Whistleblower Protection in Higher Education: A California Case Study

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1. Introduction

Over the past decade, U.S. higher education has produced a steady barrage of tawdry revelations about abuse and corruption. Starting with the 2012 conviction of former Penn State coach Jerry Sandusky on child molestation charges,[3] America's universities have regularly been in the headlines for all the wrong reasons: the cover-up of decades of sexual abuse of athletes by Michigan State University team physician Larry Nassar,[4] the public implosion of a medical-school dean at the University of Southern California in a drugs-and-prostitution scandal,[5] bribery charges against Hollywood stars for buying their children's way into competitive schools using inflated credentials,[6] and more.

Although official misconduct in higher education takes many forms, a common feature shared by each dispiriting occurrence is secrecy: concealment allows wrongdoing to fester, and when it is eventually revealed, the public is doubly angry at both the wrongdoing and the concealment. If employees or students at Michigan State – or at other institutions where serial molestation scandals are belatedly surfacing[7] – felt empowered to blow the whistle at the first sign of illicit behavior, generations of victims might have been spared. Coerced concealment can put safety at risk, as tragically demonstrated by the case of Maryland football player Jordan McNair, whose death exposed a repressive culture within the athletic program in which athletes knew coaches were taking dangerous risks but feared speaking out.[8] In secretive and image-protective organizations, reporting suspicious behavior up the internal ladder is widely perceived as futile. That is why the ability to complain externally – and if necessary, publicly – is an essential safeguard, especially in educational institutions where students are in a quasi-custodial setting and vulnerable to authority figures' coercive power.

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The First Amendment should reliably protect the ability to speak out about the workings of government agencies, including sharing suspicions of wrongdoing. The Supreme Court said as much in its most recent employee-speech case, *Lane v. Franks*, which vindicated the constitutional rights of a community college whistleblower.[9] But many government agencies, including state colleges and universities, still send a dissonant message with restrictive (and questionably legal) policies that forbid employees from speaking to the press and public.[10] Even with the assurance that the First Amendment will eventually vindicate their rights if they are unlawfully punished for speaking, people in vulnerable positions understandably may be intimidated into remaining silent.

Apart from exposing wrongdoing, there is obvious value in enabling the public to hear the first-hand perspective of subject matter experts who work in the public sector. Whether government employees are able to do their jobs safely and effectively is a matter of paramount public concern, whether the job is driving a school bus, inspecting nuclear plants, or guarding prison inmates.

The value of this frontline perspective – and the impediments to sharing it – became even more apparent during the COVID-19 pandemic that swept the United States throughout 2020 and 2021, as journalists met constant obstacles in attempting to capture the experiences of healthcare professionals, teachers, and others straining to deliver services while protecting their own safety.[11] A 2020 survey of some 900 public health workers by Physicians for Human Rights and the University of California, Berkeley, found that 63 percent experienced inadequacies in personal protective equipment in their workplaces, but only 37 percent would feel confident speaking out publicly about their safety concerns due to fear of retaliation.[12]

The experience of healthcare workers during the pandemic aligns with the experiences of journalists as captured by a series of studies published by the Society of Professional Journalists and the SPJ's former president, Prof. Carolyn S. Carlson. Carlson's surveys of journalists with varying specializations – those covering federal agencies, those covering schools, and so on – have found that journalists regularly encounter aggressive gatekeeping by the public-relations arms of government agencies, obstructing their access to newsmakers.[13] When workers on the front lines cannot share their perspect*ives,* public understanding suffers; audiences are left with news stories filled with unnamed sources, which impairs their trustworthiness.[14] As a University of Texas business professor wrote, after chronicling instances of retaliation against COVID-19 whistleblowers in both the public and private sectors:

> The epidemic of silencing front-line workers who are dealing with this once-in-a-generation pandemic only serves to extend its horrific impact. Instead, we must embrace the difficult message that these individuals are relaying and devote more resources and attention to addressing the underlying concerns.[15]

In short, the public benefits when people with subject-matter expertise can communicate directly about their observations and experiences. But workplace policies do not reliably recognize that speaking out about matters of public concern is both societally valuable and – in the public sector – constitutionally protected against retaliation. To the contrary, policies that purport to restrict constitutionally protected speech rights are pervasive throughout government. In a May 2021 study, researchers from the University of Georgia School of Law's First Amendment clinic documented that 12 of the 37 state agencies surveyed enforced strict gags on employees forbidding communications with the media, while nine others allowed communications only with supervisory approval.[16]

Using California as a microcosm for the United States, this article seeks to examine how completely the law protects speakers at state colleges and universities, and to identify where the retaliation safety net may be absent or unreliable. Section II sets down the foundational First Amendment principles that apply in the government workplace, and how those principles may vary when the regulator is a public university and the speaker is a faculty member. Section III focuses on California law, and the extent to which college employees might have additional legal protection, above-and-beyond the uncertain bounds of the First Amendment, to speak publicly about workplace concerns. This section explains why the constitutional right to speak with the press is so valuable: Because other sources of public employee rights are relatively narrow, primarily protecting disclosures to supervisors or law enforcement, but not the general public. Section IV describes the findings of a survey of employee-speech policies in effect at public colleges and universities in California, and how those policies do or do not reflect prevailing judicial interpretations of employees' legal rights. The study discerns widespread problems primarily within the police departments at California higher education institutions, where employer control over employee speech is especially heavy. What campus police are being told about their rights does not align with the scope of their rights as defined by the courts – including the federal Ninth Circuit, which makes binding legal precedent for the state of California. This finding calls for a systemic reconsideration of workplace policies for law enforcement officers across the state. Finally, Section V concludes with recommendations for ensuring that campus workplace policies assure employees that they can safely blow the whistle on impropriety, including speaking with the news media about work-related matters, without reprisals.

2. Free Speech Rights In The Government Workplace

2.1 How Federal Courts Apply the Constitution to Public Employee Speech

2.1.1 The Supreme Court's evolving balancing approach

Outside of the workplace, the First Amendment sharply curtails the government's authority to forbid speech, or punish a speaker, based on content or viewpoint.[17] The Supreme Court has recognized only a few categorical exceptions – such as obscenity, incitement of imminent lawlessness, or speech integral to criminal conduct – that may freely be proscribed or penalized.[18] Otherwise, any government restriction that targets speech based on the content of the speaker's message will be struck down as unconstitutional unless it is the most narrowly tailored remedy possible to achieve a compelling state interest.[19] A law that is insufficiently well-tailored, restricting more speech than necessary, will be invalidated as facially overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[20] Moreover, First Amendment freedoms do not stop with the speaker. The Supreme Court has recognized a constitutional right to receive information as well as to share it, so the interests of the listening audience are of legal relevance whenever speakers are silenced.[21]

Federal courts have recognized a stepped-down level of First Amendment protection in the employer/employee context, in deference to the authority of government supervisors to maintain an effective and harmonious workplace.[22] When the government acts as employer rather than regulator, its authority to enforce content-based restrictions on speech increases, and the employee/speaker's autonomy diminishes.[23]

This article focuses on the wholesale gagging of public employees from speaking publicly about their work. But it is important to note at the outset that facial challenges to rules prohibiting speech are relatively rare, in contrast with the more familiar scenario of an employee suing after being disciplined for saying or writing something the employer deems disruptive. Such cases are commonplace now that social media is making employees' off-hours vents and rants visible to co-workers and employers.[24] For those types of First Amendment challenges, federal courts have developed an elaborate and well-tested set of standards, beginning with the landmark 1968 case of *Pickering v. Board of Education*.[25]

In *Pickering*, Illinois schoolteacher Marvin L. *Pickering* wrote a letter-to- the-editor critical of his school district's spending priorities, encouraging readers to vote against a proposed bond issue that the district strongly supported.[26] *Pickering* concluded with an incendiary sign-off: "I must sign this letter

as a cit*izen*, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration."[27] Notwithstanding his discla*imer*, the school board deemed the letter to be disloyal and fired *Pickering*.

Pickering sued, alleging the district violated his First Amendment rights. But the state Supreme Court found in the district's favor, on the grounds that teachers voluntarily waive their constitutional rights when they accept public employment: "By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in."[28]

The U.S. Supreme Court reversed. The justices held that, under the First Amendment, a public employee cannot be dismissed for exercising the right to comment on matters of public concern, without proof that the employee knowingly or recklessly made false statements.[29]

The Court noted that the challenge was to arrive at a "balance between the interests of the teacher, as a cit*izen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting of [sic] the efficiency of the public services it performs through its employees."[30] Because the lower courts failed to adequately weigh *Pickering*'s interest in being heard on a matter of public importance, the justices sent the case back with instructions to apply a more speech-protective balancing approach.

In a pair of subsequent cases, the justices arguably narrowed the scope of *Pickering*, recognizing exceptions in which employers have greater latitude to punish wayward employees. First, in *Connick v. Myers*, the Court decided that speech largely loses First Amendment protection – so that a *Pickering* analysis is unnecessary – if the speaker's primary purpose is to advance a personal grievance.[31] In that case, an employee of a Louisiana prosecutor's office was disciplined for surveying her co-workers about working conditions, which – in the Supreme Court's view – was primarily motivated by her own unhappiness over an unwanted transfer.[32] In other words, *Connick* emphasized the "public concern" element of *Pickering*, so that speech qualifies for *Pickering* protection only when the employee is speaking to a matter of wider public importance: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their off*ices*, without intrusive oversight by the judiciary in the name of the First Amendment."[33] Significantly, the Court put great heavily weighted the context in which the employee spoke – an internally distributed survey, rather than an attempt to engage with the wider community, which might have been more protected.[34] Thus, the *Connick* case suggests that public-facing speech – what many of us would call "whistleblowing" – should receive greater protection.

Then in *Garcetti v. Ceballos*, the Supreme Court carved out a new category of unprotected employee speech: Speech delivered "pursuant to official responsibilities."[35] In the *Garcetti* case, prosecutor

Richard Ceballos was punished for writing a memo that fell into the opposing counsel's hands and undermined his agency's prosecution of a pending criminal case. In a 5-4 opinion written by Justice Anthony Kennedy, the Supreme Court found that there can be no First Amendment claim when an employee is punished for "speech that owes its existence to a public employee's professional responsibilities(.)"[36] As with the Connick case, the Garcetti Court put decisive weight on a key passage from the *Pickering* opinion: "The problem in any case is to arrive at a balance between the interests of the teacher, as a cit*izen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[37] The Court read *Pickering* to mean that constitutional protection applies when speaking "as a citizen" – so that, when speech is part of an official work assignment, it is unprotected.[38] Notably, the *Garcetti* majority, harkening back to *Pickering*'s facts, explicitly mentioned "writing a letter to a local newspaper" as the type of speech that would likely be unaffected by the Court's newly recognized standard.[39] The majority appeared to draw a distinction between speech that could occur uniquely within the government workplace, which would be unprotected, versus speech that could come from a citizen outs*ider,* which would remain protected.[40]

The Court's most recent pronouncement on freedom of speech in the government workplace, *Lane v. Franks*, involved whistleblowing within higher education. In *Lane*, the Court swung the pendulum back in favor of employee speech rights, clarifying that *Garcetti* means what it says and no more: Speech ceases to be constitutionally protected only if the speech itself is part of an employee's assigned duties, such as writing a memo. The speaker in *Lane*, an Alabama community college employee who lost his job after testifying about workplace corruption before a grand jury, was found to be speaking outside his assigned duties, and thus constitutionally protected against retaliation.

To summarize, when a government agency attempts to punish an employee for the content of speech, employees have substantial protection if they are speaking outside the confines of their assigned work duties and are addressing matters of public concern beyond just their own dissatisfaction. This is an important aspect of workplace-speech protections. But the law is even clearer and more speech-protective when a dispute involves a blanket prohibition on speaking rather than a specific instance of purportedly disruptive speech.

2.1.2 Prior restraints: A constitutional "red line"

There is a decisive analytical distinction between punishing an individual employee for an act of disruptive speech versus categorically prohibiting an entire class of employees from speaking at all. In the latter situation, the government's action will be reviewed less deferentially, and its burden of justification will be more demanding.

A "prior restraint" on speech is regarded as an especially serious affront to the First Amendment.[41] Prior restraints are strongly disfavored because they prevent speech from ever reaching its intended

audience, rather than waiting to see whether the speech actually causes harm and holding the speaker responsible afterward.[42]

The Supreme Court explicated the prior restraint doctrine in its landmark *Near v. Minnesota* decision, invalidating a state statute that empowered the government to enjoin distribution of any publication deemed to be "malicious, scandalous and defamatory."[43] Drawing on English common law, the Court observed that the guarantee of freedom of the press "has meant, principally although not exclusively, immunity from previous restraints or censorship."[44] The justices distinguished between imposing after-the-fact damages for speech proven to be defamatory (which is constitutionally permissible) versus stopping the presses on the suspicion that the publisher might publish something defamatory (which is not permissible): "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."[45]

The disfavor for prior restraints even extends to the government workplace. When a workplace policy looks like a blanket restraint on speech, rather than targeted punishment for an individual instance of harm-causing speech, the government faces a heavy burden to justify the policy.

The Court recognized this critical distinction in its 1995 ruling, *United States v. National Treasury Employees Union*, commonly referred to as the "*NTEU*" case.[46] In *NTEU*, a labor union challenged a statute forbidding federal government employees from accepting honorarium payments for speaking or writing articles.[47] Importantly, even though the statute merely made speaking less attractive rather than banning it altogether, the Court still regarded the law as an impermissibly broad prohibition likely to discourage employees from speaking. While the government was able to identify a legitimate concern behind the statute – preventing special interests from buying influence with regulators and policymakers in the guise of speaking fees – the Court found the blunt instrument of a blanket prohibition on speaking fees to be unjustifiably broad.[48]

In reaching its conclusion, the *NTEU* Court found the *Pickering* balancing-of-interests approach to be insufficiently speech-protective when the case implicates a prior restraint on a broad category of workers. The Court assigned the government a more demanding burden of justification: When a regulation chills the exercise of free-speech rights to prevent anticipated harms, the government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[49] The Court thus created an analytical fork in the First Amendment road: When an employee is punished for speaking and challenges the punishment, the *Pickering* line of cases applies. But when employees challenge the existence of a statute, regulation or policy that chills speech, the more rigorous and speech-protective *NTEU* analysis will apply. This assigns the government an especially high burden of justification to defend a prior restraint on speech.[50]

To illustrate the *NTEU* principle in action, a California federal court applied the *NTEU* analysis in finding that two prosecutors stated a valid First Amendment claim after they were placed under investigation on suspicion of being whistleblowers, then gagged from telling anyone about the investigation.[51] The case involved an unsigned letter sent to local government officials and a California newspaper, accusing the San Bernardino County district attorney of improprieties in managing the agency's child support recovery program, and carrying on a sexual relationship with a subordinate.[52] The district attorney put the plaintiffs on indefinite leave while he investigated whether they wrote the letter, instructing them not to disclose anything about the matter to anyone, and then allowed them return to work only under restrictive conditions that included a ban on "derogatory" or "inaccurate" remarks.[53] The district attorney then issued a broad new "executive order" forbidding any employee from releasing "any information acquired while at work," whether confidential or not, to anyone for any reason other than official office business, specifically singling out unapproved communications with the news media.[54] The two disciplined employees sued, and the county moved to dismiss their claims. But the court found that the broadly worded executive order was actionable under the First Amendment:

> The law is clear that, although the government, as an employer, has an interest in promoting the efficiency of the public services it performs, and may use such interest to justify imposing restraints on employees' speech which would be unconstitutional if applied to the public at large, nonetheless it has no absolute right to prohibit speech, and its interest in efficiency in the workplace must be balanced against both the interests of the employees, as citizens, to comment upon matters of public concern … and the interests the public may have in reading and hearing the public employees' comments.[55]

2.1.3 Prior restraints don't work at work

Courts have overwhelmingly concluded that regulations forbidding public employees from speaking to the press and public, or requiring that they obtain supervisory approval before doing so, are unconstitutional. At least four of the 12 regional federal circuits – including the Ninth, which encompasses California – have struck down rules restricting employees from discussing work-related matters; no circuit has taken a contrary position.

In the Ninth Circuit case, *Moonin v. Tice*, a three-judge panel ruled in favor of a Nevada Highway Patrol officer who was aggrieved by a directive not to discuss the agency's drug-dog program with outsiders.[56] The challenged policy stated in part: "All communication with ANY non-departmental and non-law enforcement entity or persons regarding the Nevada Highway Patrol K9 program or interdiction program, or direct and indirect logistics relating to these programs WILL be expressly forwarded for approval to your chain-of-command."[57] The court concluded that the policy was unjustifiably broad because it made no distinction between official-duty speech versus constitutionally protected speech as a citizen addressing matters of public concern: "[A]lthough the policy affects only speech relating to

the K9 or drug interdiction programs, we may not assume that the troopers speak as employees rather than citizens on every occasion in which they discuss information learned or opinions developed while on the job."[58] The court was unpersuaded by the highway patrol's defense of the policy as an attempt to insulate the agency against meddling and second-guessing by busybodies:

> Although it could be true that police departments would operate more efficiently absent inquiry into their practices by the public and the legislature, efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value. Avoiding accountability by reason of persuasive speech to other governmental officials and the public is not an interest that can justify curtailing officers' speech as citizens on matters of public concern.[59]

Accordingly, the policy not only violated troopers' First Amendment rights, but so clearly violated their rights – as established by *NTEU* – that qualified immunity did not shield the highway patrol's management against liability for damages.[60]

Moonin builds on a foundation of circuit-level precedent that even predates *NTEU*. In the earliest known case, *Barrett v. Thomas*, the federal Fifth Circuit affirmed a trial court's finding that a Texas sheriff's personnel rules restricting employee speech were unduly broad.[61] In a case following *NTEU*, the federal Second Circuit likewise found that a policy forbidding public employees from speaking without approval was an unlawful prior restraint.[62] The court found that the New York City Administration for Children's Services (ACS) violated employees' First Amendment rights by enforcing a policy stating, in part: "All contacts with the media regarding any policies or activities of the Agency – whether such contacts are initiated by media representatives or by an Agency employee – must be referred to the ACS Media Relations Office before any information is conveyed by an employee(.)"[63] Even though the agency presented substantial justifications for its policy, including safeguarding the confidentiality of sensitive information regarding troubled children, the court still found that a total blackout on unapproved communications with the public was unjustifiably broad under the *NTEU* standard.[64] And in a pair of analogous cases cited by the *Moonin* court, the federal Tenth Circuit found that educational institutions' prohibitions against discussing "school matters"[65] or "school problems"[66] with outsiders were unconstitutionally overbroad.

At the trial court level, police and firefighters have regularly won facial First Amendment challenges to policies requiring supervisory approval before speaking. Examples of the types of wording regarded as impermissible in workplace rules include:

- A Michigan ordinance stating that only the fire chief could "release facts regarding fire department matters, fires or other emergencies to the news media" and requiring employees to refer all media inquiries to the chief.[67]
- A Connecticut highway patrol policy forbidding troopers from making "official comments relative to department policy" to members of the press or public without supervisory approval.[68]

- A Massachusetts fire department rule prohibiting employees from making "statements for publication concerning the plans, policies, or affairs of the administration of the fire department" without the chief's approval.[69]

Most recently, a Mississippi court added to the unbroken string of employee wins by enjoining the Jackson school district from enforcing a wide-ranging employee ethics policy that included prohibitions against "disclosure or use of confidential school information" or "negative commentary to the media, or others within the community."[70] The judge found the policy to be vague, overbroad and viewpoint-discriminatory in violation of the Mississippi Constitution's free speech clause, observing that the regulation would forbid dissemination of "such public-interest information as unsafe or unsanitary school facilities, inappropriate content being taught in the classrooms, and misuse of public property by staff, teachers and/or administrators."[71]

In sum, the body of precedent is overwhelming: A public agency cannot prohibit employees from speaking to the press and public, or require prior approval for speaking.

2.1.4 "Unfettered discretion" and employee constitutional rights

When a government agency asserts power to decide who is allowed to speak, the Constitution requires stringent safeguards to prevent viewpoint-based gatekeeping. Both as a matter of First Amendment law and as a matter of due process, a permitting system that gives the decisionmaker unfettered discretion over speech is unconstitutional.[72] As the Court stated when striking down a city ordinance that gave a city review board total discretion to approve or deny a request to place newspaper racks on public property, "the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."[73] Open-ended permitting discretion offends the Constitution because it empowers decisionmakers to subjectively withhold permission from speakers with critical or unpopular views.[74]

The courts' disfavor for unbridled gatekeeping discretion extends to the government workplace. A U.S. district court invalidated a police department rule that forbade employees from disclosing "any information concerning the business of the department" or speaking publicly about anything "relating to the official business of the department" without prior approval.[75] In addition to being unconstitutionally overbroad in violation of the First Amendment, the regulation was deemed infirm because it "sets no standards to guide the decision-making process, does not require any explanation for a denial of permission to speak, and promises no time frame for such grant or denial."[76] Similarly, a federal district court in Massachusetts struck down a municipal regulation stating that fire department employees "may not public[ly] communicate on matters concerning [the department's] rules, duties, policies, procedures and practices without prior written approval."[77] The regulation flunked First Amendment scrutiny because it failed to provide "narrow, objective and definite" standards to cabin the discretion of supervisors in deciding whether employees would be allowed to speak. [78]

2.2 "Academic Freedom" and the Special Case of Faculty Speakers

College campuses are regarded as places where solicitude for freedom of speech should be at its highest, because higher education involves testing ideas in a laboratory-type setting before they are unleashed on the wider marketplace.[79] The Supreme Court has consistently ruled in favor of college students in free-speech disputes with their institutions.[80] In a string of cases rooted in the McCarthy "Communist witch hunt" era, the Court sided with university faculty members who were forced to swear anti-Communist loyalty oaths or otherwise targeted for their political beliefs.[81]

When the Supreme Court rolled back some employee free-speech rights in its 2006 *Garcetti* case, the Court pointedly reserved judgment on whether a more speech-protective standard might apply in the unique setting of the higher-education workplace.[82] The Ninth Circuit accepted the Court's invitation to fill in the blank, and in a 2014 ruling, declined to apply *Garcetti*'s harsh medicine to a college professor's workplace speech.

In *Demers v. Austin*, the Ninth Circuit rejected *Garcetti* in the context of university faculty, recognizing heightened "academic freedom" rights for college educators beyond the rights that other government employees generally enjoy.[83] *Demers* holds that the *Garcetti* test cannot, consistent with the First Amendment, apply to teaching and academic writing performed "pursuant to the official duties of a teacher and professor." Judicial recognition of academic freedom was visible as early as the 1950s, when the Supreme Court held that a statute compelling a professor to be interrogated about his political beliefs violated his constitutional rights, namely the rights to academic freedom and political expression.[84] Reasoning that universities are meant to foster free thought, expression, and exposure to diverse viewpoints, cases like *Demers* have since held that academic freedom affords college educators additional legal protections to choose what and how they teach, and to speak and publish on controversial matters, even when it puts them at odds with their employers.[85] Not all circuits subscribe to this view; for example, some courts have interpreted "academic freedom" rights to apply to universities, not individual educators.[86] However, the Ninth Circuit's analysis in *Demers* seems to support additional protections for individual professors at state-funded universities.

3. California Law and The Right to Speak

The First Amendment is the primary source of rights protecting the right of public employees to speak about workplace concerns without retaliation. It is relatively common for states to single out speech in certain contexts, or addressing certain topics, for an extra measure of legal protection, as California does. However, state law does not broadly recalibrate the federally recognized balance between employee rights and employer authority in the government workplace. The U.S. Constitution remains the primary source of limits on public employers' authority to control employee speech. State statutes and constitutions serve primarily as belt-and-suspenders layers of protection, or as gap-fillers clarifying the state of employee rights where federal caselaw is imprecise or unpredictable.

3.1 California Constitutional Protections

State constitutions receive relatively little attention but can be meaningful sources of individual rights supplementing federal protections.[87] Even where they seemingly are coextensive with federally protected rights, state constitutional rights may be enforced more rigorously in the state courts, owing to the tradition of skepticism for powerful, centralized government in which so many state constitutions were birthed.[88] The California Constitution is among those with an explicit free-speech protection that buttresses the federal First Amendment: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[89]

The California Constitution's free speech provisions are understood to be broader than federal law.[90] If that is the case, then a public employee aggrieved by workplace restraints might have state-based rights superior even to federal constitutional protections. However, it is not always the case that state protections exceed federal ones.[91] In some contexts, California courts regard the two free-speech amendments as coextensive, drawing on federal precedent to interpret the state analogue.[92] So far, the primary point of divergence has come in the context of speech restrictions imposed by private parties. While federal constitutional rights protect only against infringement by "state actors," California courts have recognized that private entities acting in a quasi-governmental regulatory capacity can be held liable under the state constitution.[93] So the extent to which an employee of a California higher educational institution could rely on the state constitution to fill any gaps in federal First Amendment protection for work-related speech is untested.

3.2 California Statutory and Common-Law Protections

While the U.S. Constitution sets the floor of individual rights beneath which government agencies may not descend, it is not a ceiling. State or local agencies, including public educational institutions, are free to afford speakers more than the bare minimum of rights that federal law requires.[94] California statutes protect work-related speech in relatively fact-specific contexts, none of which benefit a public employee who wishes to "go public" with concerns over dishonesty, mismanagement or unsafe conditions. While it is valuable for university employees (and their employers) to understand the full range of statutory protections, it is also important to understand their relative narrowness, which makes enforcement of federally protected rights all the more important.

3.2.1 Free speech rights of government employees in California

The California Labor Code broadly provides that no employer shall make or enforce any rule, regulation, or policy that prevents an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee with the authority to investigate, discover, or correct the suspected violation or noncompliance with a federal or state law.[95] Employers are also barred from preventing an employee from testifying before any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of federal or state statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.[96] The Labor Code also prohibits retaliation against employees for disclosing such information, for exercising the aforementioned rights in their former employment,[97] or for the acts of a family member protected under this section.[98] It clarifies that reports made by government employees to their employers qualify as disclosure of information to government or law enforcement agencies.[99] These Labor Code provisions apply to any individual employed by the state or any subdivision thereof, any city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California.[100]

The California Whistleblower Protection Act ("CWPA") declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retaliation.[101] The CWPA provides confidential avenues for government employees to report improper governmental activities. Improper governmental activity is defined as an activity by a state agency or by an employee, undertaken in the performance of the employee's duties, in a state office, or in direct relation to state employment, that (1) violates any state or federal law or regulation, (2) violates an Executive order of the Governor or certain California rules or policies, or (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency.[102]

Under the CWPA, the State Auditor is responsible for maintaining both mail and internet means for submitting allegations of improper governmental activity. The means of submission cannot require anybody to provide their name and contact information, but it can request that information for anybody who could help substantiate the claim. Importantly, there must also be an alternative system for submission to an independent investigator for employees of the Auditor's office itself.[103] There is also a provision applying specifically to court employees, providing that any written complaints they file may also be submitted to the State Personnel Board for investigation.[104] The CWPA provides that employees who use their authority to interfere with disclosure can be liable for civil damages.[105]

The State Auditor is then expected to investigate and report on improper governmental activities.[106] They are not permitted to disclose a reporter's identity without express permission, except to a law enforcement agency conducting a criminal investigation.[107] When the State Auditor deems the evidence sufficient to support an adverse action, it shall provide such evidence to the employee's appointing power, who is then required to either serve a notice of adverse action to the employee who is the subject of the investigative report, or to set forth in writing its reasons for not taking adverse action. Any employee who is served with a notice of adverse action may appeal to the State Personnel Board.[108]

Under the CWPA, a protected disclosure exists when an employee or an applicant for state employment files a written complaint to the State Auditor, concerning an improper governmental activity or a condition that may significantly threaten the health or safety of the employees or the public, with the purpose of remedying that condition.[109] Courts have held that complaints made in the context of internal administrative or personnel actions, rather than in the context of legal violations, do not constitute protected whistleblowing.[110] For example, allegations of a department head creating a stressful work environment by yelling, undermining employees' confidence, and saying hurtful things were considered "akin to internal personnel or administrative disclosures," and were not protected disclosures under the CWPA.[111] On the other hand, complaints that a department chair had conflicts of interest in hiring decisions concerning his wife, that he modified policies to favor her, and retaliated against an employee for whistleblowing, implicated the Regents' policies, which have the force and effect of statutes, and were therefore protected by the CWPA.[112]

The CWPA imposes penalties for retaliation against individuals making protected disclosures. Intentional reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for having made a protected disclosure is punishable by a fine of up to $10,000 and imprisonment in the county jail for up to one year. Employees who intentionally engage in that conduct are subject to adverse disciplinary action under Section 19572 of the California Government Code.[113] The injured party may also bring an action for damages against an employee who intentionally engages in retaliation. They are entitled to receive reasonable attorney's fees upon a finding of liability, and may be eligible for punitive damages when the offending party's acts are proven to be malicious.[114]

3.2.2 Free speech rights in California higher education

The provisions against retaliation applicable to California university employees, within both the University of California and California State University Systems, are largely similar to those concerning government employees in general. University employees, including officers or faculty members, are permitted to file written complaints with their supervisor, manager, or any other university officer designated for that purpose by the regents, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure. This should be submitted together with a sworn statement that the contents of the written complaint are true or believed to be true. The written complaint should be filed within 12 months of the most recent act of reprisal complained about.[115]

The penalty for engaging in retaliation against California university employees or applicants is the same: up to one year of jail and up to a $10,000 fine, with the potential for punitive damages and reasonable attorney's fees. University employees, faculty members, or officers who intentionally engage in retaliatory conduct are also subject to discipline by their universities. However, any action for damages shall not be available to the injured party unless they have first filed a complaint with the officer designated by the regents and the university has failed to reach a decision regarding the complaint within the time limits established for that purpose by the regents.[116] The CWPA provides that when investigations involve access to confidential academic peer review records of UC academic personnel, they should be provided in a form consistent with university policy, and that no information obtained shall be divulged without prior approval of the State Auditor.[117]

Aside from retaliation, UC employees, including officers or faculty members, are prohibited from directly or indirectly using or attempting to use their official authority or influence over the employee to intimidate, threaten, coerce, command, or otherwise interfere with the person's right to disclose improper governmental activities. This includes promising to confer, or conferring, any benefit, effecting or threatening to effect any reprisal, or taking or directing others to take any personnel action, including appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.[118] However, by its terms this statutory protection against retaliation applies only to disclosures made to the State Auditor or to an officer designated by the California regents to receive complaints – not to the broader public.[119] For that additional measure of protection, a public employee would be left to rely on federally protected constitutional rights.

4. Scrutinizing Campus Employee Speech Regulations

California leads the country in higher education enrollment, with 2.7 million students attending public and private postsecondary institutions.[120] Of those 2.7 million, 280,000 attend one of the 10 campuses of the University of California System, and 475,000 attend one of the 23 institutions in the California State System, the largest university system in the United States.[121] The UC system employs 227,000 people,[122] and nearly 56,000 people work for the Cal State system.[123] The UC institutions operate on a combined annual budget of $41.6 billion,[124] while the annual operating budget for the CSU system is $7.8 billion.[125] The sheer size and diversity of California institutions makes the state a convenient proxy for higher education as a whole. Since California has a relatively pro-worker reputation,[126] it is reasonable to assume that if California law fails to protect employees against retaliation for speaking out, then large portions of the rest of the country likewise are unprotected.

During the fall of 2021, researchers from the Joseph L. Brechner Center for Freedom of Information at the University of Florida submitted requests under the California Public Records Act to all 33 four-year public higher educational institutions in California. Researchers asked for three data points: (1) Policies regulating speech by all institutional employees generally, (2) any speech policies specific to campus police officers, and (3) any speech policies specific to students playing intercollegiate athletics. The latter two categories were chosen because it is widely documented that the speech of police officers and college athletes is particularly heavily regulated, perhaps attributable to the high-profile positions they occupy and the likelihood of media interest in their activities. Researchers sent two rounds of follow-up emails to institutions that did not respond to the initial Public Records Act request, or responded incompletely (*i.e.*, producing a policy that pertains to police or to athletes, but not responding to the remaining requests). Despite the reminders, 15 of the 33 institutions (45 percent) still failed to fulfill some or all of the three requests.[127]

4.1 By the Book: What University Rules Say About Employees' Right to Speak

A common feature of every restrictive policy produced in response to Public Records Act requests is that none of them contained any of the due process safeguards that federal courts have deemed to be constitutionally necessary when government agencies act as gatekeepers over speech. In no instance did a policy contain any standards to guide the exercise of discretion (*i.e.*, what factors would be considered in determining whether a speaker is or is not permitted to speak), or provide any assurance of a timely decision or an opportunity to appeal an erroneous decision. This type of unbridled discretion is typically fatal to any government policy in which an agency asserts authority to decide who may and may not speak.[128]

4.1.1 A Paucity of Policy: Employee Rulebooks Stay Silent

Only 19 of 33 California colleges (58 percent) provided any response when asked for any written policy addressing rank-and-file employees' interactions with the news media. Of those 19, nine (47 percent of those responding) affirmatively stated that no written policy exists. Two colleges (10 percent of respondents) produced policies that strictly forbid unauthorized communication with the news media, five colleges (26 percent of respondents) produced vague or self-contradictory policies that could be read to suggest approval is needed, and three (16 percent) produced policies consonant with First Amendment standards that do not restrict the ability to speak.

In the most restrictive category, one college's policy instructed: "It is important that media calls about campus policies, decisions, and changes, and similar be reported to [the marketing and communications office]. You can refer them directly… or take a message and contact us." The ambiguous "middle category" policies were generally phrased in terms of "expectations" as opposed to requirements, so that employees were instructed that they were "expected" to consult a media relations officer before speaking to the press, which is less forceful than a requirement but could readily be interpreted as mandatory. The most permissive policies simply offer the services of a public information officer as a resource but do not make it mandatory to obtain consent to speak. One such policy reads: "If you can't speak with the reporter—maybe you're not the best source, maybe the timing isn't good, maybe you just prefer not to comment—please call the Public Information Office. The staff may be able to help the reporter by suggesting other sources."

It is perhaps encouraging that most California universities did not produce policies that explicitly silence employees from speaking. But the absence of written policies can itself be problematic, enabling individual managers to enforce unofficial "rules" that take on binding force in the absence of authoritative guidance. A federal court in California recognized the force of informal agency norms and practices in a case involving an Oakland police officer who resigned in fear of retaliation after reporting serious wrongdoing by fellow officers.[129] The former officer introduced evidence that the police department, despite its written policy instructing officers to report misconduct, "had a general culture of punishing officers who reported misconduct," including warnings he received cautioning him not to come back to work for his own safety.[130] Evidence of an unwritten practice of retaliation was deemed sufficient to support a First Amendment claim that the police department engaged in unlawful prior restraints.[131]

Higher education is no stranger to the "unwritten gag rule." For instance, during a widely publicized controversy over the removal of a popular journalism instructor, an administrator at the University of North Alabama distributed a campus-wide email reminding faculty and staff of an "unwritten media protocol" that requires sending all inquiries from journalists to the university's marketing and communications department.[132] The existence of such unwritten norms across government agencies, including in higher education, makes it especially significant for agencies to have written policies

clearly aligned with legal and constitutional standards. As the Supreme Court has long observed, speakers who are uncertain about their rights will censor themselves for fear of stepping over an indistinct line, which is why speech restrictions require precise tailoring.[133]

4.1.2 Behind the Blue Wall of Silence

The most striking finding from the policies gathered from CSU and UC institutions was the widespread practice of forbidding police officers from speaking to the media without supervisory approval. Of the 21 institutions that provided a response to the request for police department policies, 15 of them (71 percent of those exam*ined*, and 45 percent of all California institutions) expressly forbade any unapproved communications with the news media, while another four policies (19 percent of those exam*ined*, and 12 percent of all institutions) were vague or internally contradictory so that an employee would be unable to discern whether speaking is permitted. Only two of the institutions responded to the request by stating affirmatively that no written policy existed. In no instance did an institution provide a written policy that comports with prevailing First Amendment standards.

The public has a manifest interest in knowing whether college campus police agencies are functioning properly. The most recent data from the U.S. Justice Department indicates that, as of 2012, 75 percent of large U.S. colleges and universities employed armed officers, and that 86 percent of campus officers had arrest authority.[134] Just as with municipal police, questions periodically arise about whether campus police have used their authority judiciously, including the authority to use deadly force.[135] When questions do arise, the public needs to hear the candid first-hand accounts of officers with subject-matter knowledge, not a sanitized version of reality filtered through public-relations professionals.

It is perhaps especially surprising that police department policies would be widely noncompliant with the First Amendment, because most of the litigation over government employees' rights to speak to the press has taken place in the context of public safety agencies, with the employee winning on every occasion.[136] This includes the afore-cited *Moonin* case that is binding legal precedent in California, putting police departments on notice that they cannot enforce blanket restrictions on employees' ability to discuss work-related matters.[137] The noncompliance is doubly inexplicable because most of the noncompliant police department policies were word-for-word identical, and were purportedly based on a model rulebook supplied by a commercial vendor specializing in law enforcement policies. This cookie-cutter wording reads as follows: "At no time shall any employee of this department make any comment or release any official information to the media without prior approval from a supervisor or the designated department media representative(.)" In other words, it is considered to be a standard, state-of-the-art practice to gag police officers from speaking to the news media, even though decades of court rulings have declared the practice to be unlawful.

However, the widespread noncompliance is perhaps less surprising in light of the larger cultural context of policing. Police departments enjoy broad exemptions from state open records statutes that enable them to evade public scrutiny, with the justification that public disclosure might give away strategically valuable police tactics, or interfere with resolving unsolved crimes.[138] Indeed, when California enacted a statute entitling the public to inspect long-concealed personnel files documenting serious instances of officer misconduct, police agencies widely responded by shredding the records before they could fall into the public's hands.[139] A *USA Today* investigation documented rampant retaliation nationwide against officers perceived to be whistleblowers exposing police misconduct, including instances in which officers have reported death threats against themselves or their families.[140] Indeed, police departments are so concerned with controlling the flow of information about their work and cultivating a favorable public image that it is increasingly common for them to pay six-figure compensation to public-relations consultants in addition to their own internal stable of public-relations officials.[141]

As the long history of litigation between law enforcement officers and their employers demonstrates, free speech coexists uneasily within the quasi-military environment of a police department. But whatever legitimate concerns may exist for the confidentiality of sensitive law enforcement information can be dealt with through narrowly tailored policies that pass constitutional muster, without broadly – and unlawfully – silencing officers from sharing their observations and expertise.

4.2 "Shut Up and Dribble": The Special Case of College Athlete Speech

College athletes fall into an intriguing doctrinal gray zone: They are neither ordinary rank-and-file students, nor can they comfortably be categorized as "employees." And their status is rapidly evolving as a result of seismic changes in the governance of athlete compensation owing to court rulings, state legislation, and NCAA policy changes.

The Brechner Center survey of university policies found that, second only to police officers, California college athletes are subject to significant constraints on their ability to speak. Of the 33 institutions surveyed, 22 responded to the request for policies regarding athletes and 11 did not respond. Of those 22, 12 institutions (55 percent) produced policies that categorically forbid speaking to the news media without athletic department approval, four others (18 percent) produced ambiguous policies that can be read to suggest that speaking requires approval, and only two institutions (10 percent) produced policies that clearly enable athletes to speak without needing approval. (The remaining four responding institutions, or 18 percent, acknowledged the request but indicated that no written policy exists.)

In the most restrictive category, a typical policy stated in pertinent part: "You should never agree to an interview… unless the arrangements are coordinated through the Athletics Communications office.

Never give out your home phone number to a member of the media." Significantly, none of the athletic policies made any exception for timing or context; an interview about politics or current events would be subject to the same level of control as an interview about Saturday's game. Nor was the athletic department's control limited to times of the year in which the athlete was actively competing, as opposed to the off-season.

While government agencies do have authority to enforce reasonable and content-neutral policies regulating the "time, place and manner" of communications, those policies must leave open ample alternative channels of communication to be constitutional.[142] Rules requiring athletes to obtain permission for any interaction with the news media, without exception, do not fit the description of a constitutionally permissible restriction, because they apply to communications of all manner at all times in all places.

As contrasted with the law enforcement setting, where there is ample First Amendment precedent on point, there is a dearth of legal precedent about the rights of college athletes to speak without institutional interference. This makes intuitive sense. No athlete is likely to be sufficiently motivated to give an "unapproved" interview as to obtain counsel and sue the athletic department, straining the relationship with an institution that may be the athlete's primary provider of housing, food and healthcare.[143] But if blanket prior restraints are unconstitutional in the traditional employment setting, it seems quite unlikely that the First Amendment would tolerate comparable restraints in the "quasi-employment" setting of college sports.

First, colleges have fiercely resisted categorizing athletes as "employees" for purposes other than controlling their speech, fearing that "employee" status would entitle athletes to workers' compensation and other employment benefits.[144] Second, college students have more substantial First Amendment protections than do employees, more comparable to the protections that apply in the off-campus world, where prior restraints on speech are essentially never tolerated.[145] And third, the athlete rulebooks provided by California athletic departments did not make any distinction between players receiving scholarship benefits versus players who "walk on" to the team without scholarships; uncompensated athletes apparently are equally restricted, so the restriction cannot be justified as a waiver of free-speech rights in exchange for compensation.[146]

There is unquestionable value, both for athletes and for the larger public, in freeing students to speak candidly about their life experiences, whether sports-related or not. College sports are far more racially diverse than higher education as a whole,[147] so a rule that silences athletes from speaking disproportionately affects young people of color – and subjects them to the control of authority figures who are, overwhelmingly, white.[148] Athletes were the first to be placed in harm's way when colleges reopened their campuses during the COVID-19 pandemic of 2020-21 and resumed competitive intercollegiate sports, making their inside perspective especially important for the public to hear.[149] When they feel empowered to speak freely, athletes have been able to expose inequities in the treatment of women,[150] and advocate for their own economic interests in a field that has long been regarded as exploitative.[151] For these reasons, categorical prohibitions that prevent athletes from saying anything to the press or public without approval are – in addition to being unconstitutionally overbroad – counterproductive as a matter of public policy.

5. Conclusion and Recommendations

In February 2022, the chancellor of the California State University system resigned under pressure after intense public criticism of how he handled sexual misconduct allegations against a top administrator during his time as president of California State University, Fresno.[152] Joseph Castro's departure followed an investigative report in *USA Today* documenting years' worth of misconduct complaints against one of Castro's top lieutenants at Fresno State, who not only evaded serious disciplinary consequences, but received a succession of promotions and, ultimately, a generous buyout and a clean disciplinary record.[153] The Castro case is just another addition to a scandalous ledger that is contributing to growing public distrust of higher education.[154]

The American public is widely skeptical of the value of a college education.[155] Eroding regard for academic freedom is making itself felt in a wave of legislative proposals to control the way racism is discussed in the curriculum.[156] Secrecy manifestly breeds public distrust.[157] As Prof. Brooke-Condon has written: "Government secrecy and the abuse of power have long shared a symbiotic relationship. Too often, government secrecy enables legally questionable government action. And when government actors violate the law, they reflexively embrace secrecy as a means of shielding their actions from public scrutiny and legal responsibility."[158] At a time when all institutions – Congress, the news media, organized religion, corporations, the police – are facing a crisis of confidence amid rampant online conspiracy-mongering, it is self-defeating for higher educational institutions to enforce anti-transparency policies.[159]

The statutorily protected right to blow the whistle on waste, fraud or misconduct internally within government has value. But it can be insufficient. Workers often hesitate to lodge complaints internally because they believe doing so will be ineffective or even counterproductive.[160] An internal complaint may be dealt with quietly, so that the wider public is not put on notice of a hazardous condition or dangerous person.[161] In an illustrative case within higher education, a student reporter with the *Harvard Crimson* found rampant complaints of sexual misconduct against professors within Harvard's anthropology department, which had been investigated internally but did not result in removal of any of the faculty members until the complaints became public through the *Crimson's* reporting.[162] As the *Crimson* reported: "[W]omen who were made uncomfortable by faculty in the department said they faced a persistent dilemma. Report, and risk their career aspirations in anthropology. Continue, and face greater obstacles than their male counterparts."[163] Indeed, the newspaper reported, Harvard officials became aware during their internal investigation that the complaint figures were understated, because people were intimidated from using the internal complaint process for fear of career-threatening retaliation.[164] After the newspaper's report, changes began almost immediately. Within weeks of the adverse publicity, one of the accused professors was removed from his post as director of undergraduate studies and then announced plans to retire, and another was placed on leave.[165] Because internal resolution processes do not reliably produce satisfactory results – and public disclosure often does – it is important for government employers to honor well-established

constitutional standards that protect *external* whistleblowing, and to reassure employees that those rights exist and will be respected.

The finding that California higher educational institutions fail to provide clear guidance assuring people of their free-speech rights – or, at t*imes,* affirmatively misinform them about the extent of their constitutionally protected rights – is perhaps disappointing, but unsurprising. Reviews of employee speech policies across all levels of government regularly disclose heavy-handed control that goes beyond what the First Amendment allows.[166] Anecdotally, there is quite a bit of evidence that speech-restrictive policies are commonplace across higher education nationally.[167] Colleges and universities are increasingly using their authority to restrict the flow of unflattering information in the name of cultivating a favorable public image.[168] But the foundational purpose of the First Amendment is to enable people to express dissenting views about government policies and practices.[169] If colleges are regularly telling people that they have no right to say critical things about the institution, then a much larger reckoning about the importance of dissenting speech to democratic self-governance is overdue.[170]

It is timely to have a renewed conversation about the right of employees to speak candidly about their concerns. The ability of workers to blow the whistle on wrongdoing is, belatedly, receiving national attention because of the growing recognition that silencing workers has enabled workplace sexual misconduct to fester and persist.[171] There is a rapidly evolving consensus that employees should not be constrained by broad nondisclosure agreements from exposing toxic working conditions, even if they have accepted payments in exchange for silence.[172] California became a national leader in this movement in 2021 by enacting a statute, effective in January 2022, declaring that it is an unlawful employment practice for any employer, including government employers, to compel an employee to "sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace."[173] This made California one of at least 14 states since the dawn of the #MeToo awareness movement that has banned or limited the use of nondisparagement or nondisclosure clauses to compel employees to stay silent about abusive working conditions.[174] The retreat from broad nondisclosure agreements reflects a societal acknowledgment of the salutary value of sharing information about professional misconduct by powerful people, even if people in power would prefer to keep the information confidential. Broad prohibitions against speaking to the public and press are irreconcilable with society's newfound awakening to the pervasiveness of harassment and other harmful workplace misconduct.[175]

It is likewise timely for colleges to revisit their traditionally rigid control over everything athletes say, because of the athlete-rights movement that is upending the traditionally lopsided power dynamic between athlete and institution. This movement is prominently visible in the successful antitrust challenge to NCAA regulations that limited how much expense money colleges could pay athletes[176] and in the collapse of NCAA prohibitions that long forbade athletes from monetizing their "name, image and likeness" through endorsement contracts.[177] Disturbing disclosures about misconduct

by coaches, trainers and team doctors at athletic programs across the country – almost always years belatedly, after the victims have graduated and feel insulated from retaliation[178] – amply demonstrate the downside risk of telling athletes to keep their complaints to themselves.

An optimal public employee speech policy should have several essential features. It should accurately notify employees of the full range of speech protections they enjoy under federal and state law and under agency policies and regulations. It should recognize the distinction between speaking as part of an official work assignment (which is constitutionally unprotected) versus merely discussing knowledge gained through work (which is presumed to be constitutionally protected, with some exceptions for especially disruptive speech that exceeds the protection of *Pickering*). To the extent that permission is ever required before speaking – for instance, giving an interview while on-the-clock using the employer's resources – the policy should set forth neutral standards by which permission will be granted or withheld, and a prompt turnaround time for the employer to act on a request to speak, after which inaction on the request will equate to consent. The policy should explicitly supersede any informal directives that supervisors untrained in the law may give to their supervisees, to avoid the proliferation of "unwritten rules." In the higher education context, an optimal policy will give special recognition to the importance of unfettered speech among faculty members, so that professors are assured they can share their expertise – even when addressing matters of controversy – without feeling the need to obtain approval through public-relations image-minders. And it is important for supervisory employees to be regularly trained and reminded that even a narrowly drawn confidentiality rule can become unconstitutional if it is applied selectively in a way that penalizes only government-disfavored disclosures.[179]

For organizations seeking a go-by policy, the San Francisco Police Department maintains a clear set of guidelines for emergency situations, assuring employees of their rights and reminding them that, as government employees, they have a duty to furnish information to the public.[180] The department's rule begins by reminding employees of their responsibility to cooperate with the news media "as long as investigations are not jeopard*ized,* police operations are not interfered with, or officer safety is not endangered," and in fact encourages furnishing information to the press.[181] It identifies both the categories of information that the media is legally entitled to receive, as well as narrowly defined categories of information that may, or at times *must,* be withheld.[182]

For students participating in sports, athletic departments can readily craft narrowly tailored confidentiality policies that restrict sharing only legitimately sensitive information – for instance, details about teammates' medical conditions – without also inhibiting players from discussing the social and political issues they care about. For example, at the University of Texas-Austin, a perennial college sports powerhouse, athletes are instructed to avoid using social media to share "sensitive" information (such as game strategies or recruiting plans), or photos or videos that were taken in the dressing room or other private settings.[183]

There is a perhaps unexpected roadmap for a legally optimal policy at Northwestern University, a private institution not governed by the First Amendment at all. Northwestern drastically revised its once-restrictive athlete rulebook under pressure from the National Labor Relations Board, which issued guidance indicating that substantial portions of the rulebook – including its prohibitions on speech – would be unlawful labor practices if Northwestern athletes were to be regarded as "employees" protected by the National Labor Relations Act.[184] Northwestern policies identified as contrary to the NLRA included prohibiting interviews with the press without approval from a public-relations off*icer,* and directing students and employees to say only "positive" things to the media and avoid "negative" comments.[185] Because Northwestern ameliorated the past practices – for instance, making consultation with a sports-information officer an optional service and not mandatory – there was nothing for the NLRB to investigate and no sanctions were initiated. The approach adopted by Northwestern – making clear that permission is not required before speaking, and that public-relations professionals are a resource to be voluntarily consulted as opposed to gatekeepers – can inform policymaking in other institutions as well.

Well-tailored restrictions are constitutional if they apply only to a narrow subset of speech that can legitimately be restricted for the workplace to function properly. Thus, employers may lawfully forbid employees from compromising legitimately confidential information entrusted to them, or from holding themselves out falsely as speaking on behalf of the agency.[186] This is all the authority that a university employer should need, without inhibiting employees from sharing civically valuable information that enriches public understanding and can provoke workplace reforms.

Endnotes

[1] Professor, University of Florida College of Journalism and Communications; J.D., *magna cum laude*, University of Georgia School of Law (2000). This paper was supported by a grant from the University of California National Center for Free Speech and Civic Engagement, with which Prof. LoMonte served as a 2021-22 Fellow.

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[17] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech … because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (citations omitted).

[18] *See* United States v. Stevens, 559 U.S. 460, 468 (210) (enumerating traditionally unprotected categories of speech that are understood to be criminally punishable).

[19] *See* United States v. Alvarez , 567 U.S. 709, 725 (2012) (explaining that "[t]he First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. … There must be a direct causal link between the restriction imposed and the injury to be prevented.").

[20] *Stevens*, 559 U.S.at 473.

[21] *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas.").

[22] *See* Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. Kan. L. Rev. 1, 6 (2019) ("The Supreme Court has relaxed the constraints on government authority when the speaker is a public employee. Still, the First Amendment protects public-sector workers, albeit with compromises in the name of workplace harmony and the government's interest in effectively conveying official agency messages." (hereinafter, "LoMonte, *Public Employment*").

[23] *See* Waters v. Churchill, 511 U.S. 661, 675 (1994) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.").

[24] *See* David L. Hudson Jr., *Public Employees, Private Speech: 1st Amendment doesn't always protect government workers*, ABA Journal (May 1, 2017), https://www.abajournal.com/magazine/article/public_employees_private_speech ("Public employees have been suspended for all manner of speech—supporting the shooting of police officers, lauding officers for shooting citizens, criticizing their students or co-workers, mocking minorities or religions and for a litany of other messages on social media.").

[25] 391 U.S. 563 (1968).

[26] *Id*. at 570-72.

[27] *Id*. at 572.

[28] Pickering v. Board of Educ., 36 Ill.2d 568, 577 (Ill. 1967).

[29] *Pickering*, 391 U.S. at 574.

[30] *Id*. at 568.

[31] 461 U.S. 138 (1983).

[32] *Id*. at 148.

[33] *Id*. at 146.

[34] *Id*. at 148.

[35] 547 U.S. 410, 424 (2006).

[36] *Id*.

[37] *See Garcetti*, 547 U.S. at 416, quoting *Pickering*, 391 U.S. at 568.

[38] *Id*.

[39] *Garcetti*, 547 U.S. at 423.

[40] *See id.* ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."). The Tenth Circuit applied this distinction in rejecting the First Amendment claim of a lab technician at a state detention center who internally challenged the reliability of the center's drug tests, stating that the employee "was not communicating with newspapers or her legislators or performing some similar activity afforded citizens." Green v. Board of County Com'rs, 472 F. 3d 794, 800 (10th Cir. 2007).

[41] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.") (internal quotes and citation omitted).

[42] *See* Nathan Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 Drake L.J. 381, 388-89 (2008) ("The dilemma regarding prior restraints is that they serve to preclude speech from entering the public arena before the discussion can even begin. As means for the government to screen (and likely squelch) ideas, prior restraints fly in the face of protections afforded by the First Amendment.").

[43] 283 U.S. 697 (1931).

[44] *Id*. at 716.

[45] *Id*. at 718-19.

[46] 513 U.S. 454 (1995).

[47] *Id*. at 460-61.

[48] *Id*. at 472.

[49] 513 U.S. at 475, quoting *Turner Broad. Sys., Inc. v. Federal Comms.Comm'n*, 512 U.S. 622, 624 (1994) (plurality op.).

[50] In a case challenging a confidentiality policy imposed by a Wisconsin police department, the federal Seventh Circuit succinctly explained the distinction between the *Pickering* and *NTEU* approaches: "The Court [in *NTEU*] recognized that a prior restraint, as opposed to a *post hoc* disciplinary decision, poses problems not present in *Pickering*. With a prior restraint, the impact is more widespread than any single supervisory decision would be, and the action chills potential speech instead of merely punishing actual speech already communicated." Milwaukee Police Ass'n v. Jones, 192 F. 3d 742, 750 (7th Cir. 1999).

[51] San Bernardino Pub. Emp. Ass'n v. Stout, 946 F.Supp. 790 (C.D. Cal. 1996).

[52] *Id*. at 794.

[53] *Id*. at 794-95.

[54] *Id*. at 795.

[55] *Id*. at 800-801.

[56] 868 F. 3d 853 (9th Cir. 2017).

[57] *Id*. at 859.

[58] *Id*. at 862.

[59] *Id*. at 866.

[60] *Id*. at 874.

[61] 649 F. 2d 1193 (5th Cir. 1981).

[62] Harman v. City of New York, 140 F. 3d 111, 116 (2d Cir. 1998).

[63] *Id*. at 116, 124.

[64] *Id*. at 123.

[65] Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1185-87 (10th Cir. 2010).

[66] Luethje v. Peavine Sch. Dist., 872 F.2d 352, 354-56 (10th Cir. 1989).

[67] Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp., 246 F.Supp.2d 734 (E.D. Mich. 2003).

[68] Lauretano v. Spada, 339 F. Supp. 2d 391 (D. Conn. 2004).

[69] Parow v. Kinnon, 300 F. Supp. 2d 256 (D. Mass. 2004).

[70] Jackson Fed'n of Teachers v. Jackson Pub. Sch. Dist., No. 25CI1:21-cv-00152, Declaratory Judgment and Permanent Injunction (Miss. Cir. Ct. May 10, 2022) (slip op.) at *3.

[71] *Id*. at *18.

[72] *See* Cox v. Louisiana, 379 U.S. 536, 557-58 (1965) (striking down civil-rights protester's conviction for violating prohibition against street parades, because city reserved unfettered discretion to permit or disallow parades with no written criteria); Hague v. Comm. for Industrial Org., 307 U.S. 496, 516 (1939) (finding that ordinance, which allowed city's public-safety director to withhold permission for assemblages based on his subjective assessment that the gathering would be "disorderly" or cause a disturbance, was facially unconstitutional).

[73] City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988). *See also* Staub v. City of Baxley, 355 U.S. 313, 323 (1958) (stating that an ordinance that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms").

[74] *See* Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum: Lebron v. National Railroad Passenger Corporation*, 62 Brook. L. Rev. 693, 716 (1996) ("[U]ndisclosed standards fail to provide notice of what is prohibited, invite arbitrary enforcement and chill protected speech. Vague standards likewise fail to safeguard free speech rights and pose a threat of prior restraint.").

[75] Kessler v. City of Providence, 167 F. Supp. 2d 482 (D.R.I. 2001).

[76] *Id*. at 489.

[77] Spain v. City of Mansfield, 915 F. Supp. 919, 923 (D. Mass. 1996).

[78] *Id*. at 923, citing *City of Lakewood*, 486 U.S. at 763. *See also* Swartzwelder v. McNeilly, 297 F.3d 228, 240 (3d Cir. 2002) (finding that police department rule requiring written permission from the chief before officers could respond to a summons or subpoena to provide expert testimony was unconstitutional, and remarking that the lack of standards to guide the chief in approving or denying requests was "disturbing").

[79] *See* Healy v. James, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal quotes omitted).

[80] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (finding that University of Virginia violated the First Amendment by disqualifying a student newsmagazine from competing for university funding on the basis of the religious orientation of its news coverage); Widmar v. Vincent, 454 U.S. 263 (1981) (requiring university to allow faith-based student organizations to use meeting space on par with other student associations); Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973) (siding with University of Missouri student who was expelled for distributing self-published magazine with harsh profanity and offensive cartoon imagery vilifying police).

[81] *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (invalidating New York statute that disqualified anyone who has ever belonged to a "subversive" organization from teaching in a public educational institution); Baggett v. Bullitt, 377 U.S. 360 (1964) (siding with University of Washington faculty and students who challenged a state-mandated loyalty oath requiring university employees to forswear involvement in "subversive" organizations, and to promote respect for the flag and allegiance to U.S. government institutions).

[82] *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

[83] Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).

[84] *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (finding that state legislative inquest into professor's teachings, looking for evidence of "subversive" topics, "unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

[85] *See, e.g.*, Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) (following *Demers* and concluding that academic freedom insulates faculty speech from the *Garcetti* standard "at least when engaged in core academic functions, such as teaching and scholarship").

[86] *See* Urofsky v. Gilmore, 216 F.3d 401, 409-12 (4th Cir. 2000). *But see* Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011) (holding that a state university professor's speech in opinion columns on topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and mortality, involved matters of public concern and was therefore protected under the First Amendment).

[87] Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 192 (2002).

[88] Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 Tex. Rev. L. & Pol. 137, 148 (2007).

[89] Calif. Const. Art. 1, Sec. 2(a).

[90] *See* Los Angeles Alliance for Survival v. City of Los Angeles, 93 Cal.Rptr.2d 1, 10 (Cal. 2000) (observing that "the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment").

[91] *See id.* ("Merely because our provision is worded more expansively and has been interpreted as more protective than the First Amendment, however, does not mean that it is broader than the First Amendment in all its applications.").

[92] *See* Givens v. Newsom, 459 F.Supp.3d 1302, 1312 (E.D. Cal. 2020) (stating that, while the California Constitution is more speech-protective in some respects than the First Amendment, the two are interpreted to be coextensive with respect to the type of speech restrictions that government agencies can impose in managing the expressive use of public property).

[93] *See* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899, 910 (Cal. 1979) (holding that California Constitution protects right to speak and petition on premises of privately owned shopping center, even though federal First Amendment does not).

[94] *See* Waters v. Churchill, 511 U.S. 661, 674 (1994) (observing that "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system").

[95] Cal. Lab. Code §1102.5(a) (West 2021).

[96] *Id*.

[97] Cal. Lab. Code §1102.5(d) (West 2021).

[98] Cal. Lab. Code § 1102.5(h) (West 2021).

[99] Cal. Lab. Code §1102.5(e) (West 2021).

[100] Cal. Lab. Code § 1106 (West 2021).

[101] Cal. Gov't Code § 8547.1 (West 2021).

[102] Cal. Gov't Code § 8547.2 (West 2021).

[103] Cal. Gov't Code § 8547.5 (West 2021).

[104] Cal. Gov't Code § 8547.13 (West 2021).

[105] Cal. Gov't Code § 8547.3 (West 2021).

[106] Cal. Gov't Code § 8547.4 (West 2021).

[107] Cal. Gov't Code § 8547.5 (West 2021).

[108] Cal. Gov't Code § 8547.4 (West 2021).

[109] Cal. Gov't Code § 8547.2 (West 2021).

[110] Conn v. Western Placer Unified School Dist., 113 Cal. Rptr. 3d, 116 (Cal. App. 2010).

[111] *See, e.g.*, Levi v. Regents of Univ. of Calif., 223 Cal. Rptr. 3d 577, 586 (Cal. App. 2017).

[112] *Id*.

[113] Cal. Gov't Code § 8547.8(b) ((West 2021).

[114] Cal. Gov't Code § 8547.8(c) (West 2021).

[115] Cal. Gov't Code §§ 8547.10(a), 8547.12(a) (West 2021).

[116] Cal. Gov't Code §§ 8547.10(b)-(c), 8547.12(b)-(c) (West 2021).

[117] Cal. Gov't Code § 8547.6 (West 2021).

[118] Cal. Gov't Code § 8547.11(a) (West 2021).

[119] *Id*.

[120] Public Pol'y Inst. of Calif., *California's Higher Education System* (Oct. 2019), https://www.ppic.org/wp-content/uploads/higher-education-in-california-californias-higher-education-system-october-2019.pdf, at 1-2.

[121] *Id*. at 2.

[122] University of California, The UC System, https://www.universityofcalifornia.edu/uc-system.

[123] Calif. State Univ., Facts About the CSU: Employees, https://www.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/Pages/employees.aspx.

[124] Univ. of Calif. Ofc. of the President, https://ucop.edu/institutional-research-academic-planning/_files/uc-facts-at-a-glance.pdf, at 2.

[125] Calif. State Univ., 2020-21 Operating Budget: Sources and Uses of Funds, https://www.calstate.edu/csu-system/about-the-csu/budget/2020-21-operating-budget/source-and-uses-of-funds/Pages/default.aspx.

[126] *See* Cristina Mathews, *Unlocking the Farmhouse Gate*, 40 Berkeley J. Emp. & Lab. L. 443, 447 (2019) (stating that "California's broad public policy of protecting employee rights extends to workers' political expression and to attorneys advocating for the rights of individual workers"); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 Berkeley J. Emp. & Lab. L. 345, 356 (2008) ("California is recognized as a particularly 'employee-friendly' state in its statutory and common law employment rules."); Abigail Shechtman Nicandri, *The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers' Proprietary Information and Trade Secrets*, 13 U. Pa. J. Bus. L. 1003, 1008 (2011) (describing California as "by far the most employee-friendly state" in the context of discussing the law of covenants not to compete). *See also* Margot Roosevelt, *The number of Californians represented by unions grows as national labor organizing stagnates*, L.A. Times (Jan. 23, 2020), https://www.latimes.com/business/story/2020-01-23/california-labor-union-membership (stating that California bucked national trends during 2019 by adding 139,000 union members while membership was declining nationally, and attributing success to pro-organizing measures passed by California legislators). The federal Bureau of Labor Statistics reports that 16.2 percent of California workers belonged to unions as of 2020, as compared with 10.3 percent nationally. U.S. Bureau of Labor Stats., Union Members in California – 2021 (Mar. 22, 2022), *available at* https://www.bls.gov/regions/west/news-release/unionmembership_california.htm.

[127] The California Public Records Act requires agencies to respond to a request for records within 10 days, with the possibility of a 14-day extension for an especially complex request. Cal. Gov't Code § 6253(c) (West 2021). However, that is only a deadline to provide an assessment of whether the records exist and are (or are not) subject to the PRA; it is not a hard deadline for the actual production of records. Researchers were disinclined to initial legal action against the universities to obtain the records, which is the only recourse under California law, so the sample is regrettably incomplete. It is well-documented that many government agencies, including those in California, ceased responding to records requests in a timely manner during the worst of the COVID-19 pandemic when employees were largely working from home. *See* Ashley McGlone, *Some Local Agencies Are No Longer Responding to Public Records Requests*, Voice of San Diego (Apr. 2, 2020), https://voiceofsandiego.org/2020/04/02/some-local-agencies-are-no-longer-responding-to-public-records-requests/. However, the Brechner Center requests were submitted in October and November 2021, and follow-up reminders were sent during the spring semester of 2022, after in-person instruction had resumed.

[128] *See* Carol v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) (finding that a municipality could not enjoin white supremacists from rallying on public property without, at minimum, providing the procedural safeguards of notice and some opportunity to be heard: "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (setting forth elaborate procedural standards that would be necessary to make a government pre-approval system for motion pictures constitutional, including assigning the burden of proof to the censor that the film constituted unprotected expression, requiring the censor to render a decision within a brief period of time, and providing for judicial review of a decision to censor).

[129] Batt v. City of Oakland, No. C 02–04975 MHP, 2006 WL 1980401 (N.D. Cal. July 13, 2006).

[130] *Id*. at *2.

[131] *Id*. at *6.

[132] Harley Duncan & Karah Wilson, *Recap: Kitts addresses censure, organizations, department respond to statement, new emails emerge*, The Flor-Ala (Jan. 10, 2019), https://theflorala.com/1180/news/recap-kitts-addresses-censure-organizations-department-respond-to-statement-new-emails-emerge/.

[133] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

[134] U.S. Dept. of Justice, Bureau of Justice Stats., Campus Law Enforcement, 2011–12 (Jan. 2015), *available at* https://bjs.ojp.gov/content/pub/pdf/cle1112.pdf.

[135] *See* Brian Stelter, *California University Puts Officers Who Used Pepper Spray on Leave*, N.Y. Times (Nov. 20, 2011), https://www.nytimes.com/2011/11/21/us/police-officers-involved-in-pepper-spraying-placed-on-leave.html (reporting on episode at University of California-Davis in which two officers pepper-sprayed peaceful protesters seated on campus sidewalk during "Occupy" demonstrations); *see also* Alexa Lardieri, *Protests Turn Violent After Shooting of Georgia Tech Student*, U.S. News & World Rep. (Sept. 19, 2017), https://www.usnews.com/news/national-news/articles/2017-09-19/protests-turn-violent-after-shooting-of-georgia-tech-student (describing community outcry after campus police confronted and fatally shot a mentally disturbed Georgia Tech student who was holding a pocketknife); Jess Bidgood & Richard Perez-Pena, *Mistrial in Cincinnati Shooting as Officer Is Latest Not to Be Convicted*, N.Y. Times (June 23, 2017), https://www.nytimes.com/2017/06/23/us/raymond-tensing-samuel-dubose-cincinnati.html (describing case of campus police officer Raymond Tensing, who was charged but not convicted in the 2015 fatal shooting of a Black motorist that was widely criticized as a questionable use of deadly force).

[136] *See* Brady v. Tamburini, 518 F.Supp.3d 570 (D.R.I. 2021) (police department gag policy unconstitutional); Davis v. Phenix City, No. 3:06cv544, 2008 WL 401349 (M.D. Ala. Feb. 12, 2008) (fire department gag policy unconstitutional); Parow v. Kinnon, 300 F.Supp.2d 256 (D. Mass. 2004) (fire department gag policy unconstitutional); Lauretano v. Spada, 339 F. Supp.2d 391 (D. Conn. 2004) (highway patrol gag policy unconstitutional); International Ass'n of Firefighters Local 3233 v. Frenchtown Charter Township, 246 F.Supp.2d 734 (E.D. Mich. 2003) (ordinance gagging firefighters unconstitutional); Kessler v. City of Providence, 167 F.Supp.2d 482 (D.R.I. 2001) (police department gag policy unconstitutional); Wagner v. City of Holyoke, 100 F.Supp.2d 78 (D. Mass. 2000) (police department gag policy unconstitutional); Davis v. N.J. Dept. of Law & Pub. Safety, 327 N.J. Super. 59 (N.J. Super. 1999) (state police gag policy unconstitutional); Firefighters Local 799 v. City of Providence 26 F.Supp.2d 350 (D.R.I. 1998) (fire department gag policy unconstitutional); Spain v. City of Mansfield 915 F.Supp. 919 (D. Mass 1996) (fire department gag policy unconstitutional); Barrett v. Thomas, 649 F. 2d 1193 (5th Cir. 1981) (sheriff's department gag policy unconstitutional); Grady v. Blair, 529 F.Supp. 370 (N.D. Ill. 1981) (fire department gag policy unconstitutional); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970) (police department gag policy unconstitutional); Steenrod v. Board of Engineers, 87 Misc.2d 977 (N.Y. Super. 1976) (fire department gag policy unconstitutional); Kane v. Walsh, 295 N.Y. 198 (N.Y. 1946) (fire department gag policy invalid on state-law grounds).

[137] *See* Moonin v. Tice, 868 F. 3d 853 (9th Cir. 2017) (holding that Nevada State Patrol violated officers' First Amendment rights by enforcing a policy that forbade them from speaking with the press or public about the agency's K-9 program).

[138] Nate Jones, *Public records laws shield police from scrutiny — and accountability,* Wash. Post (July 30, 2021), https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny--and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489_story.html.

[139] Sukey Lewis, Thomas Peele, Annie Gilbertson & Maya Lau, *California police are destroying files and charging high fees to release misconduct records,* L.A. Times (June 30, 2019), https://www.latimes.com/local/lanow/la-me-police-records-california-20190630-story.html.

[140] Gina Barton, Brett Murphy & Daphne Duret, *Dead rats, death threats, destroyed careers. How law enforcement punishes its whistleblowers,* USA Today (Nov. 9, 2021), https://www.usatoday.com/in-depth/story-series/2021/11/09/cops-report-excessive-force-risk-jobs/8514211002/.

[141] *See* Sofía Mejías Pascoe, *Public Agencies Are Spending More on PR to Boost Their Reputations,* Voice of San Diego (June 1, 2021), https://voiceofsandiego.org/2021/06/01/public-agencies-are-spending-more-on-pr-to-boost-their-reputations/ (reporting that local government agencies across Southern California are hiring P.R. firms to create promotional videos and cultivate a positive public image); Maya Lau, *Police PR machine under scrutiny for inaccurate reporting, alleged pro-cop bias,* L.A. Times (Aug. 30, 2020), https://www.latimes.com/california/story/2020-08-30/police-public-relations (reporting that Los Angeles County Sheriff's Office spent $4.8 million a year employing 42 employees in its public-relations unit, part of a larger trend of police using media to put a favorable spin on controversies).

[142] Enrique Armijo, *The "Ample Alternative Channels" Flaw in First Amendment Doctrine,* 73 Wash. & Lee L. Rev. 1657, 1661 (2016).

[143] *See* Deborah L. Brake, *Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds,* 22 Marq. Sports L. Rev. 395, 405 (2012) ("In competitive sport, especially at the elite level of intercollegiate athletics, coaches have power over athletes' lives far exceeding the mechanics of practicing and competing in a sport. A coach's power over athletes can extend to virtually all aspects of the athlete's life in such ways that clear boundaries are hard to delineate. This near-total control is rarely questioned."); Brianna J. Schroeder, *Power Imbalances in College Athletics and an Exploited Standard: Is Title IX Dead?,* 43 Val. U. L. Rev. 1483, 1516 (2009) (observing that a college athlete is "particularly susceptible to a coach's abuse of power and control" because coaches spend so much time with athletes, control intimate aspects of their lives including diet and medical treatment, and can use praise and criticism as tools of emotional manipulation).

[144] *See* Kavanagh v. Trustees of Bos. Univ., 795 N.E.2d 1170, 1175 (Mass. 2003) (declining to hold university accountable for injuries caused when basketball player punched opponent during game because receipt of athletic scholarship and benefits "does not transform the relationship between the academic institution and the student into any form of employment relationship"); Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1174 (Ind. 1983) (finding that athlete gravely injured during football scrimmage, which left him a quadriplegic, was not an "employee" for purposes of state benefits because his university compensation package for playing football was in the form of financial aid and not salary).

[145] *See* Healy v. James, 408 U.S. 169, 180 (1972) (indicating that college students have First Amendment rights comparable to all other citizens: "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

[146] According to NCAA figures, about 46 percent of all athletes in the most competitive division, Division I, are non-scholarship "walk-on" players. Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College WalkOn,* USA Today High Sch. Sports (Apr. 13, 2017), https://usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on.

[147] *See* Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *'I signed my life to rich white guys': athletes on the racial dynamics of college sports,* The Guardian (Mar. 17, 2021), https://www.theguardian.com/sport/2021/mar/17/college-sports-racial-dynamics (reporting that, among the elite "Power Five" athletic conferences that dominate college football and basketball, Black students made up just 5.7 percent of the study body as of 2018-19, but 55.7 percent of football players, 55.9 percent of men's basketball players, and 48.1 percent of women's basketball players); Diane Roberts, *College Football's Big Problem With Race,* Time (Nov. 12, 2015), https://time.com/4110443/college-football-race-problem/ (citing 2013 study by University of Pennsylvania researchers who found that 57 percent of college football players at Division I schools are Black, even though Black men make up only 2.8 percent of their degree-*see*king students as a whole).

[148] *See* Steve Reed, *Study: Percentage of Black college coaches remains low,* Associated Press (Mar. 3, 2022), https://apnews.com/article/nfl-sports-business-football-race-and-ethnicity-19555f4f4a67592c57aece8d5b39fdd3 (reporting that white people hold 82.2 percent of the head coaching jobs in men's college basketball, 89 percent in football, and 94.5 percent in baseball, and that 82.3 percent of athletic directors at Division I schools are white).

[149] *See* Sean Gregory, *College Athletes Are Realizing Their Power Amid the George Floyd Protests and COVID-19,* Time (June 18, 2020), https://time.com/5855471/college-athletes-covid-19-protests-racial-equality/ (commenting that athletes long intimidated by a lopsided power dynamic are "realizing their power in real time" and speaking out publicly on issues of racial injustice and COVID-19 safety).

[150] *See* Ally Mauch, *NCAA Basketball Player Talks Getting New Women's Weight Room After Speaking Out About Gender Inequality,* People (Mar. 20, 2021), https://people.com/sports/ncaa-basketball-player-new-womens-weight-room-after-speaking-out/ (recounting story of Oregon college basketball player Sedona Prince, who used social media videos to call attention to the minimal weight equipment provided for women's teams at NCAA postseason tournament).

[151] *See* Mike Cunningham, *Players protest for rights, declare they are not NCAA's property,* Atlanta Journal-Constitution (Mar. 18, 2021), https://www.ajc.com/sports/mike-check-blog/players-protest-for-rights-declare-they-are-not-ncaas-property/RHCR4JKKIVHVBAF2BR4CODPWUU/ (commenting that men's NCAA basketball players participating in the postseason championship tournament "are advocating for their rights while taking advantage of their platforms and the intense public interest in the tournament").

[152] Christine Hauser, *California State University Chancellor Resigns After Report He Mishandled Complaints,* N.Y. Times (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/california-state-chancellor-resigns.html.

[153] Kenny Jacoby, *Fresno State president mishandled sexual harassment complaints. Now he leads all 23 Cal State colleges,* USA Today (Feb. 3, 2022), https://www.usatoday.com/in-depth/news/investigations/2022/02/03/cal-state-chancellor-joseph-castro-mishandled-sexual-harassment-fresno-state-title-ix-frank-lamas/9109414002/.

[154] A 2019 Pew Research Center survey found that just 50 percent of Americans believe that higher education makes a positive contribution to the country, as opposed to 38 percent who regarded higher education's influence on the country as negative. This represents a significant decline from a decade earlier, when the same question yielded a response of 61 percent "positive" and only 26 percent "negative." *See* Caroll Doherty & Jocelyn Kiley, *Americans have become much less positive about tech companies' impact on the U.S.,* Pew Research Ctr. (July 29, 2019), https://www.pewresearch.org/fact-tank/2019/07/29/americans-have-become-much-less-positive-about-tech-companies-impact-on-the-u-s/.

[155] *See* Abigail Johnson Hess, *College grads earn 80% more—but only 51% of Americans see college as very important,* CNBC.com (Dec. 20, 2019), https://www.cnbc.com/2019/12/19/only-51percent-of-americans-*see*-college-as-important-despite-benefits.html (reporting on results of Gallup poll finding that just 51 percent of Americans regard a college education as "very" important, down from 70 percent in 2013).

[156] *See* Katie Reilly, *Republicans are Increasingly Targeting 'Divisive Concepts' at Colleges and Universities,* Time (Mar. 29, 2022), https://time.com/6162489/divisive-concepts-colleges/ (describing new laws in Tennes*see* and South Dakota restricting "divisive" teaching about race, and connecting the popularity of the movement to diminishing public regard for higher education on the political right).

[157] *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege,* 65 Ind. L. J. 845, 886 (1990) (commenting that "secrecy operates to alienate-to create subjective distance between the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.").

[158] Jenny Brooke-Condon, *Illegal Secrets,* 91 Wash. U. L. Rev. 1099, 1101 (2014).

[159] *See* Alia E. Dastagir, *Trust no one? Americans lack faith in the government, the media and each other, survey finds,* USA Today (July 23, 2019), https://www.usatoday.com/story/news/nation/2019/07/23/pew-study-american-trust-declines-government-media-and-each-other/1798963001/ (discussing Pew Research Center survey results documenting declining trust in government, media, the military and organized religion, including finding that 69 percent of Americans "say the federal government withholds important information from the public").

[160] *See* Roslyn Fuller, *A Matter of National Security: Whistleblowing in the Military as a Mechanism for International Law Enforcement*, 15 San Diego Int'l L.J. 249, 268 (2014) (observing, in the context of reporting military misconduct through the chain of command: "Internal whistleblowing in such a scenario would *seem* to be futile as superior officers appear to be complicit in international law-violating behaviour and it is impossible for the whistleblower to know how far and to whom this complicity extends."). *See also* Elletta Sangrey Callahana, Terry Morehead Dworkin & David Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, Va. J. Int'l L. 879, 905 (2004) (commenting that "[e]xternal whistleblowing, rather than an internal report, is more likely to expose wrongful activities and deter future misconduct").

[161] *See* Susan Fortney & Theresa Morris, *Eyes Wide Shut: Using Accreditation Regulation to Address the "Pass-the-Harasser" Problem in Higher Education*, 12 Calif. L. Rev. Online 43, 51 (2021) (commenting on common practice in higher education of concluding internal investigations of sexual harassment with a secrecy agreement, which fails to put future employers on notice that the employee committed wrongdoing); Noah Menold, *Passing the Trash in Illinois after Doe-3 v. McLean County Unit District No. 5: A Proposal for Legislation to Prevent School Districts from Handing off Sexually Abusive Employees to Other School Districts*, 34 N. Ill. U. L. Rev. 473, 474-75 (2014) ("In situations where school employees commit sexual misconduct against students, school administrators often handle the matters internally due to fear of lawsuits, notoriety, and embarrassment. As a result, school administrators allow the perpetrators to leave their employment without restrictions, and the public never learns of the sexual misconduct.").

[162] James K. Bikales, *Protected by Decades-Old Power Structures, Three Renowned Harvard Anthropologists Face Allegations of Sexual Harassment*, Harv. Crimson (May 29, 2020), https://www.thecrimson.com/article/2020/5/29/harvard-anthropology-gender-issues/.

[163] *Id*.

[164] *Id*.

[165] James K. Bikales, *Anthropology Prof. John Comaroff Placed on Administrative Leave Following Allegations of Sexual Harassment*, Harv. Crimson (Aug. 25, 2020), https://www.thecrimson.com/article/2020/8/25/comaroff-paid-admin-leave/; James K. Bikales, *Anthropology Prof. Urton Plans to Retire Amid Investigation into Sexual Harassment Allegations*, Harv. Crimson (July 15, 2020), https://www.thecrimson.com/article/2020/7/15/urton-retires-harvard-anthro/; James K. Bikales, *Anthropology Department Removes Urton as Undergrad Studies Director After Sexual Misconduct Allegation*, Harv. Crimson (June 3, 2020), https://www.thecrimson.com/article/2020/6/3/anthro-urton-dus-removal/.

[166] *See* Union of Concerned Scientists, Grading Government Transparency (Mar. 2015), *available at* https://www.ucsusa.org/sites/default/files/attach/2015/03/grading-government-transparency-ucs-2015.pdf (quoting scientists from the U.S. Centers for Disease Control and Environmental Protection Agency who said they were instructed to refer all press inquiries to the agency's public relations office); *see also* LoMonte, *Public Employment*, *supra* n.20 at 35 (summarizing survey of policies gathered from more than 150 federal, state and local agencies around the country and concluding: "Agency policies restraining employee speech are as unremarkable as violations of the fifty-five-mph speed limit.").

[167] In a 2019 farewell column, the outgoing editor of the Stony Brook University newspaper described the "nightmare" of attempting to obtain approval from recalcitrant public relations officers before reporters were permitted to speak with college employees. Rebecca Liebson, *I've spent the past four years covering Stony Brook — their media relations is a nightmare for student journalists*, Statesman (Apr. 28, 2019) https://www.sbstatesman.com/2019/04/28/ive-spent-the-past-four-years-covering-stony-brook-their-media-relations-is-a-nightmare-for-student-journalists/. *See also* Claudia Yaw, *UWPD gag order: Interim chief prohibits employees from talking to press*, UW Daily (Oct. 28, 2019), https://www.dailyuw.com/news/uwpd-gag-order-interim-chief-prohibits-employees-from-talking-to-press/article_cda9c896-f921-11e9-90d6-736dc438406f.html (reporting that campus police chief issued directive forbidding employees from speaking to the press following publication of an unflattering news article about criminal charges against two members of the police force).

[168] *See* Amer. Ass'n of Univ. Profs., Threats to the Independence of Student Media (Dec. 2016), *available at* https://www.aaup.org/file/StudentMediaReport_0.pdf (commenting on "[t]he growing tendency of college and university administrations and their governing boards to conduct business 'behind closed doors' and thwart access to critical information and documents").

[169] *See* Mary-Rose Papandrea, *The Government Brand*, 110 Nw. U. L. Rev. 1195, 1234 (2016) ("The government is not a private entity entitled to protect its brand from dilution.").

[170] *See* Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 Am. U. L. Rev. 253, 257 (2012) (making this point in the context of speech in K-12 schools: "Dissent offers a wide range of benefits to American society and its citizens, and the protection of dissent should be understood as a structural imperative as well as an individual's right-based expectation.").

[171] *See* E.M. Bauer, *A Conflict of Two Freedoms: The Freedom of Information Act Disclosure of Confidential Settlements in the #MeToo Era*, 58 San Diego L. Rev. 209, 267 (2021) ("Americans are … shutting the doors on confidentiality–it took until 2017 for America to start the difficult conversation about what to do when a person in power causes pain to hundreds of women and pays them hush money in the form of a settlement agreement. Realizing that they could have protected other similarly situated individuals, many victims broke their non-disclosure agreements, *see*king justice from the courts in the process.").

[172] *See* Rachael L. Jones & Virginia Hamrick, *Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs*, 35 Comm. Lawyer 7, 8 (2019) (commenting that nondisclosure clauses in settlements alleging sexual abuse by the defendant should be viewed skeptically by the courts as contrary to public policy, because they have the effect of limiting the flow of critical information available to nonparties in the larger public).

[173] Cal.Gov.Code § 12964.5(A)(1)(B)(i) (West 2021).

[174] Hannah Albarazi, *One By One, States Are Banning NDAs To Protect Workers*, Law360, (Apr. 1, 2022), https://www.law360.com/articles/1476428/one-by-one-states-are-banning-ndas-to-protect-workers.

[175] *See* Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. Colo. L. Rev. 411, 439 (2019) (commenting that "NDAs pose a major obstacle to the free flow of much important information" and pointing to the example of former President Trump's aggressive use of nondisclosure agreements to silence former spouses, paramours and employees).

[176] National Collegiate Athletic Ass'n. v. Alston, 141 S. Ct. 2141 (2021).

[177] Josh Moody, *Name, Image, Likeness: What College Athletes Should Know About NCAA Rules*, U.S. News & World Rep. (Aug. 9, 2021), https://www.usnews.com/education/best-colleges/articles/name-image-likeness-what-college-athletes-should-know-about-ncaa-rules.

[178] *See, e.g.*, Chantel Jennings & Dana O'Neil, *'We went through hell': Former players accuse Cynthia Cooper-Dyke of demeaning, demoralizing and abusive behavior,* The Athletic (May 5, 2022), https://theathletic.com/3292876/2022/05/05/cynthia-cooper-dyke-texas-southern/ (quoting former women's college basketball players from four schools who allege that recently retired Texas Southern basketball coach made sexually explicit comments and gestures, forced them into grueling practice drills even while sick or injured, and called players slurs and curse words); Erick Smith, *Former Florida women's basketball players allege abuse by ex-coach Cameron Newbauer,* USA Today (Sept. 27, 2021), https://www.usatoday.com/story/sports/ncaaw/sec/2021/09/27/ex-florida-coach-cameron-newbauer-accused-abuse-former-players/5887417001/ (describing complaints from former Florida women's basketball players, who alleged that head coach minimized their injuries, "created an abusive environment and would throw balls and scream at player during practice"); Maureen Pao, *Texas Tech Fires Top Women's Basketball Coaches Amid Abuse Allegations*, NPR.org (Aug. 7, 2020), https://www.npr.org/2020/08/07/900150855/texas-tech-fires-top-womens-basketball-coaches-amid-abuse-allegations (reporting that Texas Tech fired longtime women's basketball coach after allegations of sexual harassment by a coaching staff member, abusive practice conditions, name-calling and mockery, all of which came to light as a result of "exit interview" questionnaires anonymously completed by departing players).

[179] *See* Hanneman v. Breier, 528 F. 2d 750 (7th Cir. 1976) (finding that a police department's confidentiality rule was constitutional on its face because of narrow tailoring, but was unconstitutionally applied to punish officers who spoke out against an illicit inquest into officers' political affiliations, which was already public knowledge and therefore not confidential).

[180] *See* San Francisco Police Dept., Gen'l Order 8.09, Media Relations (Aug. 24, 1994), *available at* https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO8.09%20Media%20Relations.pdf.

[181] *Id.* at § I.A.

[182] *Id.* at §§ I.B., I.C.

[183] Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 Neb. L. Rev. 86, 138 (2020).

[184] *See* Lester Munson, *Free to tweet: Northwestern's restrictions on football players ruled unlawful*, ESPN.com (Oct. 10, 2016), https://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful (explaining that NLRB general counsel's opinion letter to Northwestern advised that athletes who qualify as employees "must be freely allowed to post on social media, discuss issues of their health and safety, and speak with the media.").

[185] Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd., to Peter Sung Ohr, Reg'l Dir. of Region 13 (Sept. 22, 2016).

[186] *See* Hanneman v. Breier, 528 F. 2d 750, 754 (7th Cir. 1976) (police department's policy forbidding officers from disclosing confidential information about internal investigations "is clearly valid on its face"); Zook v. Brown, 748 F.2d 1161, 1167 (7th Cir. 1984) (sheriff's department policy requiring pre-approval when speaking as an official representative of the department was not an overbroad restraint); Shelton Police Union, Inc. v. Voccola, 125 F.Supp.2d 604, 623-25 (D. Conn. 2001) (police department did not violate officers' First Amendment rights by requiring "all formal releases to the press" to be disseminated through the media relations officer and prohibiting release of information "relating to pending investigations or any information not otherwise available to the public if such information is exempt from public disclosure pursuant to the Freedom of Information Act").