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Note

*719 THE EXCEPTION TO THE RULE: GOVERNMENT EMPLOYERS' RIGHT TO RESTRICT FREE SPEECH OF EMPLOYEES

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INTRODUCTION

For over forty years, courts in the United States have held consistently that the individual freedoms that the Constitution recognizes are to be afforded "vigilant protection" in public academic institutions. [FN1] Thus far, courts have expressed the importance of these freedoms through their opinions regarding the rights of students and faculty in public college and university settings. [FN2] Courts face a more specific issue, however, in the form of public universities' attempts at regulating speech by faculty members when the speech in question is offensive to the university or to some constituency within it. State colleges and universities are government institutions. As government employers, public universities have much broader power regarding the restriction of their employees' speech than the federal government has as a sovereign over its citizens. While the government as an employer has less power to restrict the speech of its employees than private employers ***720** do, it has more power in the restriction of its employees than it does over the public at large. [FN3]

This Note examines how American courts generally have treated cases regarding the free speech rights of faculty on public university campuses when the speech in question is alleged to be offensive to the university and to its mission. In particular, the case of Crue v. Aiken [FN4] will be used to illustrate recent judicial reasoning on this issue. Part I of the Note will present a summary of Crue. Part II will examine the issue of prior restraints on speech and whether they are warranted in respect to speech that is thought by university administrators to be offensive to the university's mission and is made by the school's own employees. Part III will examine the history of the most significant cases involving First Amendment rights of faculty members on public university campuses. The section will focus on speech offensive to the university and the rules established by the courts to deal with such speech. Part IV will look at how recent cases have applied the rules derived from past cases. Part V will re-examine Crue and will conclude that, although the court in Crue may have decided the issue correctly regarding the student plaintiffs, it failed to examine some important issues regarding faculty plaintiffs--issues that may have made an impact on the court's decision in the case.

I. Summary of Crue v. Aiken

The University of Illinois was established in 1867 and has used Chief Illiniwek as its mascot since 1926. [FN5] Better known as "The Chief," the mascot is the personification of a Native American Indian Chief. The Chief is traditionally portrayed by a University student who, while dressed in American Indian attire, performs a routine at athletic competitions and is memorialized in various ways on

the campus and throughout the state of Illinois. [FN6] In recent years, however, the Chief has sparked controversy in the form of various groups who argue that the use of the Chief as a mascot is nothing more than the employment of a racist symbol that offends those of American Indian heritage and creates a hostile environment for Native American students. [FN7] These groups have challenged the University administration to discontinue the use of the Chief as its mascot, and to follow the example of other schools across the nation that have adopted racially neutral mascots. [FN8] Thus far, however, ***721** the University has refused to comply with the requests made by anti-Chief groups, continuing to employ the Chief at sporting events and to memorialize the mascot.

The plaintiffs in Crue were a group of students and faculty members at the University of Illinois who opposed the use of the Chief as the mascot of the University. [FN9] At one time, they had expressed their opposition to the Chief in various ways, including meetings with student groups, articles in newspapers, and protests. The University did not interfere in any of these previous activities. [FN10] Things changed, however, early in 2001, when a group of students and faculty members made contact with prospective student athletes being recruited by the University. The students and faculty members wished to make the prospective students aware of the fact that the University and the athletic department of the University employed as a mascot what those students and faculty members viewed as a symbol of racism. The students and faculty members asked some of the prospective students to "consider whether or not they wish[ed] to participate in a program which [was] indifferent to racial injustice." [FN11]

In March 2001, the Chancellor of the University, Michael Aiken, sent an email to the entire University community. The email forbade contact with prospective student athletes by all students and employees of the University without authorization from either Aiken himself or someone to whom Aiken had given permission to grant authorization. [FN12] Chancellor Aiken explained ***722** in the email, which became known as the "Preclearance Directive," that the ban on contact was imposed in order to ensure that the University complied with NCAA rules regarding recruitment of student athletes. [FN13] The students and faculty members who opposed the University's use of the Chief as a mascot viewed the email as an unconstitutional restraint of free speech and sued the University, seeking a temporary restraining order against Aiken's ukase. [FN14]

In April of 2001, the United States District Court for the Central District of Illinois held a temporary restraining order (TRO) hearing and, after taking the matter under consideration, granted the plaintiffs' request for a TRO. [FN15] The court held that the ban on contacting prospective student athletes was improper regarding students "who are neither employed by nor acting at the behest of either the University or the Department of Athletics" [FN16] because contact with prospective student athletes by current students was a prior restraint that would not violate any of the NCAA rules about which Aiken had expressed concern in the original email. [FN17] Regarding the faculty, the court again held that the ban was an unconstitutional prior restraint in that the speech that Aiken tried to prohibit was protected under the First Amendment. [FN18] The court relied on reasoning from past cases in its decision to grant the TRO, but ignored other important factors that could have made a difference in the outcome.

The district court's decision in Crue v. Aiken focused primarily on the evils of prior restraint. [FN19] The court began the part of its opinion that addressed prior restraints by explaining that "any prior restraint on expression comes to [the court] with a 'heavy presumption' against its constitutional validity." [FN20] The court subsequently admitted that while prior restraints are generally forbidden, in "exceptional cases" they would be permitted. [FN21] In determining what constituted an exceptional case for the purpose of allowing the use of prior restraints, the court explained the importance of examining the evil that would result from the speech if the speech were allowed. If the evil that would result "is both great and certain and cannot be militated [sic] by less intrusive measures," the court would allow a prior restraint to be placed upon the speech at issue. [FN22]

***723** The Crue court also examined whether a University, as a government employer,

is allowed limited power to restrict the speech of its employees. [FN23] The Crue court qualified this power by explaining that individuals cannot be expected to waive their constitutional rights solely because they accept employment with a governmental body. The court in Crue used a balancing test to weigh the interests of the employee as a citizen who enjoys the right to comment on matters of public concern against the interest of the university, as a government employer, to promote "the efficiency of the public services it performs through its employees." [FN24] This balance was further narrowed by the court through its explanation that in cases of restrictions of speech, the government has the burden of showing that the "interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation of the Government."' [FN25] The court held that the University's interests were not sufficiently interfered with by the students and faculty to warrant the use of prior restraints to restrict the speech. [FN26]

After addressing the issue, the court held the Preclearance Directive to be an unconstitutional prior restraint on the freedom of speech of the University faculty members. [FN27] Regarding the exceptional nature of the situation in question, however, the court conceded that in drafting the rules regarding recruiting procedures, the NCAA "never anticipated application of those rules and regulations to the present type of controversy." [FN28] While this goes to illustrate the exceptionality of the situation, the issue of the degree of the harm that would be caused by the speech had also to be addressed. The speech in question in Crue had the potential of causing prospective student athletes to decide against attending the University of Illinois. While ridding the University of its allegedly racist mascot was the goal of the faculty, they attempted to achieve this goal through the dissuasion of prospective students from attending the University. The immediate goal of a university's athletic department is to recruit the best student athletes that it can for the university. By intruding on this function, the faculty members attempted to hinder the efficiency of the recruiting process.

Crue involves issues pertaining both to prior restraints on speech and to the free speech rights of government employees. While the final outcome of the case has yet to be determined, [FN29] it is worth examining whether or not the district court's conclusion was correct, and if so, whether the prior restraint doctrine and the rules governing free speech for government employees need ***724** to be reexamined by our nation's judiciary. This Note involves detailed analysis of both of these issues and will illustrate the implications that they bring regarding the treatment of government employees in the First Amendment context.

II. THE PRIOR RESTRAINT DOCTRINE

When considering the subject of prior restraints, the courts have been adamant in declaring them unconstitutional unless they satisfy several stringent conditions. The doctrine of prior restraints was first articulated by the Court in the case of Near v. Minnesota, [FN30] decided in 1931. In Near, the State of Minnesota used an existing state law to obtain a court order that stopped the publication of defamatory newspapers. The complaint was based on the assertion that the papers were a nuisance in that they were "malicious, scandalous and defamatory". [FN31] The Saturday Press, a periodical published in Minneapolis by Jay Near, a rabid anti-Semite, circulated an edition in 1927 that contained several articles accusing members of the community, including special law enforcement officer Charles D. Davis, mayor George E. Leach, chief of police Frank W. Brunskill, and county attorney Floyd B. Olson of participation in bootlegging, gambling, and racketeering in Minneapolis. The article further accused these and several other political figures of failing to perform their duties regarding the pursuit and arrest of Mose Barnette, a Jewish gangster operating in Minneapolis, and of secretly participating in the illegal activity in which Barnette was involved. The accusations led to the original complaint by the accused public officers, who asked a state court for a preliminary injunction against the newspaper. An order was issued by the district court directing the publishers of the newspaper to show cause as to why an injunction should not be ordered. [FN32] The publishers entered a demurrer based on

the theory that the complaint did not state facts upon which a cause of action could rest. [FN33] The district court in which the case for the injunction was heard overruled the demurrer and certified the question of the constitutional permissibility of the newspaper's statements to the state supreme court. [FN34] The Minnesota Supreme Court upheld the state statute prohibiting The Saturday Press from publishing defamatory statements, whereupon Near answered the complaint and the case went to trial in the district court. [FN35] The district court found the articles in question defamatory, thus constituting a nuisance, and enjoined the defendants from publishing further issues of The Saturday Press. [FN36] The Minnesota Supreme Court affirmed the decision, whereupon the defendants appealed to the United States Supreme Court.

***725** The Supreme Court ruled the Minnesota statute an unconstitutional prior restraint on Near's First Amendment rights because the Minnesota statute was designed to stop future publication of the newspaper's allegedly defamatory articles. It stated:

> The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.' ... Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends. This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute. [FN37]

The prior restraint doctrine was designed in Near to forbid almost all regulations that would prevent speech through publication. [FN38] In short, the Near Court held to be unconstitutional prior restraints that infringed upon the constitutional right of the press to publish its material, regardless of the content. [FN39] The Court explained that the publishers in Near would be forced to deal with the subsequent consequences should the court find the speech defamatory. [FN40] The Near decision, however, did except from the prior restraint prohibition four cases: troop movements, obscenity, incitement, and the protection of private rights according to equitable principles. [FN41] The prior restraint doctrine has since been extended to cover nearly all types of speech, and has resulted in punishment after the fact being generally accepted as the ***726** only remedy available for harmful speech if the speech in question can be sanctioned at all. [FN42]

While the Supreme Court has repeatedly upheld the prior restraint doctrine, [FN43] courts have recognized exceptions other than those articulated by the Near Court to the rule that such restraints are unconstitutional. While the most common reason for prohibiting prior restraints on speech is the desire not to chill potential speech, the Court has made exceptions for instances of speech where, for example, the expected damage to a party's interest is particularly grave. [FN44]

In CBS v. Davis, [FN45] the Supreme Court explained the factors that should be examined to determine the damage that would result from prohibiting a prior restraint on speech. Davis involved an application by CBS to the circuit court in the Seventh Judicial Circuit of South Dakota for an emergency stay of a preliminary injunction ordered by the circuit court judge. [FN46] The injunction prohibited CBS from airing footage taped for the television show "48 Hours" that was taken at a meat packing company in South Dakota. [FN47] The footage was taped to show the unsanitary conditions at the plant, and was obtained through an employee of the plant who went undercover, wearing hidden cameras, to tape the conditions inside the plant. The South Dakota Circuit Court held that any harm to CBS by prohibiting the use of the footage would be outweighed by the harm that would come to the plant in the form of loss of business and "public dissemination of [the plant]'s confidential and proprietary practices and processes" if the footage was shown. [FN48] The South

Dakota Supreme Court denied CBS' application for a stay of the injunction granted by the lower court, and ordered a hearing for a petition for a writ of mandamus. [FN49] The same court later changed the order to require the circuit court judge either to rescind the injunction or to show cause as to why the writ of mandamus should not be issued. [FN50] The United States Supreme Court held that the plant did not meet its burden of proving that the evil that would result from the airing of the footage would be both "great and certain and [could] not be mitigated by less intrusive measures." [FN51] The Court explained that while the broadcast could result in damage to the plant, such ***727** speculation had not persuaded courts in the past. [FN52] The Court granted the application for the stay of the injunction to CBS, allowing the footage to be aired. [FN53]

Justice Blackmun's opinion in Davis is illustrative of the strict barriers that exist with regard to prior restraints on speech. [FN54] The opinion explained that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for ... misdeeds in the First Amendment context." [FN55] Davis clarifies the rule used by federal courts that restricts the use of prior restraints to prevent harmful speech from occurring, ordinarily allowing only for post-factum remedies that punish harmful speech. Allowing for sanctions only after the fact as a remedy for harmful speech has been the generally accepted approach used by courts. [FN56] Courts, however, have also found exceptions to the rule when "the threat to First Amendment values is not significant but the expected damage in the absence of a prior restraint is particularly grave." [FN57] It has been asserted, however, that concern for the chilling effect of injunctions is at the "core of the prior restraint doctrine." [FN58] The Supreme Court addressed the possibility of the use of injunctions as remedies for potentially harmful speech when it further narrowed the scope of the doctrine by holding that injunctions are permissible remedies where they would "neutrally regulate the time, place, and manner of speech and do not target acts of speech themselves." [FN59]

A third case illustrating the prior restraint doctrine and the way in which it is implemented by the courts is Republican Party of Minnesota v. White. [FN60] The case involved a challenge to the state's "announce clause" by Gregory Wersal, a candidate for associate justice of the Minnesota Supreme Court. [FN61] The announce clause developed by Minnesota in 1974, stated that a "candidate for judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues" during the course of his political campaign. [FN62] During his 1996 campaign, Wersal distributed materials that were critical of several Minnesota Supreme Court decisions regarding issues such as welfare, abortion, and crime. [FN63] A complaint was filed against ***728** Wersal with the Office of Lawyers Professional Responsibility, which was run by the Minnesota Lawyers Professional Responsibility Board ("Board"), and while no formal action was taken against him, Wersal withdrew from the election because he feared that further complaints would threaten his ability to practice law. [FN64]

Wersal elected to run for associate justice again in 1998. Upon asking the Board whether or not it would enforce the announce clause that year, Wersal was told that the Board could not give him an answer until he submitted the opinions that he would voice. [FN65] Upon receiving the vague response, Wersal filed a suit against the Board in district court, seeking an injunction and alleging that the announce clause violated the First Amendment right to free speech in that the clause prevented him from stating his views on certain issues relevant to his campaign. [FN66] Other plaintiffs, such as the Minnesota Republican Party, joined the suit under the claim that the restrictions on Wersal's speech kept the plaintiffs from learning Wersal's views and from making an informed decision regarding whether or not to endorse his candidacy. [FN67] Both sides filed motions for summary judgment, and the district court held in favor of the State, finding that the announce clause did not violate First Amendment privileges. [FN68] The Eighth Circuit affirmed, and Wersal sought certiorari from the Supreme Court. [FN69]

Justice Scalia, writing for the majority, began the opinion with an analysis of the meaning of the announce clause and concluded that the clause was designed to

> [P]rohibit[] a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running,

except in the context of discussing past decisions--and in the latter context as well, if he expresses the view that he is not bound by stare decisis. [FN70]

The Court analyzed the issue under a strict scrutiny standard because: 1) the announce clause burdened speech focused on qualifications of candidates for political office, a subject that is "'at the core of our First Amendment freedoms;"' and, 2) the announce clause prohibited speech on the basis of its content. [FN71] The compelling state issue that the State asserted was the impartiality of the state judiciary. The Court held, however, that the announce clause was not narrowly tailored to serve this purpose because it "[did] not restrict speech for or against particular parties, but rather speech for or against particular issues." [FN72] The Court further explained that the interest of ***729** the State in judiciary impartiality may have been served by the announce clause, but that the interest itself was not compelling. [FN73] Judicial "impartiality" means not that litigants would receive equal application of the law, but that they would be guaranteed an equal chance to persuade the court on the legal issues involved in their cases. [FN74] The Court clarified its analysis by stating that such impartiality is not necessary in our judicial system, in that a judge with no predisposition toward a particular issue is not only nearly impossible to find, but also not expected or necessary in our nation's judiciary. [FN75] The Court found no state claim that justified the use of the announce clause to regulate election speech. The Court reversed the decision of the Eighth Circuit Court of Appeals and held that the announce clause violated the candidates' right to free speech under the First Amendment and, was therefore, unconstitutional. [FN76]

White illustrates that the prior restraint doctrine laid out in Near is still alive and well in the courts of our nation. The courts' current understanding of the prior restraint doctrine is that prior restraints on speech are almost always unconstitutional because they infringe upon a fundamental liberty guaranteed by the Constitution. [FN77] The prior restraint doctrine has survived in cases from Near to White because of the importance the Supreme Court places on the interest that it is designed to protect. Near expressed the concern that prior restraints on speech were the "essence of censorship", [FN78] and the treatment of the prior restraint doctrine has survived through White, where the court stated that "[p]rinciples of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." [FN79] The reason for the survival of the doctrine is that the Supreme Court is unwilling to take away an individual's right to free speech, a right that is guaranteed by the Constitution.

The prior restraint doctrine, as it stands today, and as it is applied in White, works to safeguard the freedom of speech guaranteed to individuals under the First Amendment. While it cannot be argued that government employees do not deserve the basic protections that the First Amendment affords other citizens, the doctrine's requirement of proof of damages is burdensome to public employers. Government employers restrict their employees' speech, presumably, to prevent the damage that could occur if the speech were allowed. In some cases, the estimate of harm that is viewed as insufficient proof of damage by a court may be the only thing that government employers have to go on as proof of damaging speech. By disallowing the potential of harm to warrant the use of prior restraints, the courts have made it nearly impossible for government employers to limit in advance what their employees may say about the organization. The entire process includes the ***730** speech's being made, the speaker's being punished by the employer, and the speaker's subsequent lawsuit making it through the court system. By the time this process is concluded, the damage to the employer has been done already, and in many cases may prove irreparable by post-speech remedies. Despite the problems that may be present with the prior restraint doctrine, however, it has survived the past seven decades and is still the law of our nation regarding the prohibition of future speech.

III. CASE HISTORY/RULES ESTABLISHED

Courts in the United States have recognized in several cases the importance of the free speech rights of faculty in public colleges and universities. [FN80] Through a series of cases regarding post factum responses to employee speech by their

governmental employers, however, the courts have also explained that in certain situations, while prior restraints are not an option to the employer, government agencies may limit the speech of their employees through punishment of harmful speech. The rules regarding restriction of First Amendment rights of employees of public universities are based on the rules regarding the free speech rights of governmental employees generally. This basis is found in four Supreme Court cases: Pickering v. Board of Education of Township High School District 205, [FN81] Connick v. Myers, [FN82] Rankin v. McPherson, [FN83] and Waters v. Churchill. [FN84]

The Fourth Circuit Court of Appeals has interpreted Supreme Court rulings regarding the First Amendment rights of faculty at public colleges and universities to mean that faculty members are to be treated on the same level as all other government employees in the First Amendment context. [FN85] While the Supreme Court has not explicitly condoned this view of academic freedom, ***731** some courts have interpreted the Court's decisions to mean just that. [FN86] Those opposed to this reasoning view it as flawed, arguing that it misconstrues the Supreme Court decisions regarding academic freedom. [FN87] It is possible, alternatively, that the solution to the debate lies in protecting faculty speech that is made within the role of the faculty member in question, but not speech that is made outside of that professorial role. Academic freedom, however, is a doctrine with no clear definition, and the debate as to what the concept actually means is one that is outside the scope of this article. [FN88] For the purposes of this Note, professors at public universities are considered to have only those speech rights that governmental employees have, although it is acknowledged that reasonable people may disagree with this treatment of them.

In 1968, the Court decided Pickering, a case in which Marvin L. Pickering was dismissed from his position as a high school teacher at Township High School District 205 in Will County, Illinois, after writing a letter criticizing the local Board of Education. [FN89] Pickering had sent the letter to a local newspaper criticizing a tax increase that the Board had proposed. The Board determined the letter was "detrimental to the efficient operation and administration of the schools of the district", and dismissed Pickering. [FN90] Pickering sought review of the Board's determination and brought a subsequent action in the Circuit Court of Will County, where the dismissal was affirmed based on the Board's determination that the contents of Pickering's letter warranted his dismissal. [FN91] Pickering appealed to the Supreme Court of ***732** Illinois, which affirmed the judgment of the circuit court, whereupon Pickering appealed to the United States Supreme Court. [FN92] The Court held that in cases such as Pickering's, where there has been no proof of "false statements knowingly or recklessly made by him," a teacher's statements on matters of public concern could not be used as grounds for his dismissal. [FN93] The Pickering decision focused on the issue of speech on matters of public concern. The Court concluded that where a governmental body attempts to regulate the speech of its employees, if the speech is regarding a matter of public concern, the regulation will not be constitutional. [FN94] The Court not only emphasized the importance of protection of public employees' speech, but also recognized the problem a government employer faces in striking "a balance between the interests of the teacher, as a citizen, 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." [FN95]

Twenty years after the Supreme Court decided Pickering, it decided Connick v. Myers, a case in which Sheila Myers, an Assistant District Attorney in New Orleans, sued her employer claiming that she was wrongfully discharged after exercising her First Amendment rights in a constitutional manner. [FN96] Myers expressed her opposition to the transfer planned for her by the District Attorney to a different section of the criminal court. She expressed her views to several individuals within the office, and then distributed a questionnaire throughout the office. The issues addressed by the questionnaire included employee morale and whether employees felt pressure to work on political campaigns. Myers was dismissed by the District Attorney for her refusal to accept the transfer and for insubordination in the form of the questionnaire. Myers filed suit in district court to challenge the dismissal. The district court ordered Myers reinstated and ordered that she be paid back pay, damages and attorney's fees, based on the determination that she was wrongfully

discharged for exercising her constitutional right to free speech. [FN97] The district court said that the reason behind Myers' dismissal was the distribution of the questionnaire, not the refusal to accept the transfer, and that the questionnaire focused on issues of public concern and was therefore constitutionally protected free speech. [FN98] The court of appeals affirmed, where-upon the District Attorney appealed to the United States Supreme Court. [FN99]

The Connick Court adopted the Pickering balancing test, as well as the rule of Pickering regarding speech on matters of public concern. [FN100] In Connick, however, the Court expanded upon the public concern doctrine by explaining that in determining whether a public employee's speech actually ***733** addresses a matter of public concern, the content, form and context of the statement in question must be examined. [FN101] In Connick, the Court found that the speech in question, made by an Assistant District Attorney, did not constitute speech on a matter of public concern because the speech regarded confidence in various supervisors within the agency, the level of office morale, and the need for a grievance committee within the office. [FN102] The Court viewed this speech as merely an extension of a personal dispute over the speaker's transfer within the workplace. [FN103] The Court further explained that because the plaintiff in the case had not attempted to convey a message to the public regarding her evaluation of the District Attorney's office, her speech could not be regarded as about a matter of public concern. [FN104] The Connick Court announced the rule that individual grievances by a government employee about the agency for which the employee works cannot constitute matters of public concern unless made known to the public.

The next major case regarding restriction of speech of public employees was Rankin v. McPherson. [FN105] Ardith McPherson was employed as a temporary deputy constable of a county constable's office in 1987. A coworker of McPherson's overheard a conversation between McPherson and another co-worker concerning the attempted assassination of President Reagan. During that conversation, McPherson stated "[i]f they go for him again, I hope they get him." [FN106] The deputy constable who overheard the conversation reported the comment to Constable Rankin, whereupon Rankin confronted McPherson. [FN107] Subsequent to McPherson's admitting to making the comment, she was fired. [FN108] McPherson filed suit in district court alleging that the constable had violated her First Amendment right to free speech. The district court found for the constable and upheld the discharge, but the Fifth Circuit vacated and remanded. [FN109] The district court again heard the case and again found for the constable, whereupon the Fifth Circuit again reversed and remanded, holding that McPherson's remark constituted speech on a matter of public concern and that the government's interest in efficiently running the organization did not outweigh her own First Amendment interest. [FN110]

Certiorari was granted, and the Supreme Court's subsequent opinion focused on the reasoning derived from Pickering and Connick regarding the issue of speech on matters of public concern and the balancing of government interests in efficiency against individual interests in free speech rights. [FN111] The Court emphasized the importance of the tests, stating that ***734** "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public function but because superiors disagree with the content of employees' speech." [FN112] The Court held that regardless of the "inappropriate or controversial character" of McPherson's statement, it was most definitely made in regard to a matter of public concern. [FN113] Further, the Court held that McPherson's First Amendment rights were not outweighed by any state interest, reasoning that the balancing test is used to keep focus on the effective function of the public enterprise and that the state's interest in such functioning was not marred by McPherson's statement. [FN114] Upon consideration of various factors including the function of the agency, McPherson's position within it, and the nature of McPherson's statement, the Court held that her First Amendment rights were not outweighed by the agency's interests and affirmed the judgment of the Fifth Circuit. [FN115]

Nearly a quarter of a century after the Supreme Court decided Pickering, it decided Waters v. Churchill, [FN116] a case in which a nurse was fired for criticizing one of her superiors at the hospital for which she worked. Cheryl

Churchill was fired from McDonough District Hospital after a conversation that she had with a co-worker was overheard and reported to Churchill's superiors. Churchill made comments to the co-worker that were critical of the obstetrics department in which she worked, mainly concerning the hospital's "cross-training" policy, which Churchill viewed as threatening to patient care. Upon the termination of her employment, Churchill brought suit against the hospital in district court, claiming that her speech was protected under Connick because it was regarding a matter of public concern and because Churchill's own interest in the expression was not outweighed by the hospital's interest. [FN117] The district court rejected Churchill's arguments and granted the hospital's motion for summary judgment. [FN118] Churchill appealed, and the Seventh Circuit reversed, finding that Churchill's speech was on a matter of public concern and that the hospital had not substantially shown that the speech was disruptive, as was required before punishment could be justified. [FN119] The Supreme Court granted certiorari, and vacated the judgment of the Seventh Circuit in favor of the hospital officials, taking as the main issue whether the Connick test should be applied to what the government employer believed was said, or to what the trier of fact determined to have been said. [FN120] The Court also discussed the amount of power government employers have regarding ***735** restriction of First Amendment rights, as well as on the duty of an employer to adequately investigate claims that raise free speech issues. [FN121] The Court in Waters first addressed the issue of whether or not the employee's speech was on a matter of public concern, the issue being whether to follow the Connick test, which takes the speech as the employer found it to be, or to ask a jury to determine the facts surrounding the speech. [FN122] Justice O'Connor, in writing the opinion, explained that for speech to be given First Amendment protection, the entire context of the speech must be examined, including the constitutional significance of the speech. [FN123]

A separate but related issue in the Waters opinion is the general view of the Court on the power of government agencies to regulate the speech of their employees. Despite the fact that there was not a prior restraint issue in Waters, the Court reiterated that the government has greater power regarding employees' speech than it does regarding the public at large. [FN124] The Court explained that the reason for the greater power of the government in respect to its employees' speech stems from the fact that the government has an interest in running its agencies efficiently. [FN125] If the government's interests in efficiently achieving its goals would be served by restricting the speech of certain employees, a court is more likely to find the restrictions acceptable. [FN126] The Court found that Churchill's comments on cross- training in the obstetrics department of McDonough District Hospital might have chilled another's interest in working for the hospital. The Court explained that "[d]iscouraging people from coming to work for a department certainly qualifies as disruption" of the organization's efficient running. [FN127] The Waters opinion was a major step in the Court's recognition of government agencies' power over the speech of their employees. The reasoning within the opinion is extremely important when analyzing cases such as Crue v. Aiken. If professors at public universities are, in fact, government employees and have no more First Amendment rights than any other classification of government employee, then the rules derived from Pickering, Connick, and Waters should apply ***736** when deciding whether or not professors deserve First Amendment protection for speech directed against their employers.

IV. MODERN APPLICATIONS OF PICKERING-CONNICK-WATERS ANALYSIS

The main test to be derived from Pickering, Connick, and Waters has two parts. The first part asks whether the speech that led to a governmental worker's punishment was on a matter of public concern. If it was, then the second part asks whether the injury to the government's interest caused by the speech is outweighed by the employee's interest in free speech. Just as important, however, is the ruling by the Supreme Court in Waters regarding the power of the government to restrict the speech of its employees when the speech could interfere with the efficient running of the organization. These rules have been addressed in several First Amendment cases since the decisions were handed down, and continue to be addressed today. [FN128] While the following cases do not involve the prior restraint issues that were addressed in Crue, each illustrates either the reasoning courts have used to define matters of

"public concern" or to clarify the reasoning that is to be applied to the balancing test when determining whether post factum punishments for employee speech were warranted.

Speech on matters of public concern has been addressed in numerous cases in recent years. In Gardetto v. Mason, [FN129] for example, the Tenth Circuit employed the Pickering Court's explanation of "public concern" defined the concept as containing those matters "which can 'be fairly considered as relating to any matter of political, social, or other concern to the community."' [FN130] Gardetto concerned a situation in which Ann Gardetto, a faculty member at Eastern Wyoming College ("EWC"), was demoted and suspended after speaking out against the president of EWC and some of the policies employed at the College. [FN131] Gardetto brought suit in district court, alleging the violation of her First Amendment rights. The district court jury found for ***737** EWC and the district court judge denied Gardetto's motion for a new trial. [FN132] On appeal, the Tenth Circuit explained that internal disputes among personnel do not traditionally constitute matters of public concern, but if the speech concerns an issue of governmental integrity, it is considered as addressing an issue of public concern. [FN133] The court vacated the district court's judgment and remanded the case to that court for a new trial. [FN134]

Another fairly recent case focusing on the Pickering analysis is Williams v. Alabama State University, [FN135] in which Patrice Williams was denied tenure and terminated from Alabama State University ("ASU") after her criticism of a textbook written by other faculty members. The University moved to dismiss Williams' complaint on the theories that ASU was entitled to qualified immunity and that Williams did not meet the heightened pleading standard needed in § 1983 actions. [FN136] While the court agreed with ASU that Williams failed to meet the heightened pleading standard, it granted her leave to amend her complaint. [FN137] After Williams filed the amended complaint, the district court denied ASU's motion for dismissal, holding that Williams' complaint alleged a violation of her right to free speech under the First Amendment. [FN138] The Eleventh Circuit heard the case on interlocutory appeal by ASU and, in deciding for the defendants, used the test developed in the Pickering line of cases. [FN139] The court found that Williams' speech did not involve a matter of public concern under Connick in that it was simply "a professor's in-house criticism of a particular text" and therefore not a public issue, whether or not the speech was related to a matter that could constitute public concern in the future. [FN140] The court further reasoned that, even had Williams' speech been regarding a matter of public concern, it would have failed to meet the balancing test laid out in Pickering. [FN141] The court explained that while Williams had some interest in criticizing the textbook she was using to teach her students, this interest did not outweigh the University's interest in making efficient academic decisions. [FN142] The court pointed to Justice Powell's concurrence in Connick, stressing the importance of the "[g]overnment, as an ***738** employer, [having] wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to [discipline] employees whose conduct hinders the efficient operation and to do so with dispatch." [FN143]

The 1993 case of Powell v. Gallentine [FN144] is another case that utilized the test from the Pickering line of cases. Powell involved a suit by Dr. David Powell, a professor at Western New Mexico University ("WNMU") against University officials claiming that his First Amendment rights were violated by the University when he was terminated from his tenured faculty position. Dr. Powell was fired after he publicly spoke of allegations of grade fraud at the University. [FN145] The district court that heard the case denied WNMU's motion for summary judgment and WMNU appealed on the basis of qualified immunity on Dr. Powell's First Amendment claim. [FN146] The Tenth Circuit affirmed the judgment of the district court. The Tenth Circuit reasoned that, because Powell's allegations of grade fraud "sought 'to bring to light actual or potential wrongdoing or breach of public trust' on the part of the defendants", it constituted a matter of public concern under Connick. [FN147] The court further found that Powell's interest in speaking out regarding the alleged grade fraud outweighed the University's interest in the efficient operation of the institution even if Powell's allegations were false. [FN148] The court reasoned that even false allegations warrant First Amendment protection unless knowingly or recklessly made by the claimant. [FN149] The court further explained that in order

for a public university "[t]o prevail in the Pickering balancing, [the university] must show evidence of an actual disruption of [the university's] services resulting from the speech at issue." [FN150]

The Eighth Circuit has also addressed the issue of public concern and the balancing of employee and employer interests. Burnham v. Ianni [FN151] involved a suit by professors and former students at the University of Minnesota -- Duluth ("UMD") who brought a § 1983 action against an officer and the University alleging First Amendment violations after an exhibit in the history department depicting professors holding weapons was taken down due to repeated complaints from Judith Karon, UMD's affirmative action officer. [FN152] The pictures displayed were of the eleven professors in the history department dressed in costumes, including props that illustrated the field in which each of them specialized. [FN153] Two of the photographs in particular were the sources of complaints -- one that pictured Professor Albert Burnham holding ***739** a military pistol and one that pictured Professor Ronald Marchese holding a Roman short sword. [FN154] Chancellor Ianni ordered the pictures removed after complaints from Ms. Karon that the pictures were offensive and possibly connected to death threats received by a professor at the school. [FN155] The students and professors filed suit in district court, and the defendants moved for summary judgment, which was granted in part and denied in part. [FN156] The complaints against the University were dismissed with prejudice, and the claims for money damages and injunctive relief against Ianni were dismissed. [FN157] The district court, however, denied Ianni's motion for summary judgment based on qualified immunity, finding that his actions violated the students' and professors' First Amendment rights. [FN158]

On appeal, the Eighth Circuit initially reversed the district court's decision to deny the defendant's motion for summary judgment. [FN159] Upon a subsequent grant of en banc review, however, the Eighth Circuit held that the speech was protected and that Ianni's motion for summary judgment should be denied. [FN160] The Eighth Circuit applied the Pickering test to the situation, despite the fact that the suit did not involve the discharge or discipline of an employee. [FN161] In determining whether or not the speech was of public concern, the court examined the content, form and context of the speech, as required by Connick. [FN162] The court determined that the speech at issue, while not of the "utmost public concern", was within the meaning of public concern put forth in the Pickering test, in that "[w]hen weighed against the meager evidence of workplace disruption, the plaintiffs' [acts of displaying the photographs] clearly addresse[d] matters of public concern ...." [FN163] The court then held that the requirement from Waters that a government employer make a substantial showing that the alleged disruptive speech is, in fact, disruptive before the speech may be punished was not met in this case by the University. [FN164] The court expressed concern that permitting Ianni's restrictions of the display without evidence of any resulting harm would allow too many violations of First Amendment rights based on arbitrary claims. [FN165]

It has been proposed that the majority of cases after Pickering have been decided in favor of the government employer's right to control the organization over the employee's right to free speech. [FN166] Some criticize this trend, ***740** viewing it as discouraging the employees' legitimate criticism of the way government organizations are run, resulting in a "chilling effect" on employee speech. [FN167] It may be, however, that the threat of disciplinary action by public employers for potentially damaging speech by employees may cause the employee to think before speaking against the employer. This threat may result in lowering the number of court battles over employee diatribes based on the employee's private gripes with the employer. The rules derived from Pickering and the cases that followed have made it clear that government employee speech critical of the employer will be protected from the employer's sanctions only, 1) if it is made in regard to a matter of public concern, and 2) if the employee's interest in the speech is not outweighed by the government's interest in running its organization efficiently. If public employees are made aware of these rules by their employers and are made aware of the threat of possible disciplinary action for speech made without concern for them, there will likely be a decrease in speech made for personal reasons and with utter disregard for the organization's efficient operation, as well as of speech regarding negative practices or actions by the employer.

The main issue regarding the constitutionality of post factum punishments for harmful speech arises when considering the principle of legality. This principle prohibits the government from punishing an individual for his actions without first providing fair warning of the sort of conduct that could lead to punishment. [FN168] This warning is required in order for the government to fulfill its due process obligations. The theory behind the prior restraint doctrine, however, encourages the government not to provide this warning. A warning that particular types of speech will incur punishment could be held to operate as a prior restraint. [FN169] Through these two separate but related holdings, the Court prevents government agencies from observing their due process obligations while still adhering to the rules stemming from the prior restraint doctrine. The implications of this dichotomy can be seen in Crue.

***741** V. Crue Reconsidered

The opinion in Crue addressed the issue of whether the speech involved constituted a matter of public concern. The district court stated in its opinion "that the Chief Illiniwek controversy presents a matter of public concern." [FN170] The court also stated that the members of the faculty in question had an interest in communicating with the public regarding the topic. [FN171] It was undisputed by either side in Crue that speech about the Chief Illiniwek controversy constituted a matter of public concern under the definitions provided in Pickering and cases since, such as Gardetto. [FN172]

A more pressing issue in Crue was whether the balancing test announced in Pickering, when applied to the facts of Crue, resulted in the speech in question deserving First Amendment protection. The faculty members in Crue engaged in speech to prospective student athletes in an attempt to inform them of the problems that those faculty members had with the University's use of Chief Illiniwek as its mascot. The faculty members contacted the prospective students in an effort to persuade them that the Chief was a racist symbol and presumably to dissuade them from attending the University because of the problems that the Chief creates for minority groups and for others who oppose what they see as a racist symbol. The ultimate goal of the communication was, we may assume, to persuade the University to cease using the Chief as its mascot.

The balancing test announced in Pickering states that for speech to receive protection under the First Amendment, the employee's interest in the speech must outweigh the injury to the government that occurs as a result of the speech. [FN173] The court in Crue pointed out that the University failed to show any degree of harm caused by the speech of the faculty and students. [FN174] The Waters case, however, explained that if a government agency's interests in efficiently achieving its goals would be served by restricting the speech of its employees, the court would be more likely to find those restrictions constitutional than when efficiency interests would not be served, but Waters did not explain how the employer should balance its interests against the employees. [FN175] The University employees in Crue were interfering with the efficient running of the institution when they approached prospective student athletes with the purpose of dissuading them from attending the University. The primary purpose of universities across the nation is to educate, and many, the University of Illinois included, function additionally as fora for athletic competition. The fact that employees of the University might dissuade prospective students from attending the school is evidence that their message could ***742** hinder the efficiency of the scholastic and athletic recruitment process. While there was no evidence offered that the speech had any impact on the prospective student athletes' decisions to attend the University, the risk of that harm is present, and the threat could develop into a reality that would be harmful to the institution.

While a more thorough analysis by the court may have made a difference in the amount of power the University had to restrict the speech of its employees, it would not have made a difference in the determination that the Preclearance Directive operated as an unconstitutional prior restraint on speech. Chancellor Ianni's email

was sent with the intention of prohibiting the future speech of employees, and would probably be found unconstitutional regardless of the rationale used in the determination. The University probably would have been more successful in dealing with the speech by the professors had it punished the faculty members post factum, allowing the court to employ the Pickering balancing test after considering the University's arguments regarding the harm that occurred as a result.

Crue presented the district court with a complicated issue involving the constitutionality of both prior restraints on speech and the restriction of government employee speech by their employers. The court used the Near line of cases to determine the prior restraint issue, and included aspects of the Pickering-Connick-Waters line of cases to determine whether the restriction of the employees' speech at issue in the case was constitutional. While the court examined the applicable rules regarding the two aspects of the case, it failed to do so thoroughly. Had it considered other relevant factors, the court might have found that the University administration acted constitutionally in restricting the speech of its employees.

The reasoning developed from the Pickering-Connick-Waters line of cases requires courts in the United States to examine two main factors in deciding whether a restriction on the speech of a government employee is warranted. First, the Pickering decision requires a court to ask if the speech in question involves a matter of public concern. The speech at issue in Crue involved a matter of public concern. Both sides in the case -- the University and the plaintiff faculty -- agreed that speech regarding the potentially racist Chief Illiniwek was on a matter of public concern. [FN176] The plaintiff groups viewed the mascot as a racist symbol and were searching for avenues with which to convey that message. However, the Connick court further narrowed what constitutes speech that is on matters of public concern by requiring an examination of not only the content, but also the form and context of the speech. In Crue, the plaintiff groups were speaking on a general matter of public concern -- the Chief -- but not in a public context. The plaintiffs were speaking specifically to prospective student-athletes, a specific group with interests related to the University. There was no examination by the court as to how the plaintiff groups received information regarding the names of the student athletes or into whether the student- athletes constituted a private group related to the University. While it is apparent that the speech by the faculty ***743** was on a matter of public concern, the form and context of the speech is questionable and was not examined by the court in Crue.

The second test derived from the Pickering-Connick-Waters analysis is the balancing test developed in Pickering. The test pits the interests of the employee regarding his freedom of speech against the interests of the government employer in running an agency efficiently. The Waters court held that the speech in question could have chilled another's interest in working for the government agency at which the speech was directed and was therefore not protected by the First Amendment. The court in Crue did not address the potential that the faculty members' speech had to discourage prospective student-athletes from attending the University. The speech by the faculty members could have easily dissuaded a prospective student from attending the University. By targeting the prospective student-athletes, the faculty members seemed to attempt more than just getting their point across. The specific aim seemed to be to reach the administration and get them to drop the Chief as the mascot by persuading potential student-athletes not to attend the University. Reaching this goal involved interference with the efficient running of the University and its athletic department, in particular. This aspect of Crue should have been more thoroughly examined by the court. Additionally, the interests of the faculty could have been served through routes other than direct contact with prospective student athletes. In the past, groups opposed to the Chief have expressed their views through avenues such as letter writing, public speaking, and student meetings, none of which convinced University officials to retire the Chief. [FN177] The University did not interfere in any of these activities. [FN178] It can hardly be argued that had the faculty members in Crue argued in letters to the editor of the University newspaper that Chief Illiniwek was a racist symbol that "creates a hostile environment for Native American students, promotes the acceptance of inaccurate information in an educational setting, makes it difficult to recruit Native American

students, and contributes to the development of cultural biases and prejudices" [FN179] that the University could have regulated the speech constitutionally.

The efforts at issue in Crue to contact prospective student athletes were aimed at getting the University of Illinois to drop a symbol that some members of the campus community viewed as racist. These efforts were made through means that could cause a disruption in the efficient running of the University's services and that were intended to do so. The interests of the University in this case outweigh the interests of the plaintiff faculty members in that the University was attempting to protect itself from a harm caused by its own employees who have various other avenues available with which to express their views regarding the matter at hand.

***744** VI. CONCLUSION

The treatment of the First Amendment rights and faculty on public college and university campuses has developed over a span of more than four decades and dozens of cases. While courts' examination of the law regarding this subject matter is extensive, definitive rules have not yet been developed. The likelihood that the courts will ever articulate any sort of clear-cut rule is small, as the courts are constantly presented with unique First Amendment issues. While future cases concerning First Amendment law in public colleges and universities may well follow the guidelines promulgated by the cases outlined above, there are many aspects of free speech, especially regarding government employees, that need to be more closely examined.

Crue is a case in point regarding the courts' view of the First Amendment rights of faculty at public universities. While the preclearance directive issued by Chancellor Aiken was a prior restraint of the professors' free speech under existing doctrine, the circumstances surrounding the speech were not examined thoroughly enough by the court in respect to the balancing test set forth in Pickering. Had the University chosen to punish the faculty members for their interference with the University's athletic recruitment process instead of arguing that the preclearance directive was allowable as a prior restraint, the court would have had to examine several issues more carefully. Whether such punishment would have been determined constitutional by the court is not clear, but the University would have had a better chance of prevailing in the case had it chosen that course of action. Courts, however, need to start taking into account issues like the potential harm of speech versus the actual harm in making decisions as to whether a public university has the right to prevent or punish speech on matters of public concern by its employees when the speech could harm the efficient running of university programs. The harm that could result may be greater than the courts could imagine and without some sort of prior check on that speech, could irreparably damage the University.

[FNa1]. B.A., University of Illinois at Urbana-Champaign, 2000; J.D. Candidate, Notre Dame Law School, 2003. The author would like to thank Associate Dean John Robinson for his assistance in the completion of this Note and Angela M. Graham and William M. Murphy in the Office of Public Affairs at the University of Illinois at Urbana-Champaign for their assistance and cooperation in obtaining materials for this Note.

[FN1]. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)); Boy Scouts of Am., S. Fla. Council v. Till, 136 F. Supp. 2d 1295, 1307 (S.D. Fla. 2001) (School Board's decision to keep Boy Scout troop from using school facilities for meetings violated the First Amendment rights of the members of the organization); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 690 (6th Cir. 2001) (professor's dismissal as a result of his using harsh language in a class discussion where the language was warranted was a violation of the professor's First Amendment rights); and Richard H. Hiers, Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy, 29 J.C. & U.L. 35 (2002).

[FN2]. See, e.g., Gardetto v. Mason, 100 F.3d 803 (10th Cir. 1996) (concluding that a professor's speech was protected by the First Amendment because the speech did not interfere with the efficient running of the operations of the university by which he was employed); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that the University's decision to deny eligibility to a student organization constituted viewpoint discrimination and was therefore an unconstitutional restraint on the students' speech); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that University's decision to deny a student religious group the use of school facilities was unconstitutional); Healy v. James, 408 U.S. 169 (1972) (holding that a university's disagreement with a student group's political views is not valid reason for the university to deny the group recognition by the school); and Kincaid v. Gibson, 236 F.3d 342, 343 (6th Cir. 2001) (holding that a university's confiscation of a yearbook violated a student's First Amendment rights because the yearbook was a "journal of expression" protected by the Constitution).

[FN3]. See Waters v. Churchill, 511 U.S. 661, 671 (1994) ("We have never explicitly answered this question, though we have always assumed that its premise is correct -- that the government as employer indeed has far broader powers than does the government as sovereign.").

[FN4]. 137 F. Supp. 2d 1076 (C.D. Ill. 2001).

[FN5]. See Fighting Illini Athletics: Chief Illiniwek, available at http://fightingillini.fansonly.com/trads/ill-trads-thechief.html. (last visited, Apr. 10, 2003).

[FN6]. See id.

[FN7]. These groups include the National Coalition on Racism in Sports and the Media and smaller anti-Chief student groups. See Julie Wurth, Opponents vow to abolish symbol from UI by 2000 (April 4, 1998), available at http://www.newsgazette.com/ngsearch/story.cfm?number=2493. (last visited Apr. 10, 2003).

[FN8]. In 1969, Dartmouth College changed its mascot from the "Indians" to the "Big Green"; in 1972, Stanford University changed its mascot from the "Indians" to the "Cardinal"; in 1995, St. John's University changed its mascot from the "Redmen" to the "Red Storm"; in 1996, the University of Tennessee at Chattanooga changed its mascot from "Chief Moccanooga" to the "Mockingbird"; in 1996, Miami University of Ohio changed its mascot from the "Redskins" to the "Red Hawks." See American Indians and Sports Team Mascots: A Timeline of Change, available at http://www.ncai.org/main/pages/issues/other_ issues/documents/mastimeline.htm. (last visited Apr. 10, 2003).

[FN9]. See Crue, 137 F. Supp. 2d at 1076.

[FN10]. See id. at 1079.

[FN11]. Id.

[FN12]. The pertinent text of Chancellor Aiken's message runs as follows:

Questions and concerns have been raised recently about potential contacts by employees, students or others associated with the University with student athletes who are being recruited by the University of Illinois. As a member of the National Collegiate Athletics Association (NCAA) and the Big Ten Athletic Conference, there are a number of rules with which all persons associated with the University must comply. For example, the NCAA regulates the timing, nature and frequency of contacts between any University employee and prospective athletes. It is the responsibility of the coaches and administration in the Division of Intercollegiate Athletics to recruit the best student athletes to participate in varsity sports at the University of Illinois. No contacts are permitted with prospective student athletes, including high school and junior college students, by University students, employees or others associated with the University without express authorization of the Director of Athletics of his designee.

The University faces potentially serious sanctions for violation of NCAA or Big Ten rules. All members of the University community are expected to abide by these rules, and certainly any intentional violations will not be condoned. It is the responsibility of each member of the University to ensure that all students, employees and others associated with the University conduct themselves in a sportsmanlike manner. Questions about the rules should be addressed to Mr. Vince Ille, Assistant Director for Compliance, Bielfeldt Athletic Administration Building, 1700 S. Fourth Street, Champaign, IL 61820, (217) 333-5731, E-mail: ille@uiuc.edu. Id.

[FN13]. See id.

[FN14]. See id. at 1081.

[FN15]. Id. at 1076.

[FN16]. Id. at 1084.

[FN17]. See id.

[FN18]. Id.

[FN19]. See id. at 1076.

[FN20]. Id. at 1083 (quoting CBS v. Davis, 510 U.S. 1315, 1317 (1994)).

[FN21]. Id.

[FN22]. Id. (quoting Davis, 510 U.S. at 1317).

[FN23]. See Connick v. Myers, 461 U.S. 138 (1983).

[FN24]. Crue, 137 F. Supp. 2d at 1085 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[FN25]. Id. (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454,

468 (1995) (internal citation omitted)).

[FN26]. Id.

[FN27]. See id. at 1084.

[FN28]. Id. at 1087.

[FN29]. Crue is currently before the Seventh Circuit on appeal by the University of Illinois.

[FN30]. 283 U.S. 697 (1931).

[FN31]. Id. at 703 (internal citation omitted).

[FN32]. Id. at 704-05.

[FN33]. Id. at 705.

[FN34]. Id.

[FN35]. Id.

[FN36]. Id. at 706.

[FN37]. Id. at 702-03.

[FN38]. See id. at 716-23.

[FN39]. Id.

[FN40]. Id. at 718-19.

> The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. 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. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions. The importance of this immunity has not lessened.
>
> Id.

[FN41]. See id. at 716.

[FN42]. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713 (1971); and Michael I. Myerson, Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint, 52 MERCER L. REV. 1087 (Spring 2001).

[FN43]. See Thomas v. Chicago Park Dist., 534 U.S. 316 (2002); City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001); Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); and N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

[FN44]. See CBS v. Davis, 510 U.S. 1315 (1994).

[FN45]. Id.

[FN46]. Id.

[FN47]. Id.

[FN48]. Id. at 1316 (internal citation omitted).

[FN49]. Id.

[FN50]. Id.

[FN51]. Id. at 1317.

[FN52]. Id. at 1318.

[FN53]. Id.

[FN54]. See Bruce E.H. Johnson, CBS v. Davis: Oddball Lessons from a Typical Prior Restraint Case, 13 COMM. LAW 1 (Summer 1995).

[FN55]. Davis, 510 U.S. at 1318.

[FN56]. Ariel L. Bendor, Prior Restraint, Incommensurability, and the Constitutionalism of Means, 68 FORDHAM L. REV. 289, 300 (1999).

[FN57]. Id. (citing DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 168 (1991)).

[FN58]. Vincent A. Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 MINN. L. REV. 11, 15 (1981).

[FN59]. Bendor, supra note 56, at 300; see also Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 763-64 (1994); MacDonald v. Chicago Park Dist., 976 F. Supp. 1125 (N.D. Ill. 1997); and Beal v. Stern, 184 F.3d 117 (2d Cir. 1999).

[FN60]. 536 U.S. 765, 122 S. Ct. 2528 (2002).

[FN61]. Id. at ___, Id. at 2531.

[FN62]. Id. (internal citation omitted).

[FN63]. Id.

[FN64]. Id.

[FN65]. Id. at ___, Id. at 2532.

[FN66]. Id.

[FN67]. Id.

[FN68]. Id.

[FN69]. Id.

[FN70]. Id. at ___, Id. at 2534.

[FN71]. Id. (quoting Republican Party v. Kelly, 247 F.3d 854, 861 (8th Cir. 2001)).

[FN72]. Id. at ___, Id. at 2535.

[FN73]. Id. at ___, Id. at 2536.

[FN74]. Id.

[FN75]. Id.

[FN76]. Id. at ___, Id. at 2542.

[FN77]. See id. at ___, See id. at 2540.

[FN78]. Near, 283 U.S. at 713.

[FN79]. White, 536 U.S. at ___, 122 S. Ct. at 2540 (internal citation omitted).

[FN80]. See, e.g., Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Adler v. Bd. of Educ., 342 U.S. 485 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (holding professor in contempt for his refusal to answer questions posed by the Attorney General regarding the content of his lectures was a violation of the professor's liberties regarding academic freedom and political expression); Wieman v. Updegraff, 344 U.S. 183 (1952) (statute requiring faculty and staff to take an oath of loyalty denying any past involvement with Communist organizations offended the employees' constitutional rights); Saleh v. Upadhyay, 11 Fed.Appx. 241 (4th Cir. 2001) (university retaliated against faculty when it threatened professors' tenure after they wrote a paper on wrongful acts performed by the university); Vanderhurst v. Colo. Mtn. Coll. Dist., 208 F.3d 908 (10th Cir. 2000) (when professor was fired by college and claimed that it was based on speech made in the classroom and, therefore, violated his First Amendment rights, the college must show that their pedagogical interests outweigh the professor's First Amendment interests); Gardetto v. Mason, 100 F.3d 803 (10th Cir. 1996); and Powell v. Gallentine, 992 F.2d 1088 (10th Cir. 1993) (university was not entitled to qualified immunity after firing professor for voicing allegations of grade fraud by the university because the speech was on matters of public concern and the interests of the professor outweighed the interests of the school).

[FN81]. 391 U.S. 563 (1968).

[FN82]. 461 U.S. 138 (1983).

[FN83]. 438 U.S. 378 (1987).

[FN84]. 511 U.S. 661 (1994).

[FN85]. See Hiers, supra note 1, at 107.

[FN86]. See id.

[FN87]. See id.

[FN88]. See, e.g., Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000). While cases such as Urofsky view professors as public employees, it is a hotly contested issue whether or not professors are mere government workers, to be treated in the same manner as other government employees. See, e.g., Richard Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?, 40 WAYNE L. REV. 1, 22 (Fall 1993):

> Public school teachers and state college or university professors may not usually think of themselves as government employees, but for many legal purposes they are. Strangely, in First Amendment litigation, higher ranking public school, college, and university officials typically are referred to-- somewhat loosely--as "government employers" or even more loosely, as "the government." That in a democracy the public is the ultimate employer of even the highest elected and appointed officials often seems forgotten.

[FN89]. The letter in pertinent part read,

> ... [T]wo new high schools have deviated from the original promises by the Board of Education.
>
> ... [W]e have problems passing bond issues ....
>
> As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.

Pickering, 391 U.S. at 575-78.

[FN90]. Pickering, 391 U.S. at 564.

[FN91]. Id. at 565.

[FN92]. Id.

[FN93]. Id. at 574.

[FN94]. Id.

[FN95]. Id. at 568.

[FN96]. See Connick, 461 U.S. at 138.

[FN97]. Id.

[FN98]. Id.

[FN99]. Id.

[FN100]. Id.

[FN101]. Id. at 147-48.

[FN102]. Id. at 148.

[FN103]. Id.

[FN104]. Id.

[FN105]. 483 U.S. 378 (1987).

[FN106]. Id. at 380.

[FN107]. Id. at 381.

[FN108]. Id. at 382.

[FN109]. Id.

[FN110]. Id. at 383.

[FN111]. See id.

[FN112]. Id. at 384.

[FN113]. Id. at 387.

[FN114]. Id. at 389.

[FN115]. Id. at 392.

[FN116]. 511 U.S. 661 (1994).

[FN117]. Id.

[FN118]. Id.

[FN119]. Id.

[FN120]. Id. at 664. Additionally, the Court found that there was enough evidence to produce an issue of fact as to whether the plaintiff was dismissed from her position because of things she said to one of her superiors, or because of criticisms she voiced concerning programs of the hospital to which her superior was sensitive.

[FN121]. Id.

[FN122]. Id. at 668.

[FN123]. Id. at 671.

[FN124]. Id.

[FN125]. Id. at 675.

[FN126]. See id. The Court explained that:

> [G]overnment agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the [employer] may ... fire the [employee] is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the [employer] and the [employer's] staff have a job to do, and the [employer] justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Id. at 674-75.

[FN127]. Id. at 680.

[FN128]. See, e.g., Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); and Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566 (7th Cir. 2002).

[FN129]. 100 F.3d 803 (10th Cir. 1996).

[FN130]. Id. at 812 (quoting Connick, 461 U.S. at 146).

[FN131]. Gardetto was employed in the capacity of Director of Nontraditional Student Services/Special Services for Eastern Wyoming College. Her position required her supervision of four staff members and twelve peer counselors at the College's Adult Reentry Center ("ARC"). She alleged that six speech incidents in particular led to her demotion and suspension:

> (1) her criticism of the college's proposed reduction-in-force procedures at the college's board of trustees meeting, (2) her opposition to the application of those procedures to terminate a fellow ARC employee and eliminate that employee's position, (3) her support for a vote of "no confidence" in [the president of the college] by a local faculty association, (4) her criticism of [the president] for holding himself out as a "doctor" when he did not have a doctoral degree, (5) her campaign support of three non-incumbent candidates vying for a position on the college's board of trustees, and (6) her criticism of the reorganization of the ARC to a visitor giving a speech at the college.

Id. at 808.

[FN132]. Id. at 811.

[FN133]. Id. at 812.

[FN134]. Id. at 817.

[FN135]. 102 F.3d 1179 (11th Cir. 1997).

[FN136]. Id. at 1181.

[FN137]. Id. It is interesting to note here that the heightened pleading standard used the by the Eleventh Circuit in this case may violate the Federal Rules of Civil Procedure as the United States Supreme Court understands them. See, e.g.,

Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002) (The Court resolved a split among the federal circuit courts, holding that a heightened pleading standard that requires a party to present a prima facie case in order to survive a motion to dismiss conflicts with the Federal Rules of Civil Procedure. The Court explained that Rule 8(a) clearly states that a party's complaint only needs to state "a short and plain statement of the claim showing that the pleader is entitled to relief.") (quoting Fed. R. Civ. P. 8(a)(2)).

[FN138]. Id. at 1182.

[FN139]. Id.

[FN140]. Id. at 1183.

[FN141]. Id.

[FN142]. Id.

[FN143]. Id. at 1184.

[FN144]. 992 F.2d 1088 (10th Cir. 1993).

[FN145]. Id. at 1089-90.

[FN146]. Id.

[FN147]. Id. at 1090-91 (quoting Connick, 461 U.S. at 148).

[FN148]. Id. at 1091.

[FN149]. Id.

[FN150]. Id. (internal citation omitted).

[FN151]. 119 F.3d 668 (8th Cir. 1997).

[FN152]. Id.

[FN153]. Id. at 670-71.

[FN154]. Id. at 671.

[FN155]. Id. at 672.

[FN156]. Id. at 673.

[FN157]. Id.

[FN158]. Id.

[FN159]. Id. at 670. See also Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996), rehearing en banc, opinion vacated by, Burnham v. Ianni, 119 F.3d 668 (1997).

[FN160]. Id. at 681.

[FN161]. Id. at 678-79.

[FN162]. See id. at 679.

[FN163]. Id.

[FN164]. Id. at 680.

[FN165]. See id.

[FN166]. See Stephen Allred, Note, Connick v. Myers: Narrowing the Free Speech Right of Public Employees, 33 CATH. U. L. REV. 429, 456 (1984).

[FN167]. See Bruce Bodner, Constitutional Rights -- United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech -- Waters v. Churchill, 114 S. Ct. 1878 (1994), 68 TEMP. L. REV. 461, 490 (1995); and Peter C. McCabe, Note, Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees, 60 IND. L.J. 339 (1985).

[FN168]. See, e.g., Hope v. Pelzer, 536 U.S. 730 (2002) (explaining that for purposes of qualified immunity, the salient question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional); and U.S. v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992) (finding that a defendant against whom the government sought the death penalty pursuant to a statute permitting such penalty against a person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise, but which does not provide means of execution, had fair warning of consequences of his conduct at time he allegedly committed murders).

[FN169]. See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (holding that the government's warning to booksellers that certain book titles could be found obscene was an illegal prior restraint on speech).

[FN170]. Crue, 137 F. Supp. 2d at 1086.

[FN171]. Id.

[FN172]. Id.

[FN173]. See Pickering, 391 U.S. at 563.

[FN174]. Crue, 137 F. Supp. 2d at 1088.

[FN175]. See Waters, 511 U.S. at 661; and Edward J. Velazquez, Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court, 61 BROOK. L. REV. 1055 (1995).

[FN176]. See Crue, 137 F. Supp. 2d at 1086.

[FN177]. See id. at 1079.

[FN178]. Id.

[FN179]. Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and for a Preliminary Injunction at 2, Crue v. Aiken, 137 F. Supp. 2d 1076 (C.D. Ill. 2001) (No. 01-1144).

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