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LAW SCHOOL CLINICS AND THE FIRST AMENDMENT

Jonathan L. Entin[†]

Professor Babich has provided us with a troubling account of external pressures brought to bear on a highly regarded clinic at Tulane Law School.¹ Professor Joy has put the Tulane story into broader context with accounts of other clinics that have encountered similar criticism and efforts to confine their activities.² In this brief comment, I want to raise questions about the extent to which law school clinics could successfully assert First Amendment defenses against outside efforts to restrict their activities in the event that such pressure were to result in litigation.

The discussion proceeds in three stages. First, I will offer other examples in which law reform has generated political backlash. The frequency of the phenomenon should come as no great surprise. Perhaps the haves do not always come out ahead,³ but just as the race is not always to the swift or the battle to the strong,⁴ we should expect the haves to defend their position vigorously.⁵

Second, I will address some First Amendment issues that bear on this subject. Specifically, I will examine the implications of *Garcetti v. Ceballos*,⁶ a 2006 ruling that takes a restrictive view of the speech rights of public employees and therefore might have troubling implications for clinics at public law schools. I will also examine *Legal Services Corp. v. Velazquez*,⁷ a pre-*Garcetti* case that points in

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¹ Adam Babich, *De-Lawyering Legislation and Environmental Law Clinics: Can the Preemption Doctrine Protect Participation Rights?*, 61 CASE W. RES. L. REV. 1109 (2011).

² Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087 (2011).

³ See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

⁴ See *Ecclesiastes* 9:11 ("I again saw under the sun that the race is not to the swift, and the battle is not to the warriors, and neither is bread to the wise, nor wealth to the discerning, nor favor to men of ability; for time and chance overtake them all.")

⁵ Cf. THE YALE BOOK OF QUOTATIONS 655 (Fred R. Shapiro ed., 2006) (noting that Damon Runyon is said to have observed: "The race is not always to the swift nor the battle to the strong—but that's the way to bet.")

⁶ 547 U.S. 410 (2006).

⁷ 531 U.S. 533 (2001).

the other direction by treating the activities of government-funded lawyers as private speech rather than government speech.

Third, I will pick up on a hint in *Garcetti* that academic freedom, which has important First Amendment aspects, might bear on the extent to which law school clinics enjoy legal protection against some of the egregious assaults that Professors Babich and Joy recount in their articles. In doing so, however, I will point to some ambiguities in the law of academic freedom and in the nature of law schools that might limit the extent of protection that academic freedom provides to clinics.

I. LAW REFORMERS AND OTHER TARGETS OF BACKLASH

During my first week at Northwestern University School of Law, one of my professors was installed in an endowed chair. In his remarks at the installation ceremony, Jon Waltz did not address anything related to the law of evidence or trial procedure, in which he had gained prominence,⁸ or health law, in which he had done pioneering scholarship.⁹ Instead, he talked about his peripheral involvement in the Chicago 7 case, which grew out of the violence surrounding the 1968 Democratic National Convention.¹⁰ Waltz consulted with defense lawyers William Kunstler and Leonard Weinglass about some evidentiary issues in the case.¹¹ He also testified as a defense witness at the retrial of the defendants and their

⁸ See, e.g., JON R. WALTZ, INTRODUCTION TO CRIMINAL EVIDENCE (4th ed. 1997); JON R. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE: AN ANALYSIS (2d ed. 1975); JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE (8th ed. 1995) (a frequently cited casebook that is still in print as JON R. WALTZ, ROGER C. PARK & RICHARD D. FRIEDMAN, CASES AND MATERIALS ON EVIDENCE (11th ed. 2009)); JOHN KAPLAN & JON R. WALTZ, THE TRIAL OF JACK RUBY (1965); Jon R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097 (1985); Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869 (1981).

⁹ See, e.g., JON R. WALTZ & FRED E. INBAU, MEDICAL JURISPRUDENCE (1971); Jon R. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408 (1969); Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 NW. U. L. REV. 628 (1970); Jon R. Waltz & Carol R. Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U. L. REV. 696 (1973).

¹⁰ There is a voluminous literature about that case, especially the original trial. See, e.g., JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION (1970); J. ANTHONY LUKAS, THE BARNYARD EPITHET AND OTHER OBSCENITIES (1970); JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL (rev. ed. 1993).

¹¹ See Jon R. Waltz, *On Being Monitored*, 212 NATION 113, 113 (1971) [hereinafter *Waltz, Monitored*] (noting that his consultation with the Chicago 7 defense team had made him the target of military intelligence); Jon R. Waltz, *Wind-Up of the Chicago 7*, 218 NATION 78, 78 (1974) [hereinafter *Waltz, Wind-Up*].

lawyers on contempt charges after their original convictions were overturned on appeal.¹²

Professor Waltz focused his remarks at the chairing ceremony on his connection to the original trial. That chaotic proceeding was presided over by Judge Julius Hoffman, a prominent graduate of the law school who had many influential friends and supporters.¹³ Indeed, Hoffman was such a prominent alumnus that the law school had named a classroom for him—a room in which Waltz refused to teach. Judge Hoffman's supporters were outraged that a faculty member, let alone one as prominent as Professor Waltz, would have anything to do with the defense in the case. According to Waltz, the critics approached the dean of the law school and the president of the university, demanding that he be fired and threatening to withhold future financial support. Pausing briefly for effect, he continued: "To their everlasting credit, the dean and the president told those people, in so many words, to go jump in Lake Michigan." He spent the rest of his career at Northwestern.

In a similar vein, Edna Smith Primus, the protagonist in *In re Primus*,¹⁴ had to go to the Supreme Court to overturn disciplinary sanctions imposed in connection with a challenge to a local sterilization policy. Primus, an officer of and cooperating attorney with the South Carolina affiliate of the American Civil Liberties Union, addressed a meeting of low-income women who had been sterilized or threatened with sterilization as a condition for continued receipt of Medicaid benefits.¹⁵ She advised the women of their legal rights and thereafter wrote to one of those women saying that the

¹² Five of the seven defendants were convicted of at least some of the charges against them. The U.S. Court of Appeals for the Seventh Circuit overturned the criminal convictions against those five defendants and remanded for a new trial. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). The Department of Justice decided against a retrial of the substantive case. *In re Dellinger*, 370 F. Supp. 1304, 1307 n.1 (N.D. Ill. 1973), *aff'd on other grounds*, 502 F.2d 813 (7th Cir. 1974); see Waltz, *Wind-Up*, *supra* note 11, at 79.

All of the defendants as well as Kunstler and Weinglass were held in contempt for their conduct during the original trial. The Seventh Circuit reversed all of the contempt convictions but remanded many of those counts for retrial before a different judge. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972). Professor Waltz testified for the defense at the contempt retrial. At one point during his testimony, the visiting judge presiding over the retrial asked: "Are you a movement lawyer?" SCHULTZ, *supra* note 10, at 380. Waltz was, in fact, a Republican. *Id.*; Waltz, *Monitored*, *supra* note 11, at 113. Several years later he ran unsuccessfully as a GOP candidate for the Illinois Appellate Court. Jon R. Waltz, *Some Firsthand Observations on the Election of Judges*, 63 JUDICATURE 184 (1979).

¹³ Judge Hoffman received his law degree from Northwestern in 1915 and served as a state trial judge before his appointment to the federal bench in 1953. *Biographical Directory of Federal Judges: Hoffman, Julius Jennings*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1064&cid=999&ctype=na&instat=na> (last visited Apr. 14, 2011).

¹⁴ 436 U.S. 412 (1978).

¹⁵ *Id.* at 414–15.

ACLU was prepared to represent her on a pro bono basis should she want to sue.¹⁶ That woman decided not to accept the offer.¹⁷ The state bar imposed a private reprimand for the letter, which the authorities regarded as unethical solicitation of a client.¹⁸

The Supreme Court set aside the sanction. The Court emphasized that Primus had not solicited a prospective client in person and that her letter did not involve any prospect of "pecuniary gain."¹⁹ Rather, she was promoting her "personal political beliefs" and "the civil-liberties objectives of the ACLU" by advising the woman of her legal rights.²⁰ The letter "comes within the generous zone of First Amendment protection reserved for associational freedoms."²¹ The record contained no evidence of undue influence, overreaching, misrepresentation, or invasion of privacy that might have justified professional discipline,²² nor did it present any threat of frivolous claims that provides the basis for the barratry doctrine.²³

Both of these situations involved one-time episodes. More analogous to some of the challenges that law school clinics face is the effort of several states to shut down the NAACP's litigation efforts at the height of the civil rights movement. The leading example involved Virginia's attempt to outlaw the association's desegregation lawsuits as a prohibited form of barratry, but several other states also pursued the same goal.²⁴ The theory was that the NAACP controlled the litigation and induced unsuspecting plaintiffs to lend their names to cases which they otherwise had no interest in pursuing.²⁵ The state legislature therefore amended its laws against soliciting legal business to include agents of an organization that hired a lawyer in connection

¹⁶ *Id.* at 416.

¹⁷ *Id.* at 417. The woman might have been pressured by her physician to drop the suit, but that possibility was never an issue in the proceedings. She took her youngest child to the doctor's office for an apparently routine visit. The doctor, in the presence of his lawyer, asked the woman to sign a document stating that she would not sue. *Id.*

¹⁸ *See id.* at 417-21.

¹⁹ *Id.* at 422.

²⁰ *Id.* In reaching its conclusion, the Court relied heavily on its earlier ruling in *NAACP v. Button*, 371 U.S. 415 (1963). *See Primus*, 436 U.S. at 427-28; *infra* notes 28-31 and accompanying text.

²¹ *Primus*, 436 U.S. at 431.

²² *Id.* at 434-35.

²³ *Id.* at 436-37. In reaching these conclusions, the Court distinguished a companion ruling that upheld the imposition of sanctions against a private attorney for directly approaching two 18-year-old women who had been injured in an automobile accident and offering to represent them on a contingent-fee basis. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

²⁴ *See* MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 273-74 (1994).

²⁵ *See NAACP v. Harrison*, 116 S.E.2d 55, 65-66 (Va. 1960), *rev'd sub nom. NAACP v. Button*, 371 U.S. 415 (1963).

with any case to which the group was not a party and in which it had no pecuniary interest.²⁶

The Supreme Court ultimately thwarted this stratagem, but not before the effort diverted considerable time and resources that the organization might have devoted to even more aggressive legal assaults on racism.²⁷ In *NAACP v. Button*,²⁸ the Court held that the amended Virginia barratry statute violated the First Amendment. The NAACP's legal activities were a form of political expression and association that enjoyed constitutional protection.²⁹ Although the state had a legitimate interest in regulating the ethics and integrity of the legal profession, that interest did not justify the infringement on First Amendment freedoms that the regulation embodied.³⁰ The NAACP's activities did not pose a danger of conflict of interest or financial gain by lawyers at the expense of their clients, so the state could not forbid the targeted arrangements.³¹

A final example of external pressure involves the legal services program. Originally part of the Office of Economic Opportunity, the federal antipoverty agency, the legal services program provides

²⁶ The Virginia legislative package included several other measures aimed at undermining the NAACP's litigation efforts. See TUSHNET, *supra* note 24, at 274–75. The state courts invalidated the other measures. See *NAACP v. Harrison*, 116 S.E.2d at 72; NAACP Legal Def. & Educ. Fund v. Harrison, 7 RACE REL. L. REP. 864 (Va. Cir. Ct. 1962).

²⁷ TUSHNET, *supra* note 24, at 273–74.

²⁸ 371 U.S. 415 (1963).

²⁹ *Id.* at 428–29.

³⁰ *Id.* at 439–40.

³¹ *Id.* at 443–44.

This decision should be read against the background of concerted efforts by southern states to divert the NAACP from its larger mission, a move that was intended to reduce the civil rights activism that segregationists suspected the organization of fomenting. See generally NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 212–24; TUSHNET, *supra* note 24, at 283–300; Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 374–80, 386–88 (1959). The Supreme Court rejected efforts to force the association to turn over its membership lists to state and local officials and struck down some other forms of harassment.

On attempts to force disclosure of membership lists, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremlion v. NAACP*, 366 U.S. 293 (1961). The Alabama authorities did not get the message right away. Their case returned to the Supreme Court three more times. See *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam); *NAACP v. Gallion*, 368 U.S. 16 (1961) (per curiam); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). For the full history of the Alabama case, see *id.* at 289–93.

On other southern harassment of the NAACP, see, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating an Arkansas law requiring all public school teachers to disclose annually all organizations to which they belonged or contributed over the previous five years); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963) (holding that a state legislative committee could not compel the president of a local NAACP branch to produce membership records in connection with his testimony because the committee had failed to show sufficient need for the information).

lawyers for low-income persons around the nation.³² Because legal services lawyers sometimes challenge powerful private interests as well as local officials and policies, the program has generated a fair amount of controversy. In its early years, several governors opposed the program.³³ The most prominent example involved Governor Ronald Reagan's 1970 veto of a grant to California Rural Legal Assistance, a high-profile agency that had successfully litigated test cases on behalf of agricultural workers, welfare recipients, and Medicaid patients.³⁴ After a special commission made up of three state supreme court justices from elsewhere in the country exonerated CRLA of all charges of improper conduct asserted by Reagan's antipoverty director, OEO devised a compromise under which CRLA received continued funding while the state got a planning grant for another experimental program and the governor withdrew his veto.³⁵

Even after the 1974 passage of legislation establishing the Legal Service Corporation as an independent, nonprofit entity,³⁶ the program has remained controversial. In addition to the limitations at issue in *Velazquez*,³⁷ LSC-funded programs and attorneys face many statutory restrictions, including bans on political activity, lobbying, fee-generating cases, and litigation relating to school desegregation and most abortions; there also are stringent limitations on class actions.³⁸ Some of these restrictions have always applied to the

³² For a detailed account of the creation of the legal services program, see EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 39-70* (1974). For an account of the creation of local legal services agencies, see *id.* at 71-102.

³³ See ALAN W. HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 15 (2007) (noting that governors of Florida, Connecticut, Arizona, Missouri, North Carolina, North Dakota, and Mississippi took actions restricting funding to legal services programs); JOHNSON, *supra* note 32, at 193 (stating that governors of five states vetoed funding for Legal Services). For other examples of controversies arising from legal services efforts, see *id.*

³⁴ See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 7 (1972); Jerome B. Falk, Jr. & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599, 606-10 (1973).

³⁵ For detailed accounts of the CRLA controversy, see HOUSEMAN & PERLE, *supra* note 33, at 15-16; Bennett & Reynoso, *supra* note 34, at 23-77; Falk & Pollak, *supra* note 34, at 608-41.

³⁶ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l (2006)). On the background to the corporation's creation, see HOUSEMAN & PERLE, *supra* note 33, at 19-22.

³⁷ See *infra* notes 55-64 and accompanying text.

³⁸ See 42 U.S.C. §§ 2996e(d)(5), 2996f(b) (2006). In addition, various appropriations riders have imposed additional restrictions on LSC programs, including bans on advocacy relating to welfare reform and representation of foreign nationals. See HOUSEMAN & PERLE, *supra* note 33, at 36-37; Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687, 693 (2009); Andrew Haber, *Rethinking the Legal Services Corporation's Program Integrity Rules*, 17 VA. J. SOC. POL'Y & L. 404, 419-23 (2010). For discussion of the restrictions on welfare litigation, see

program, while others were adopted after the Reagan administration's unsuccessful campaign to abolish the program³⁹ or in the wake of the Republican victory in the 1994 congressional elections.⁴⁰

Controversy over the legal services program, both under OEO and later under LSC, was quite predictable. To the extent that the program subsidizes lawsuits that challenge public policies, elected officials can be expected to react with skepticism if not outright hostility. A similar phenomenon occurred in connection with the community action program, which was the centerpiece of the War on Poverty overseen by OEO. Mayors and other officials around the nation sought either to eliminate or to control local community action agencies in order to minimize the political threat that those agencies posed.⁴¹ As the sociologist Lewis Coser put it: "I know of no government in history which has deliberately financed its own opposition."⁴² This observation does not necessarily make the criticisms of legal service legitimate, but it helps to explain their existence.

Although the situations described in this section differ from those that Professors Babich and Joy discuss in their articles, we should anticipate similar reactions from those powerful entities that law school clinics challenge. The rulings in *Primus* and *Button* suggest that clinics might invoke constitutional protections to ward off some restrictions that might arise from outside attacks, but those attacks do not involve claims of barratry or other ethical lapses of the sort that were at issue in those cases. Nevertheless, a couple of other relatively recent Supreme Court decisions might bear on the status of law school clinics that face external pressure to handle only small cases on behalf of individual clients instead of larger cases that could have broader social, political, or economic impact.

infra notes 55–64 and accompanying text.

³⁹ See generally HOUSEMAN & PERLE, *supra* note 33, at 29–33; Ken Engle, *The LSC Under Siege*, A.B.A. J., Dec. 1987, at 66; Angela F. Turner, Comment, *President Reagan and the Legal Services Corporation*, 15 CREIGHTON L. REV. 711 (1982).

⁴⁰ See *supra* note 38.

⁴¹ See DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY 131–35, 142–46, 150–54 (1969); Elliott A. Krause, *Functions of a Bureaucratic Ideology: "Citizen Participation"*, 16 SOC. PROBS. 129, 139–40 (1968); Comment, *Participation of the Poor: Section 202(a)(3) Organizations Under the Economic Opportunity Act of 1964*, 75 YALE L.J. 599, 610–11, 613–14, 616–17 (1966).

⁴² Quoted in Krause, *supra* note 41, at 140. Coser was hardly an advocate of consensus politics. He made his academic reputation with a thoughtful analysis of the uses of division. See LEWIS COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956).

II. SOME RECENT FIRST AMENDMENT JURISPRUDENCE

Many law school clinics are part of public law schools, so restrictions on their activities might have First Amendment implications. Accordingly, this section considers the extent to which governmental restrictions on clinics affiliated with public law schools are likely to survive a constitutional challenge. It focuses on two recent Supreme Court decisions, both involving lawyers, that seem to point in different directions with regard to law school clinics.

The first case, *Garcetti v. Ceballos*,⁴³ found that public employees have no First Amendment protection for speech made in connection with their official duties.⁴⁴ The case arose when a deputy district attorney, following an apparently common conversation with defense counsel in a criminal case, raised persistent questions about the accuracy of an affidavit that the office had submitted in support of a search warrant.⁴⁵ The deputy was called to testify as a defense witness at a suppression hearing.⁴⁶ Thereafter, he alleged, his superiors unconstitutionally retaliated against him in various ways.⁴⁷

The Court recognized that “the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern”⁴⁸ but nonetheless rejected Ceballos’ claim because “his expressions were made pursuant to his [official] duties” as a deputy district attorney.⁴⁹ After all, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.”⁵⁰ Ceballos’ activities were not those of a citizen but of a public

⁴³ 547 U.S. 410 (2006).

⁴⁴ *Garcetti* is the latest in a series of cases in which the Court has addressed the speech rights of public employees. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) (holding that public employees enjoy First Amendment protection for speech addressing matters of public concern but that an assistant district attorney’s survey relating to internal policies did not, for the most part, address matters of public concern); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (applying a balancing test and holding that a teacher could not be dismissed for writing letters to a local newspaper critical of district policies because the letters did address matters of public concern). See generally Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115 (criticizing the Supreme Court’s approach to speech by public employees); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008) (endorsing and explaining the Court’s approach in this area).

⁴⁵ *Garcetti*, 547 U.S. at 413–14.

⁴⁶ *Id.* at 414–15. The trial court denied the motion to suppress. *Id.* at 415.

⁴⁷ Ceballos claimed that his job responsibilities were changed and that he was transferred to a different courthouse and passed over for promotion. *Id.*

⁴⁸ *Id.* at 417.

⁴⁹ *Id.* at 421.

⁵⁰ *Id.* at 421–22.

employee. Although the First Amendment allows public employees to “contribut[e] to the civic discourse,” it does not give them “a right to perform their jobs however they see fit.”⁵¹ Any other conclusion would lead to “permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”⁵²

The logic of *Garcetti* suggests that clinicians at public law schools could not assert a successful First Amendment defense against restrictions on the types of cases they pursue if those restrictions are imposed by officials who have supervisory authority over their work. Clinicians at such schools are public employees, and the work they do in selecting cases and representing clients is part of their official duties. Because *Garcetti* says that the First Amendment offers no protection to public employees in the performance of their official duties, it is likely that restrictions on the types of cases that clinics at public law schools may take would survive a legal challenge.

Two caveats are in order before we accept this conclusion. First, it is possible to argue that cases handled by clinics at law schools involve matters of public concern. *Garcetti* by its terms does not apply to such situations. Unfortunately, the facts of *Garcetti* show that this argument cannot succeed. Criminal cases, like those at issue there, do involve the public. Indeed, crime has long been a matter of public concern. But the *Garcetti* Court focused less on the general interest in crime than on the work responsibilities of the deputy district attorney. His job was to work on criminal cases subject to oversight by his superiors. On this view, clinicians are employed to handle cases and train aspiring lawyers. In doing so, they are acting not as citizens but as public employees.

Second, it might be that the apparently bright-line rule of *Garcetti* does not apply in the academic setting. The Court recognized that “expression related to academic scholarship or classroom instruction” might enjoy broader constitutional protection but explicitly declined to resolve that question.⁵³ We shall turn to the question of academic freedom in the next section. Before doing so, however, we should address the other recent case that bears on the First Amendment rights of lawyers who are employed by the government.

⁵¹ *Id.* at 422.

⁵² *Id.* at 423; *cf.* *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976) (rejecting a terminated police officer’s procedural due process claim by noting that federal courts are “not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies” despite “the harsh fact that numerous individual mistakes are inevitable” in that process and concluding that “[t]he United States Constitution cannot feasibly be construed to require federal judicial review for every such error” (footnote omitted)).

⁵³ *Garcetti*, 547 U.S. at 425.

As noted earlier, legal services lawyers face several statutory restrictions on their work.⁵⁴ One of those restrictions was struck down in *Legal Services Corp. v. Velazquez*.⁵⁵ At issue in that case was an appropriations rider that prohibited legal services lawyers from seeking to amend or challenge the constitutionality of welfare laws.⁵⁶ The Supreme Court rejected the argument that the rider funded government speech. Earlier cases, notably *Rust v. Sullivan*,⁵⁷ had upheld viewpoint-based restrictions where the government itself was the speaker or where the government had used private speakers to convey its own message.⁵⁸

According to the *Velazquez* Court, the legal services program “was designed to facilitate private speech, not to promote a governmental message.”⁵⁹ Moreover, the rider placed “a substantial restriction” on that private speech.⁶⁰ It undermined the “traditional role” of lawyers⁶¹ and, by preventing them from presenting serious questions about the validity of welfare statutes and regulations, also threatened the independence and integrity of courts that rely on attorneys who are supposed to advance “all the reasonable and well-grounded arguments necessary for proper resolution” of cases.⁶² Because the rider sought “to draw lines around the [legal services] program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider,”⁶³ the restriction constituted impermissible viewpoint discrimination in violation of the First Amendment. The

⁵⁴ See *supra* notes 38–40 and accompanying text.

⁵⁵ 531 U.S. 533 (2001).

⁵⁶ The rider at issue provided in relevant part prohibited the use of LSC funds for the purpose of

initiat[ing] legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (emphasis added). This rider was carried over in subsequent years and remained in effect when *Velazquez* was decided. *Velazquez*, 531 U.S. at 538.

⁵⁷ 500 U.S. 173 (1991).

⁵⁸ *Velazquez*, 531 U.S. at 541. *Rust* upheld a ban on discussion of abortion by federally funded family-planning programs. 500 U.S. at 179–80, 193–95.

⁵⁹ *Velazquez*, 531 U.S. at 542.

⁶⁰ *Id.* at 544.

⁶¹ *Id.*

⁶² *Id.* at 545.

⁶³ *Id.* at 546.

Court rejected the argument that the restriction sought only to define the scope of the program, warning: “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”⁶⁴

Velazquez might help law school clinics that receive government funding to fend off some restrictions on the types of cases that they take. If publicly funded law school clinics are engaged in private speech, then governmental prohibitions or limitations on their work might constitute viewpoint discrimination. Of course, the answer might depend on the nature of the governmentally imposed restriction. After all, *Velazquez* did not address a complete ban on certain kinds of cases; the rider at issue limited the kinds of legal arguments that legal services lawyers could make in cases that those lawyers were permitted to handle. The Supreme Court noted that federal law prohibits legal services lawyers from working on whole classes of cases—including most criminal cases as well as matters involving nontherapeutic abortions, school desegregation, and selective service—but did not suggest that such subject-matter bans were constitutionally problematic.⁶⁵ *Velazquez* emphasized that the government had no obligation to maintain a legal services program but that, having decided to create such a program, the government could not insulate its laws from constitutional attack by the lawyers it had chosen to fund.⁶⁶

Two points seem to follow from this discussion. One is that properly promulgated restrictions on the kinds of cases that publicly funded law school clinics are allowed to take or the types of clients that they are permitted to represent might pass muster. *Velazquez* apparently rejects only limitations on the kinds of legal arguments that government-subsidized lawyers may assert. On this view, subject-matter restrictions are less problematic than viewpoint-based limitations.

The other is that, read narrowly, *Velazquez* might not be directly relevant to clinics at private law schools (and perhaps at some public schools) that do not receive government funds. After all, that case addressed only a funding restriction. But the decision rejected the

⁶⁴ *Id.* at 547.

⁶⁵ *Id.* at 537–38.

⁶⁶ *Id.* at 548. The government does have a constitutional obligation to provide legal counsel to indigent criminal defendants. *See, e.g.,* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). *But see* *Scott v. Illinois*, 440 U.S. 367 (1979) (limiting the right to counsel to cases in which a defendant is sentenced to a term of imprisonment). The Supreme Court has never required any specific method for providing lawyers to indigent criminal defendants who are entitled to counsel.

restriction as unconstitutional viewpoint discrimination. Accordingly, if government cannot condition the award of funds on a grantee's agreement not to advance certain kinds of legal arguments, it must follow that government may not directly forbid lawyers from advancing those arguments even if the lawyers do not receive public subsidies. Again, however, narrower restrictions could be more difficult for unsubsidized clinics to attack than viewpoint-based restrictions.

This second point receives some support from a case involving a previous attempt to restrict the work of Professor Babich's clinic. In 1999, the Louisiana Supreme Court promulgated regulations that tightened eligibility requirements for clients of law school clinics and prohibited law students from serving as attorneys under the student-practice rule for any client whom the clinic had contacted for the purpose of representation.⁶⁷ The new rules, apparently adopted in response to political pressure and complaints from business interests,⁶⁸ survived a constitutional challenge.

In *Southern Christian Leadership Conference v. Supreme Court of Louisiana*,⁶⁹ the United States Court of Appeals for the Fifth Circuit upheld the revised student-practice rule. The more stringent client-eligibility requirements promoted the goal of providing legal representation to those who could not afford to hire their own lawyers.⁷⁰ The limits on solicitation satisfied the First Amendment. Distinguishing *Button* and *Primus*, which involved efforts to ban solicitation of clients, the Fifth Circuit explained that the Louisiana rule did not prohibit any speech but merely limited the roles that clinic students could play in cases in which the clinic had made the initial contact with the client.⁷¹ Because the students were not and could not be licensed as lawyers, the rule simply forbade them from acting as attorneys in certain clinic cases; they remained free to work as paralegals, researchers, or trial aides.⁷² Distinguishing *Velazquez*, the court explained that the rule did not restrict the types of cases that

⁶⁷ Under the revised rules, clinics could represent individuals or families with income up to 200 percent of federal poverty guidelines and community organizations if more than half of their members qualified for individual representation under the rule; such organizations also had to certify that they lacked the resources to hire private counsel. LA. SUP. CT. R. XX, §§ 4-5. The restriction on students appearing in the role of attorneys applied to any case in which anyone associated with a clinic had initiated contact with the individual or organization. *Id.* § 10.

⁶⁸ For the background to the amended Louisiana student-practice rule, see Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 243-51 (1999).

⁶⁹ 252 F.3d 781 (5th Cir. 2001).

⁷⁰ *Id.* at 789.

⁷¹ *Id.*

⁷² *Id.* at 789-90.

clinics could take or the kinds of arguments that they could advance on behalf of those clients; the rule also did not actually forbid clinics from soliciting clients but merely defined the roles that clinic students could play on behalf of clients whom the clinic had legitimately solicited.⁷³ Finally, the alleged animus of politicians and business groups did not affect the validity of the otherwise viewpoint-neutral rules. There was no evidence that the Louisiana Supreme Court shared such animus; at most the plaintiffs claimed that the court had succumbed to political pressure.⁷⁴

If these very restrictive regulations can pass constitutional muster,⁷⁵ law school clinics could face a daunting task in fending off stringent but carefully drafted limits on their activities. Regulations such as those struck down in *Button*, *Primus*, and *Velazquez* presumably could not be imposed on clinics, but facially neutral regulations that might undermine clinic operations might be upheld. Before concluding that restrictions on clinics are effectively immune from legal challenge, we should recall the Fifth Circuit's pointed remark that neither Tulane University nor any of its law school clinics challenged the Louisiana student-practice restrictions.⁷⁶ It is not clear that the case would have come out differently had the university or any of its clinics been parties to the case, but the statement might imply that they could have advanced arguments based on academic freedom. The *Garcetti* Court also alluded to academic freedom but did not address the issue in any detail.⁷⁷ The next section discusses that subject.

III. LAW SCHOOL CLINICS AND ACADEMIC FREEDOM

Academic freedom encompasses "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."⁷⁸ Although the idea of academic freedom emerged from conflicts between faculty members and boards of trustees,⁷⁹ the Supreme Court has recognized that at least some

⁷³ *Id.* at 791–92.

⁷⁴ *Id.* at 794.

⁷⁵ The executive director of the Association of American Law Schools characterized the Louisiana regulation as the "most restrictive" of its kind. Joy, *supra* note 68, at 238 (quoting Carl C. Monk).

⁷⁶ 252 F.3d at 787–88.

⁷⁷ See *supra* text accompanying note 53.

⁷⁸ AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM & ACADEMIC TENURE 292 (1915), available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

⁷⁹ See MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 24–27 (2009) (chronicling the tensions between academics and their governing boards, culminating with the formation of the AAUP and the promulgation

aspects of academic freedom enjoy First Amendment protection.⁸⁰ For example, in *Sweezy v. New Hampshire*,⁸¹ Chief Justice Warren's plurality opinion warned that "impos[ing] any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."⁸² Justice Frankfurter's concurring opinion offered a more extensive defense of free inquiry.⁸³ A decade later, in *Keyishian v. Board of Regents*,⁸⁴ the Court characterized academic freedom as having "transcendent value to all of us."⁸⁵ Those statements were dicta. In *Sweezy*, the Court found that a state attorney general's investigation of allegedly subversive activities had not been properly authorized;⁸⁶ in *Keyishian*, the Court held that a statute requiring the dismissal of faculty members for "treasonable or seditious" utterances was unconstitutionally vague.⁸⁷

In other cases, however, concerns about academic freedom appear to have played a more central role. For example, in *Regents of the University of Michigan v. Ewing*,⁸⁸ the Court called for deference to faculty judgments about students' academic performance. That case involved a medical student who was dismissed for failing a

of the 1915 Declaration of Principles on Academic Freedom); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 952-53 (2009) (describing the emergence of conflicts between the faculty and governing boards resulting from the move away from narrow, religious-focused curriculums, to science-based instruction, original research and the development of scholarly expertise in a broad variety of disciplines); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 273 (1989) ("Disputes tended to be internal to the university, and academic freedom became conceived as an adjustment of rights among participants."); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 233 (summarizing and supporting the AAUP's criticisms of boards of trustees' efforts to control professorial works as unduly constraining academic freedom).

⁸⁰ This essay focuses only on the ability of university-based law school clinics to assert First Amendment-based academic freedom against external pressure. Some of the cases discussed in this paragraph involve constitutionally based claims of academic freedom by individuals against external pressure. The extent to which academic freedom protects individual faculty members against adverse actions by trustees, administrators, or other faculty members is beyond the scope of this essay, but the question has generated thoughtful debate. Compare Rabban, *supra* note 79, at 280-300 (arguing that the First Amendment protects the academic freedom of individual professors in some circumstances), with Byrne, *supra* note 79, at 301-11 (arguing that constitutional academic freedom does not protect individual faculty members against institutional action).

⁸¹ 354 U.S. 234 (1957) (Warren, C.J., plurality opinion).

⁸² *Id.* at 250.

⁸³ *Id.* at 261-64 (Frankfurter, J., concurring in the result).

⁸⁴ 385 U.S. 589 (1967).

⁸⁵ *Id.* at 603.

⁸⁶ *Sweezy*, 354 U.S. at 253-55.

⁸⁷ *Keyishian*, 385 U.S. at 604; *see id.* at 593 (quoting the statute).

⁸⁸ 474 U.S. 214 (1985).

comprehensive exam.⁸⁹ In rejecting the student's procedural due process claim, the Court explained: "When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."⁹⁰ The judiciary should overturn an academic decision only if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."⁹¹

Similarly, the Court has invoked academic freedom in two of its most significant affirmative action cases. Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*,⁹² for instance, emphasized that academic freedom was "a special concern of the First Amendment" that entitled the university to broad discretion in selecting its students.⁹³ That discretion was not unfettered: Justice Powell concluded that the quota system under which a state university's medical school reserved a specified number of seats in each entering class for members of designated racial and ethnic minorities violated the Equal Protection Clause.⁹⁴ A quarter-century later, in *Grutter v. Bollinger*,⁹⁵ a five-justice majority endorsed Justice Powell's approach. In upholding the University of Michigan Law School's consideration of race as one factor in making admissions decisions, the Court deferred to the university's academic judgment about the educational importance of a diverse student body.⁹⁶

Bakke suggests, however, this deference to academic judgments has its limits. As the Court explained in *University of Pennsylvania v. EEOC*,⁹⁷ a university has no privilege to withhold internal and external peer reviews of an unsuccessful candidate for promotion and tenure when the candidate alleges that her rejection violated Title VII.⁹⁸ Academic freedom does not protect universities from compliance with such generally applicable civil rights laws.⁹⁹ Nor is *Bakke* the only affirmative action case in which the Court has rejected

⁸⁹ *Id.* at 216.

⁹⁰ *Id.* at 225.

⁹¹ *Id.*

⁹² 438 U.S. 265 (1978).

⁹³ *Id.* at 312.

⁹⁴ *Id.* at 315–20.

⁹⁵ 539 U.S. 306 (2003).

⁹⁶ *Id.* at 328–29.

⁹⁷ 493 U.S. 182 (1990).

⁹⁸ *Id.* at 189.

⁹⁹ *Id.* at 198 (reasoning that the protections of academic freedom are generally limited to cases where the government conduct intends to or does in fact direct the content of the university discourse).

a university's race-based admissions program. In *Gratz v. Bollinger*,¹⁰⁰ a companion case to *Grutter*, the Court invalidated the point system that the University of Michigan used for undergraduate admissions because that system gave all minority applicants the same substantial number of points and thus did not provide for individualized consideration.¹⁰¹

What do these cases imply about whether law school clinics could successfully assert an academic freedom claim to fend off external pressures on their work? At first blush, clinics seem to have a powerful argument that their operations fall within the classic definition of freedom to teach. Clinics are the predominant mechanism by which law schools satisfy the accreditation requirement to provide students with "live-client or other real-life practice experiences,"¹⁰² but that requirement does not mean that schools must operate their own clinics or provide every student with such real-life practice opportunities.¹⁰³ In other words, a law school's decision to operate a clinic appears to represent exactly the kind of academic judgment that deserves judicial deference.

There are at least two reasons to question whether an academic freedom argument would succeed in court. First, it might be argued that academic freedom as recognized in the cases does not apply to the work of law school clinics. Institutional academic freedom, which protects universities from external interference, traditionally has been justified in the name of defending "the fundamental academic values of disinterested inquiry, reasoned and critical discourse, and liberal education."¹⁰⁴ On this view, the government might well be permitted to regulate aspects of universities that are "unrelated to liberal studies."¹⁰⁵ This is so because the concept of academic freedom rests on a commitment to detachment and disinterestedness.¹⁰⁶ Training students for the labor market is only peripherally, if at all, related to those values, the argument goes, so the government might have greater latitude to regulate activities relating to vocational training.¹⁰⁷ Law school clinics inculcate skills that are designed to prepare

¹⁰⁰ 539 U.S. 244 (2003).

¹⁰¹ *Id.* at 271-75.

¹⁰² ABA Standards for Approval of Law Schools Standard 302(b)(1) (2010-2011).

¹⁰³ *Id.* Interpretation 302-5.

¹⁰⁴ Byrne, *supra* note 79, at 338.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 333-35 (discussing the merits of knowledge pursued with detachment as disinterestedness, arguing that this is one of the "indigenous values served by universities").

¹⁰⁷ *See id.* at 332 (arguing that there is no reason in principle why the government cannot regulate university training encouraging the development of practical, career-related skills as it does private enterprises).

students for legal practice rather than detached and disinterested inquiry, so perhaps their work falls outside the boundaries of academic freedom, however this concept applies to other aspects of what law professors (including clinicians) do.

There are other reasons to question whether academic freedom necessarily insulates law school clinics from external regulation. Clinics enable law students to appear in court, under faculty supervision, in circumstances where they otherwise could not represent clients because the students have not been admitted to the bar. Student-practice rules are an integral part of the clinical experience: without such rules, promulgated by the judiciary, law students would not be able to perform lawyers' roles. Because students have no independent right to appear in court on behalf of clients, it is not clear that invoking academic freedom will add much to the more general First Amendment arguments against content-based regulations of legal practice that prevailed in *NAACP v. Button* and *Legal Services Corp. v. Velazquez*¹⁰⁸ or the First Amendment arguments that failed in *Southern Christian Leadership Conference v. Supreme Court of Louisiana*.¹⁰⁹

CONCLUSION

It is not at all clear that either general First Amendment doctrine or academic freedom, to the extent that this concept rests on First Amendment considerations, will protect law school clinics from at least some external regulation. Nevertheless, the uncertain prospects of judicial vindication should not occasion despair. After all, academic freedom is more than a legal concept that is enforced by courts. It also represents a powerful intellectual and social norm that can be used in the public arena to fend off attacks on universities.¹¹⁰ Professor Waltz's experience at Northwestern, where the law school and the central administration resisted calls for his ouster because of his role in the Chicago 7 case,¹¹¹ offers an optimistic example of how this norm can be used effectively.

¹⁰⁸ See *supra* notes 28–31 & 55–64 and accompanying text.

¹⁰⁹ See *supra* notes 69–75 and accompanying text.

¹¹⁰ See generally FINKIN & POST, *supra* 79.

¹¹¹ See *supra* Part I.