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Political Activist + Public Servant?

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Cover Page Footnote

Thank you to Jeff Murphy, MEA attorney, for his conversations about First Amendment cases and teachers' rights.

METHODS

Political Activist + Public Servant?

SHARON MURCHIE

How do we write as political activists while also working as public servants? Do we have freedom of speech as public school teachers? Can—and should—our writing and our speech be censored? How can we write and work for social and political change, when we are charged with remaining apolitical in the classroom? This article outlines the limitations on teachers' First Amendment rights and is both a call to action and a call to caution.

You are a teacher. You are a writer. You believe in social justice, in equity, and in speaking and writing about your beliefs and core values. You sit in a precarious position. Let's say, hypothetically, that there was a political figure with whom you strongly disagreed. Or perhaps there is a hot-button issue that seems to bring all the fire and brimstone to a boil and you have an opinion on this issue. Or, maybe, you are aware of practices within your work environment or community that are negatively affecting your colleagues and students. Is it possible that when you look for examples of equity, you instead find instances of injustice? And when this happens, do you speak out? Can you speak out? Should you speak out?

As public servants hired by our communities to teach their children, we have an obligation to respect the values of these communities. But what if we disagree with some of those values? Do we have to reflect those values in public spaces? Or should we simply remain silent? There is safety in flying below the radar, in remaining apolitical. But are we truly serving our students and our communities and our country and our humanity if we bury our heads in the sand? As Gersande La Flèche, blogger, writer, and co-founder of the not-for-profit *Kids Code Jeunesse* writes, “to be apolitical in a space is a function of privilege that happens when your body is not questioned and does not cause a disturbance everywhere you go, and when your history, merit, and value as a human being are not cast into doubt at every turn” (2016, para. 18).

On social media, I often see teachers begging to ‘leave politics out of it’ or insisting we should ‘take the high road.’

But, as Donalyn Miller points out, “There are a lot of people who say that educators shouldn’t be political, but I think they misunderstand what education is. Education has always been political” (2017, para. 19). If we do not speak out in public spaces when our core values are aching, we are abandoning our calling—our duty, even—to move the needle towards justice and equity. Desmond Tutu bluntly stated, “If you are neutral in situations of injustice, you have chosen the side of the oppressor” (Younge, 2009, para. 21). As teachers and as writers, we are compelled to speak out, and to write our truths.

At the same time, we must also protect our families, our careers, and ourselves. We are in a unique position to have to balance our own core values that drove us into teaching with the core values of our communities. And it is important to understand that the umbrella protection of the First Amendment is not as impermeable as one might think.

Teachers and the First Amendment

Several Supreme Court decisions related to the First Amendment and public officials have shaped both our protections and the limitations on our free speech. For teachers, the right to free speech is defined by three main points.

First, the speech must be a matter of public concern. In other words, the public needs to be educated on this topic; this issue directly affects them.

Pickering v. Board of Education, 391 U.S. 563 (1968), was a case that involved a teacher who was dismissed after writing a letter to the local newspaper that was critical of the local Board of Education and superintendent and the way they allocated funds to athletics in relation to academics (Hudson, 2001). The teacher claimed that his First and Fourteenth Amendments were violated in his dismissal, but the school board, the Circuit Court of Will County, and the Supreme Court of Illinois affirmed his dismissal. When the case got to the Supreme Court of the United States, they ruled that his First Amendment rights had, in fact, been violated, and “in the

absence of proof of the teacher knowingly or recklessly making false statements the teacher had a right to speak on issues of public importance without being dismissed from his or her position” (Wikipedia Contributors, 2019). Marvin Pickering was then reinstated to his teaching position (Hudson, 2001).

For teachers, the first checkpoint that must be passed is that the speech must be a matter of public concern in order for it to be protected. Simply airing a personal gripe is not protected under *Pickering v. Board of Education*, but speaking out about health and safety issues, or about issues that are fundamentally impacting our students and our communities can arguably be matters of public concern and protected under *Pickering v. Board of Education*.

Second, if the matter is of public concern, there must be a balance between the interest of the employee’s right to comment versus the interest of the employer in efficiency and morale. According to the law, a public servant’s right to free speech does not outweigh and cannot disrupt the organization’s ability to function.

Connick v. Myers, 461 U.S. 138 (1983), is a United States Supreme Court decision that highlighted the interest of the employer as a factor under the First Amendment. The case involved Sheila Myers, an Orleans Parish, Louisiana, assistant district attorney who had been fired by her superior, District Attorney Harry Connick Sr. (Yes, *that* Harry Connick Jr’s father.) After receiving a transfer that she very vocally did not want, Myers distributed a questionnaire to other prosecutors asking their opinions of Connick’s management practices. At the initial trial, the judge found that the firing had been motivated by the questionnaire and therefore was an infringement on Myers’ right to speak out on matters of public concern. The Fifth Circuit Court affirmed that decision, so Connick appealed to the Supreme Court. The Supreme Court of the United States reversed the decision of the lower courts. Justice Byron White wrote for the majority that “most of the matters Myers’ questionnaire had touched on were of personal, not public, concern and that the action had damaged the harmonious relations necessary for the efficient operation of the district attorney’s office” (Wikipedia Contributors, 2018).

For teachers, the checkpoint of *Connick v. Myers* throws a wrench in the wheels. Even if the matter is of public concern, if the speech disrupts or undermines the operations of the district, it may not ultimately be protected. *Connick v. Myers* introduces the idea of balancing the importance of the public’s concern and the rights of the speaker with the possible negative impact of the speech on the employer.

Third, speech ordinarily required by the job is not protected by the First Amendment. A public servant, if speaking out as part of their job, and not as a citizen on a matter of public concern, is not protected.

Garcetti v. Ceballos, 547 U.S. 410 (2006), ruled that a government employee does not have First Amendment protection if the speech is required as part of his position. The plaintiff in the case was a district attorney (Ceballos) who claimed he was “subjected to adverse employment actions for speaking out about an allegedly defective search warrant in a criminal case.” The Court ruled, in a 5-4 decision, that “Because Ceballos was engaged in speech pursuant to his job duties, he was not speaking as a citizen on a matter of public concern, but only as a government employee” (Secunda, 2010, para. 9).

This is the trickiest checkpoint for teachers, because any speech that is determined to be part of the job duties of a teacher is ultimately not protected speech under *Garcetti v. Ceballos*. Communications in the classroom are not protected; any communications—even on social media—that are deemed to be part of a teacher’s job duties are not protected speech.

Therefore, in order to confirm if a teacher’s speech is protected by the First Amendment, the following steps must be considered.

Step 1: Is the employee speaking as a citizen?

(a) is the speech outside the ordinary requirements of the job?

(b) Is the speech on a matter of public concern?

Step 2: If the answers to both parts of Step 1 are “Yes,” apply the balancing test – measure the employer’s justification for restricting the speech against the employee’s interest in speaking out.

The First Amendment states that “Congress shall make no law...abridging the freedom of speech...” (U.S. Const. amend. I), but three specific court cases have defined specific limitations on the freedom of speech for public servants. As teachers, we should first consider if the speech is beyond our job duties and a matter of public concern, and then weigh those considerations against the possible disruption of operations of the school district before speaking out, if we hope to be protected by the law.

Other Considerations

In addition, we have to consider our individual districts’ school board policies that may dictate what types of behaviors we can and cannot participate in. What is your district’s social

media policy? What is your district's publications policy? It's important to understand what their expectations are, regardless of your First Amendment rights and limitations. As an example, the school board policy in my own district has a section under "Staff Ethics" that states that staff members must "refrain from using position or public property...for partisan political or religious purposes" (Bath Community Schools, n.d.); there is also a whistleblower policy that requires whistleblowers to approach their supervisor and submit allegations in writing through proper channels. Finally, a section entitled "Freedom of Speech in Non-instructional Settings" mirrors the language of *Connick v. Myers* by stating:

The Board of Education acknowledges the right of its professional staff members, as citizens in a democratic society, to speak out on issues of public concern. When those issues are related to the District, however, the professional staff member's expression must be balanced against the interests of this District. (Bath Community Schools, n.d.)

The policy then goes on to outline and clarify guidelines by which staff members can "avoid situations in which the professional staff member's expression could conflict with the District's interests"; these guidelines state that the employee must "state clearly that his/her expression represents personal views and not necessarily those of the School District" and "refrain from expressions that would disrupt harmony among co-workers" as well as "not make threats or abusive or personally-defamatory comments about co-workers, administrators, or officials of the District" and "refrain from making public expressions which s/he knows to be false or are made without regard for truth or accuracy" (Bath Community Schools, n.d.).

These sections of my district's School Board Policy are located within the "Professional Staff" section of the policy manual located under the Board of Education tab on the district's website; although the specific order of sections and the content varies by district, Board of Education policies and bylaws can usually be found on a school district's public-facing website.

The final legal limitation regarding a teacher's freedom of speech is FERPA. The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education (U.S. Department of Education, 2018).

Under FERPA, the following things are protected information and cannot be made public:

- Date and place of birth, parent(s) and/or guardian addresses, and where parents can be contacted in emergencies;
- Grades, test scores, courses taken, academic specializations and activities, and official letters regarding a student's status in school;
- Special education records;
- Disciplinary records;
- Medical and health records that the school creates or collects and maintains;
- Documentation of attendance, schools attended, courses taken, awards conferred, and degrees earned;
- Personal information such as a student's identification code, social security number, picture, or other information that would make it easy to identify or locate a student. (Protecting the Privacy of Student Education Records. (n.d.).

Publishing anything that can be linked back to students is a possible violation of FERPA. Although we may want to write about our students' work and our own work in the classroom, it is critically important, above all, that we protect the privacy of our students, even when we have something incredibly important to share.

But Teaching is Political! What Can I Write About?

There is no such thing as a neutral educational process. Education either functions as an instrument that is used to facilitate the integration of the younger generation into the logic of the present system and bring about conformity to it, or it becomes "the practice of freedom," the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world. (Richard Shaull, forward to *Pedagogy of the Oppressed*, 1970, p. 34)

In order to fully understand how the law might be applied to the speech of teachers, especially of teacher-writers, I spoke with Michigan Education Association staff attorney Jeff Murphy, and presented several hypothetical scenarios. Although these scenarios are based on recent real-life situations faced by colleagues in Michigan, identifying details have been altered to protect the privacy of individuals.

Scenario #1: I post negative things on Facebook or on my blog about an elected official and call him a racist.

His answer: *It depends on who the audience is. If your Facebook friends/blog audience include students, parents, co-workers and administrators, and if the post creates an uproar in the community you could lose your first amendment protection* [emphasis added]. The post is obviously not speech required by the job [Step 1A], so *Garcetti* does not apply. That means we go to the *Connick/Pickering* test – criticism of the President is a matter of public concern [Step 1B] and the right to criticize the government is quintessential free speech, so the post would be protected...UNLESS it causes a disruption of your employer's operations [Step 2]. If that is the case, a court could find that the disruption trumps (ironic that “trumps” works in this explanation) your free speech right. (Personal communication, 2017)

Scenario #2: Trucks with Confederate Flags have been lining up on the road next to our school. Can I disparage Confederate flag wavers in a blog post?

His answer: Again, it depends on the audience – who has access to your personal blog. This is speech not required by the job [Step 1A], so *Garcetti* does not apply. *Waving the confederate flag is, arguably a matter of public concern* [Step 1B] and, *so long as your post does not disrupt the employers' operations* [Step 2], *the speech should be protected by the First Amendment* [emphasis added]. (Personal communication, 2017)

Scenario # 3: My kids in AP English this year are ridiculously lazy and also have no fashion sense. Can I post this comical rant on Twitter?

His answer: *A tweet or post about your students is likely not protected* [emphasis added]. Once more, this speech is not required by the job [Step 1A], so *Garcetti* does not apply. Comments on working conditions are considered “personal gripes unworthy of First Amendment protection” [therefore not a matter of public concern, Step 1B]. Even if we could establish a First Amendment right in this situation, if the tweet got out to students and parents, their reactions may disrupt the employer's operations [Step 2] sufficiently to strip you of that protection. (Personal communication, 2017)

Scenario #4: Our district's evaluation process and policies are horrible. Can I blog on a personal blog and disparage my district/administration's evaluation policies?

His answer: *Disparaging Board policies are essentially comments*

on working conditions, so they are personal gripes not worthy of protection [emphasis added]. [Step 1A + 1B: not a job duty to discuss evaluations and not a matter of public concern; also could be disruptive (Step 2)]. The answer might change if there is something unusual about the Board policy or the procedure by which it was adopted [in which case it might be a matter of public concern, Step 1B]. (Personal communication, 2017)

How Do We Then Safely Express Our Core Values?

In his Nobel Prize acceptance speech, Elie Wiesel said, “We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented” (Elie Wiesel Foundation for Humanity, 2017, para. 9). We cannot stay silent. We are teachers, writers, and activists. We have to write our truth. As Allison Greer, author of the Peacefield History blog points out, “if you have chosen to become a teacher, you have chosen to become a political being...You cannot remove politics from your profession” (2018, para. 5). Staying silent is not a moral option for many of us. We have to acknowledge that staying silent is an act of privilege, or as Paulo Freire said in *The Politics of Education* (1985), “washing one's hands of the conflict between the powerful and the powerless means to side with the powerful, not to be neutral” (Freire Institute, n.d.).

In order to speak your truth, and yet stay within the boundaries of the law (and maintain your employment), it is important to follow the advice of Cathy Fleischer, English Professor, co-director of the Family Literacy Initiative, and founder of EverydayAdvocacy.org: make sure that your political activist actions are smart, safe, savvy, and sustainable (2019). Most of us became teachers because we wanted to change the world. And I truly believe that we can. This is, in part, a call to action. So many teacher-writers are actively writing to push back at injustices and inform their readers about their passions. From teacher-activists like Peter Greene (@palan57; curmudgecation.blogspot.com), Steven Singer (@StevenSinger3; gadflyonthewallblog.com), José Luis Vilson (@TheJLV; thejosevilson.com), Tracy Castro-Gill (@TCastroGill; teacheractivist.com), Jesse Hagopian (@JessedHagopian; iamaneducator.com), and Jessyca Mathews (@JessycaMathews; jestakeastand.weebly.com/), to teacher-mentors like Amy Rassmussen, Shana Karnes, and Lisa Dennis (@3TeachersTalk and ThreeTeachersTalk.com), Allison Greer (@PFHHistory; PeacefieldHistory.com), and Susan Barber (@susangbarber; susangbarber.com; APLitHelp.com), there are countless great models of teachers actively and publicly exercising their freedom of speech. But this article is also a call to caution:

we have to make sure that we are informed, and that we act in thoughtful and deliberate ways. We must fight for social justice, and we have the platform, and we have the talent. But we also have the responsibility to follow the law and to make sure that we never foolheartedly jeopardize our ability to reach and teach our students.

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