicit connection between education and democratic governance, as pointed out in a 1977 case decided in the Second Circuit Court of Appeals which emphasized that "an educated and enlightened citizenry is a prerequisite to the functioning of any representative democracy" (*East Hartford*, 1977: 838, 843). Mr. Jefferson said:

I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom, and happiness.... Preach, my dear Sir, a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that

the people alone can protect us against these evils, and that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests and nobles who will rise up among us if we leave the people in ignorance. (*East Hartford*, 1977: n3, quoting Peterson, 1975: 399-400; see also *Wisconsin*, 1972: 213)<sup>4</sup>

And as Benjamin Franklin reminded us, liberty is somewhat hollow without knowledge: "God grant that not only the love of liberty, but a thorough knowledge of the rights of man may pervade all the nations of the earth so that a philosopher may set his foot anywhere on its surface and say, 'this is my country'" (*Tayyari*, 1980: 1380).<sup>5</sup>

A United States Supreme Court case decided in 1923 conveyed a similar sentiment in upholding a teacher's due process rights, and even implied that education is a fundamental right. In *Meyer v. Nebraska*, Meyer, a public school teacher, was convicted under a Nebraska state statute because he unlawfully taught the subject of reading in the German language, and this was considered dangerous to the health and safety of children (*Meyer*, 1923: 397-398). Justice McReynolds wrote that "liberty" within the meaning of the due process clause

denotes not merely freedom from bodily restraint but also the right of the individual... to acquire useful knowledge... The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged"... *the individual has certain fundamental rights which must be respected*. (399-401; emphasis added)

The Court went on to do a substantive analysis of whether the teacher's liberty had been compromised when he was prevented from teaching German and found that it had (402-403).

The *Meyers* Court's placement of a teacher's right in the context of his role in the society at large was also articulated by Justice Douglas in 1972 in the university context. "The First Amendment," he wrote, "involves not only the right to speak and publish but also the right to hear, to learn, to know.... And this Court has recognized that this right to know is 'nowhere more vital than in our schools and universities'" (*Presidents*, 1972: 998, 999 (Douglas, J., dissenting), quoting *Kleindienst*, 1972: 753, 763).

Importantly, the *Rodriguez* Court itself, even as it declared that education was not a fundamental right, did not dispute that education is "essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote" (*San Antonio*, 1973: 35). It made a distinction between negative and positive rights, however, and held that a crucial feature of cases that recognized

the fundamental status of rights was that in those cases the state had “deprived” or “interfered” with the free exercise of a right; in the *Rodriguez* case, however, the rights at issue were “affirmative and reformatory” (39). Whatever one thinks of the justice of such a distinction, it seems the Supreme Court has left open the door to declaring that when state interference with academic speech is at issue, education is a fundamental right that should be taken into account when determining the contours of academic freedom.

One of the most important Supreme Court cases recognizing explicitly a right to academic freedom, *Keyishian*, was decided in 1967 in response to attempts to suppress speech viewed as subversive and Communist (*Keyishian*, 1967: 589). Professor Keyishian’s one-year contract was not renewed because he refused to sign a statement saying he was not a Communist. The Court described academic freedom as “of transcendent value to all of us and not merely to the teachers concerned” and went on to say, “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection’” (*Keyishian*, 1967: 603, quoting *Associated Press*, 1943: 372). Quoting *Sweezy*, an earlier McCarthy-era case, the Court put the matter in even stronger terms, stating that to deny freedom of inquiry and impose any “straight jacket on the intellectual leaders in our colleges and universities” would be to cause “our civilization [to] stagnate and die” (*Sweezy*, 1957: 250, quoted in *Keyishian*, 1967: 603).

Although the Court’s reasoning was contextualized firmly in the First Amendment with no explicit reference to any right to education, the Court did set academic freedom apart from other first amendment freedoms in its reasoning, and in doing so emphasized the necessity of education to the maintenance of a robust society. Whether the Court is willing to admit it or not, therefore, there is a strong indication in our nation’s jurisprudence indicating that the Court values academic freedom precisely because of the fundamental and essential role education, and specifically university professors, fulfill in our democracy.

### **The Politics of “Objectivity” and Academic Speech of Marginalized Speakers**

Once a court finds that a fundamental right is at issue, state action that adversely affects that right “must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest” (*San Antonio*, 1973: 97-98 (Marshall, J., dissenting)). Defining the contours of academic freedom, and what state actions improperly impinge on it, is not always an easy endeavor, and I certainly do not presume to attempt to define its proper contours here. Rather, in the remainder of this article, I would like to highlight a few considerations that courts

and others concerned with academic freedom should keep in mind, and which are particularly relevant to scholars grappling with issues related to the Middle East.

In particular, it is crucial to negotiate the boundaries of academic freedom in a way that is mindful of the essential role it plays in protection and inclusion of voices of marginalized groups and viewpoints. After all, “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’” (*Snyder*, 2011: 1215, quoting *New York Times*, 1964: 270). Academic freedom plays a vital role not only because it ensures the integrity of democracy in the abstract, but because provision of a quality education gives students who are marginalized the tools they need to effectively enter into public political discussion of issues that are important to their future as citizens of the state. One important way to further that goal is to create strong protections for professors who are structurally less powerful within academic institutions (such as contingent faculty) or professors whose views, ethnicities or fields of study lie outside the dominant academic culture.

As critical race theorists remind us, free speech jurisprudence does not occur in a vacuum, and the way in which the First Amendment is used to protect or exclude speech should be evaluated in light of the historical context and power relations (Matsuda et al., 1993: 14). The Supreme Court in *Brown v. Board of Education* emphasized that because education was “perhaps the most important function of state and local governments” and “required in the performance of our most basic public responsibilities” a segregated educational scheme disadvantaged black children and was therefore unconstitutional (*Brown*, 1954: 493). In doing so, it did not examine the concept of the justifications that schools for black children were “separate but equal” in the abstract, but rather examined power relations between the races and the psychological effects the scheme had on black children (494-495). As Edward Said (1996: 227) argued in advocating for a broad, pluralistic definition of academic freedom, “A single overmastering identity at the core of the academic enterprise, whether that identity be Western, African, or Asian, is a confinement, a deprivation.”

Therefore, as we debate the contours of academic freedom, whether in the legal or academic arena, we should be cognizant of how the voice being excluded fits into the broader political and cultural landscape, and evaluate critically the rationales academic institutions or others put forward for suppression of speech. The courts need help in this regard. Even the legal standard suggested by the dissenting justice in *Garcetti* could be problematic when applied in the academic context; Justice Souter concedes, while writing generally about public employees, that “an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it” (*Garcetti*, 2006: 435). He further states, by

way of example of the type of government interest that might justify government suppression of speech, that “a statement that created needless tension among law enforcement agencies would be a fair subject of concern” (438). Controversial speech often does create tension, but that is precisely the existence of such tension that makes First Amendment protections necessary (*Rankin*, 1987: 387).<sup>6</sup>

Such a standard, leaving aside whether it would be appropriate in the non-academic context, should be viewed with great skepticism in the academic one. It could be easily manipulated by academic administrations to justify broad interference with the substantive speech of professors (see: *Snyder*, 2011: 1219).<sup>7</sup> As the case of Norman Finkelstein (see article by Matthew Abraham in this special issue) makes clear, criticizing “the way” a professor articulates a particular point of view is a tactic universities sometimes use to mask their interference or suppression of the substance of what the professor is saying. Just as professors should generally be given deference as to the substance of their ideas, they should be given considerable deference as to the manner in which they frame those ideas.

Marcy Knopf-Newman and others argue that many of the strategies used to combat Communist ideology when the *Sweezy* and *Keyishian* cases were decided, such as the blacklisting, monitoring and investigation of professors, “have been resuscitated and redirected to academics working in Middle East studies” (Knopf-Newman, 2005). I will briefly address here one particular frequently-deployed justification for suppression of speech relating to Palestine/Israel: the requirement that the speaker (if s/he presents material critical of Israel or Zionism) adhere to the warped conceptions of “objectivity,” political “neutrality,” and “balance,” and avoid betraying any political sympathies in his or her teaching and research. First, to require professors to pretend that they are apolitical beings would not only be disingenuous (Salaita, 2008) but a strange imposition given that one of the primary justifications for the constitutional protection of academic freedom is the preparation of students for participation in the political realm, as discussed above. Scholarship with political implications is reconcilable with reasoned discourse (*ibid.*). Proponents of the doctrine of “balance” also often equate holding a political perspective that they perceive as too left-wing with *indoctrination* of students (Pipes and Schanzer, 2002; also Glazov, 2004), which are of course very different concepts.

As Steven Salaita (2008) points out, some of the primary promulgators of these tactics, even as they condemn the political partiality of scholars, themselves have strong ideological stakes in the Palestinian/Israeli conflict and neoconservative ideologies. They also often reference or make implicit use of stereotypes about Arab and Muslim irrationality or violence (*ibid.*) in their call for a return to “civilized discourse” (Pipes and Schanzer, 2002). For example, IsraCampus, an Israeli organization modeled after its American counterpart, Campus Watch, posted an advertisement in which it conflated Haifa University professors’ challenges to

the Israeli orthodoxy with support for terrorism, brainwashing, incitement, and anti-Semitism (Cook, 2009).

Similarly, the Anti-Defamation League (ADL) denounced an article by Professors Mearsheimer and Walt about the Israel Lobby and United States foreign policy as “a classical conspiratorial anti-Semitic analysis,” lacking “balance,” and “one of the most unprofessional works coming out of respectable quarters” (ADL, 2006). In the article, Drs. Mearsheimer and Walt had argued that the charge of anti-Semitism is often deployed to silence political criticism of the Israeli lobby (Mearsheimer and Walt, 2006). Kenneth Marcus dismissed their credibility on this topic because of the fact that they had written a book arguing that the United States’ diplomatic and material support for Israel, influenced in large part by the Israel lobby, did not serve American or Israeli interests (Marcus, 2008: 26). Mr. Marcus wrote, “In light of the particular place which Professors Walt and Mearsheimer occupy in this debate, the objectivity of their perspective may itself be subject to question” (*ibid.*). Although thankfully Drs. Mearsheimer and Walt were not in danger of losing their faculty positions when they wrote on the topic (Mr. Marcus points out that the charge of anti-Semitism has not succeeded in silencing them), the rhetorical devices the ADL deployed in an attempt to intimidate them are similar to arguments made in favor of excluding others from academic discourse.

Some of these advocates for political neutrality scarcely attempt to hide the fact that when they criticize scholars for being too “ideological” or not sufficiently “objective,” what they really mean is that they are too left-wing or too supportive of human rights and self-determination for Palestinians. The American Council of Trustees and Alumni, which Ellen Schrecker describes as “the lead organization in the crusade against multiculturalism and the academic left,” wrote a report complaining that dozens of courses at American universities “too often look more like lessons in political advocacy and sensitivity training than objective and balanced presentations of scholarly research” (Schrecker, 2010b). Daniel Pipes, founder of the Middle East Forum, criticized a Columbia University investigation report about academic freedom for failing to adequately expose the “stridently pro-Palestinian, anti-Israeli bias on the part of several professors” and wrote about the necessity of “creating political balance at Columbia and other universities” through “concentrated and protracted effort by stakeholders—alumni, students, parents of students, legislators—to reclaim an institution that has become a fortress for the left” (Pipes, 2005).

This approach is mirrored by the political approach of the United States government itself to resolution of the Israeli-Palestinian problem; inherent to the Oslo Accord negotiations and the current faltering attempts at bringing the current political actors in the conflict to “direct talks” is the idea that fairness dictates treating both parties on equal footing (leaving aside more active and direct steps by the United States to place

the parties on unequal footing). As Kathleen Christison argues in "The Problem with Neutrality between Palestinians and Israel" (2004), "Treading a middle path between one utterly powerless party and another party with total power, effectively removes all restraints on behavior by the powerful party." There is an analogous concept in the speech context: Israeli interests and speech are already overrepresented in US legislative action, media, and within academia. To insist, therefore, that a particular professor's speech be "neutral"—if such a feat is even possible—is essentially to insist that the more dominant viewpoint predominate.

These demands for supposed "neutrality" or "balance" in academic speech resonate to some degree within academia even among those who may not be driven by strong ideological impulses, but rather by fear of appearing to support speech that is "radical" or "controversial," or of angering supporters of the Israeli occupation and purveyors of the view that any criticism of Israel is itself anti-Semitism. In such circumstances, the suppression of speech often manifests itself in exclusion of speech on the basis that it reveals "bias" or is not accompanied by a view "from the other side." In Dr. Ginsberg's case, her colleagues, who were not necessarily ideologically vested in justifying Israeli policies, worried that the films she sought to present on campus, which were both Israeli and Palestinian, were too "bleeding edge," "polemical," that an Israeli film should be added to "balance out the perspective of [a particular] Palestinian film," and that her introductory remarks at a film screening might create the perception that her academic program was biased in favor of Palestinians (*Ginsberg*, 2009: 26-28, 36, 39; also: Ginsberg's article, "The Deployment of 'Anti-Semitism,' 'Controversy,' and 'Neutrality' in *Ginsberg v. NCSU*" in this special issue).

Earlier, DePaul University denied Norman Finkelstein tenure because he did not "show due respect for the opinions of others," or "strive to be objective in [his] professional judgment of colleagues" (Holtzman, 2007). It seems that the primary victim of Dr. Finkelstein's non-"objectivity," and the catalyst of the tenure denial, was Alan Dershowitz, a powerful Harvard professor and an advocate for Israel who had campaigned vociferously against Dr. Finkelstein's tenure and whose book Dr. Finkelstein had subjected to a pointed and meticulous critique (see article by Matthew Abraham in this special issue).

In the context of speech about the Palestinian-Israeli conflict, to *require* that any speech that is critical of Israeli policy only exist alongside speech that is supportive of Israeli actions is itself imposition of a particular ideological position. Proponents of such a requirement are sending a message to the speaker that unqualified anti-Zionist speech is unreasonable or illegitimate. Most would not dare to send the same message about speech that is supportive of right-wing Israeli policies (Knopf-Newman, 2005). As Ilan Pappé (2007: xviii), Norman Finkelstein (2005: 2) and Raja Halwani (2005), among others, assert, there is mainstream scholarly

consensus about the historical origins of the Palestinian-Israeli conflict, and the conflict itself is, at its core, not very complex. It is therefore not appropriate to always require that “both sides” of the conflict be represented in a way that gives the illusion of moral or political parity between the colonizer and the colonized (*ibid.*).

Requirements such as political neutrality and “balance” would be considered ludicrous in contexts about which there is scholarly consensus about the substance of the moral or historical position in question (*ibid.*). For example, a requirement that any speech about the history of slavery in the United States be accompanied by a presentation by proponents of slavery would be considered by most to be unjustifiable and an ideological imposition. Similarly, it would be wrong to fault professors on the basis that their scholarship betrays an anti-slavery bias. Of course, Evangelical neoconservatives in the Texas State Board of Education *did* recently succeed in abusing the concept of balance in shaping schools’ historical representations of slavery. They removed references to the “slave trade” and required that the “contributions” of pro-slavery Confederate leaders be highlighted in history textbooks. Justifying the move, former board chairman Don McLeroy said the Texas history curriculum has been unfairly skewed to the left, and the Board was merely restoring balance (Castro, 2010).

The concept of objectivity should not mean in all cases acknowledging, as equally valid, an opposing view. Objectivity refers to whether a statement is factual—capable of being proven true or false—without reference to the internal feelings of the speaker. The use of the concept of “balance” is sorely in need of clarification as well. Demands for “balance” are sometimes attempts to “revise the structure of plausibility” so that assertions that have been discarded by a consensus of scholars on a particular topic are imposed on any academic who addresses that topic (Hollinger, 2005). David Hollinger (2005) proposes an alternative definition of scholarly balance: “To be balanced is simply to do an academic project professionally. To be imbalanced is to leave out of account something that the academic norms of evidence and reasoning in the interest of truth require you to take into account.” Such a standard would give significant deference to professors, as experts in their fields, to determine how to go about engaging the academic and broader communities in scholarly discourse.

It is not fair to professors, nor to students and others who are exposed to a professor’s speech, to require that academic speech be vetted through administrators’ conceptions of bias, objectivity and neutrality.

## Notes

1. The author wishes to thank Mohammed Abed, Orayb Najjar, Tomis Kapitan, Terri Ginsberg, and Matthew Abraham for their feedback and advice, which greatly improved this article.

2. The judge who wrote the opinion, Diane Wood, was one of the candidates President Obama considered for a nomination to the Supreme Court and a target of Conservative lobbying efforts. See Oliphant, 2009.
3. (Noting the United States' "strong support for developing international human rights standards, as expressed, for example, in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, both of which provide for equal access for all to higher education....")
4. ("Providing public schools ranks at the very apex of the function of a State.")
5. (Declaring as unconstitutional a university motion that sought to exclude Iranian students from campus by denying admission to any student "whose home government holds, or permits the holding of U.S. citizens hostage....")
6. ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.")
7. ("'Outrageousness,' however, is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression"; internal citation removed.)

## References

- Anti-Defamation League. (2006). "Mearsheimer and Walt's Anti-Jewish Scream: A Relentless Assault in Scholarly Guise." March 24, [http://www.adl.org/Israel/mearsheimer\\_walt.asp](http://www.adl.org/Israel/mearsheimer_walt.asp) (accessed March 30, 2011).
- Black, D. (2010). Unlocking the Power of State Constitutions with Equal Protection: The First Step toward Education as a Federally Protected Right. *William and Mary Law Review*, 51(4), 1343-1416.
- Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).
- Castro, A. (2010). Texas Board of Education Approves More Conservative Curriculum. *Huffington Post*, May 21, [http://www.huffingtonpost.com/2010/05/21/texas-board-of-education-\\_n\\_584697.html](http://www.huffingtonpost.com/2010/05/21/texas-board-of-education-_n_584697.html) (accessed March 29, 2011).
- Chemerinsky, E. (2004). The Deconstitutionalization of Education. *Loyola University of Chicago Law Journal*, 36, 111-135.
- Christison, K. (2004). The Problem with Neutrality between Palestinians and Israel. *Counterpunch*, July 10-12, <http://www.counterpunch.org/christison07102004.html> (accessed March 30, 2011).
- Cook, J. (2009). Right-wing Groups Creating Climate of Fear at Israeli Universities. *Electronic Intifada*, November 16, <http://electronicintifada.net/v2/article10891.shtml> (accessed March 29, 2011).
- East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford*, 562 F.2d 838 (2nd Cir. 1977).
- Finkelstein, N. (2005). *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History*. Berkeley: University of California Press.
- Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- Ginsberg v. Board of Governors of the University of North Carolina*, No. 09-CVS-1789 (N.C. Gen. Ct. of Justice 2009), Plaintiff's Response to Defendant's Motion for Summary Judgment.
- Glazov, J. (2004). Brainwashed. *FrontPageMagazine*, May 13, <http://www.freerepublic.com/focus/f-news/1134624/posts> (accessed March 29, 2011).
- Grutter v. Bollinger*, 539 U.S. 306 (2003).
- Halwani, R. (2005). Bias and the Israeli-Palestinian Conflict. November 1, <http://rajahalwani.blogspot.com/2005/11/bias-and-israeli-palestinian-conflict.html> (accessed March 28, 2011).
- Hollinger, D. A. (2005). What Does It Mean to Be "Balanced" in Academia? George Mason University's History News Network, February 28, <http://hnn.us/articles/10194.html> (accessed March 29, 2011).
- Holtschneider, D. H. (2007). Letter to Norman Finkelstein, June 8, <http://www.normanfinkelstein.com/pdf/tenuredenial/Finkelstein,Norman06.08.2007.pdf> (accessed March 28, 2011).
- Hong v. Grant*, 516 F.Supp.2d 1158 (C.D.Cal. 2007), *affirmed on immunity grounds*, 2010 WL 4561419 (9th Cir. 2010).

- Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995).
- Hutson, B., Kavanagh, P., and Mattson, K. (eds.) (2003). *Steal This University: The Rise of the Corporate University and the Academic Labor Movement*. London: Routledge.
- Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967).
- Kleindienst v. Mandel*, 408 U.S. 753 (1972).
- Knopf-Newman, M. J. (2005). Fair and Balanced? On Academic Freedom in Post 9/11 America. *Palestine-Israel Journal of Politics, Economics & Culture*, 12(2/3), 101-108.
- Marcus, K. (2008). Higher Education, Harassment and First Amendment Opportunism. *William & Mary Bill of Rights Journal*, 16 (symposium).
- Matsuda, M., Lawrence III, C. R., Delgado, R., and Crenshaw, K. W. (1993). *Words that Wound*. Boulder, CO: Westview Press.
- Mearsheimer, J. and Walt, S. (2006). The Israel Lobby. *London Review of Books*, March 23, 3-12.
- Meyer v. Nebraska*, 262 U.S. 390 (1923).
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- Oliphant, J. (2009). Supreme Court Nomination: Partisan Groups Dive into the Fray. *Chicago Tribune*, May 21, [http://articles.chicagotribune.com/2009-05-21/news/0905200894\\_1\\_supreme-court-judge-diane-wood-judicial-confirmation-network](http://articles.chicagotribune.com/2009-05-21/news/0905200894_1_supreme-court-judge-diane-wood-judicial-confirmation-network) (accessed March 30, 2011).
- Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003).
- O'Neil, R., Areen, J., Finkin, M., Gerber, L., Van Alstyne, W., and Nelson, C. (2009). Committee A Report: Protecting an Independent Faculty Voice: Academic Freedom After *Garcetti v. Ceballos*. November-December, 67-88, <http://www.aaup.org/AAUP/comm/rep/A/postgarcettireport.htm> (accessed March 29, 2011).
- Pappe, I. (2007). *The Ethnic Cleansing of Palestine*. Oxford: Oneworld Publications.
- Peterson, M. (ed.) (1975). *The Portable Thomas Jefferson*. New York: Penguin.
- Pipes, D. (2005). Conservative Professors, an Endangered Species. *New York Sun*, April 12, <http://www.meforum.org/pipes/2526/conservative-professors-an-endangered-species> (accessed March 28, 2011).
- Pipes, D. and Schanzer, J. (2002). Extremists on Campus. *New York Post*, June 25, <http://www.meforum.org/pipes/424/extremists-on-campus> (accessed March 29, 2011).
- Presidents Council District 25 v. Community School Board No. 25*, 409 U.S. 998 (1972).
- Rajagopal, B. (2003). Academic Freedom as a Human Right: An Internationalist Perspective. *Academe*, May-June, <http://www.aaup.org/AAUP/pubsres/academe/2003/MJ/Feat/Bala.htm> (accessed March 29, 2011).
- Rankin v. McPherson*, 483 U.S. 378 (1987).
- Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).
- Rutherford v. City of Cleveland*, 179 Fed.Appx. 366 (6th Cir. 2006).
- Said, E. W. (1996). Identity, Authority, and Freedom: The Potentate and the Traveler. In *The Future of Academic Freedom*, ed. L. Menand. Chicago: University of Chicago Press, 214-228.
- Salaita, S. (2008). Curricular Activism and Academic Freedom: Representations of Arabs and Muslims in Print and Internet Media. *Arab Studies Quarterly*, 30(1), 1-14.
- San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).
- Schrecker, E. (2010a). *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University*. New York: The New Press.
- (2010b). Ward Churchill at the Dalton Trumbo Fountain: Academic Freedom in the Aftermath of 9/11. *AAUP Journal of Academic Freedom*, 1, <http://www.academicfreedomjournal.org/index.html> (accessed March 29, 2011).
- Serrano v. Priest*, 5 Cal.3d 584 (Cal. 1971).
- Snyder v. Phelps*, 131 S.Ct. 1207 (2011).
- Sweezy v. State of N.H.*, 354 U.S. 234 (1957).
- Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.C.N.M. 1980).
- United States v. Associated Press*, 52 F.Supp. 362 (D.C.N.Y. 1943).
- Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).
- Van Duzart v. Hatfield*, 334 F.Supp. 870 (D.C.Minn. 1971).
- Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Copyright of Arab Studies Quarterly is the property of Pluto Journals and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.