Dangerous Thoughts? Academic Freedom, Free Speech, and Censorship Revisited in a Post-September 11th America

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INTRODUCTION

On September 26, 2001, *The O'Reilly Factor*[1] aired an interview with Dr. Sami Al-Arian, a Kuwaiti-born Palestinian professor of computer science at the University of South Florida ("USF"). During the interview, Dr. Al-Arian was repeatedly accused of terrorist involvement.[2] The interview sparked an alarming chain of events that rocked southern Florida's academic world. In the days immediately following Al-Arian's appearance, USF received an overwhelming number of calls and letters, both threatening Al-Arian and attracting negative media attention to the University.[3] After giving Al-Arian an extended paid leave, USF President Judy Genshaft released a

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1. *The O'Reilly Factor* is a television news program, broadcast on the FOX News cable network.

2. In the September 26, 2001 interview, host Bill O'Reilly accused Al-Arian of "having radical views, of having made radical statements in the past, and of having possible ties to terrorist groups." Thor L. Halvorssen, *The University of South Florida Betrays the Rule of Law: The "Thug's Veto" and the Ongoing Case of Sami Al-Arian*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE) (Jan. 29, 2002), *at* http://www.thefire.org/issues/arian.php3 (on file with the Washington University Journal of Law & Policy). O'Reilly persisted in his accusations, despite Al-Arian's repeated denials of having any terrorist involvement. *Id.*

It should be noted that at *that* time, Al-Arian had not been charged with any crime, even after intense investigation by the FBI and other U.S. authorities. *University Seeks to Fire Scholar for Reputed Link to Terrorism*, N.Y. TIMES, Aug. 22, 2002, at A18 [hereinafter *Fire Scholar*]. *See also infra* note 13.

3. Lou Marano, *University Moves to Fire 'Disruptive' Prof*, UPI, Jan. 29, 2002, LEXIS, Nexis Library, UPI File. At times, the disruption to the school was severe enough to require the temporary closing of parts of the USF College of Engineering. Memorandum from Thomas M. Gonzalez, Attorney, to R. B. Friedlander, Interim General Counsel, University of South Florida (Dec. 17, 2001) at para. 5 [hereinafter Gonzalez], *available at* http://www.usf.edu/News/2001/arianindex.htm.

statement announcing the University's intention to revoke Al-Arian's tenure and terminate his employment.[4]

Sami Al-Arian's case is just one example of the hateful public response that often arises when professors and other public individuals act or speak in a controversial manner.[5] Though such words or actions are rarely intended to harm anyone or to incite raucousness, the offended public frequently demands strong reprimands or termination.[6]

Since the terrorist attacks of September 11, 2001, the United States, now more than ever, must be wary of when and to what extent academia gives in to the pressures applied by a newly frightened and paranoid public. It is true that academic institutions have some legal right to control the conduct of their professors, especially actions within the scope of one's professional employment.[7] Yet, it is equally true that all citizens' First Amendment speech and expression rights continue to be paramount principles of American constitutional law.[8]

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4. Press Release, Judy Genshaft, President, University of South Florida, Statement of University of South Florida President Judy Genshaft (Dec. 19, 2001) [hereinafter Genshaft], *available at* http://www.usf.edu/News/2001/arianindex.htm. Prior to the start of the 2002–03 academic year, USF reiterated its plan not only to dismiss Al-Arian, but also to pursue a judicial declaration of the dismissal's validity, thus enjoining Al-Arian from pursuing his own legal claims. *Fire Scholar*, *supra* note 2, at A18. However, on December 16, 2002, the United States District Court for the Middle District of Florida declined to hear USF's declarative suit, allowing Al-Arian to continue his pursuit of First Amendment claims. *Judge Declines to Hear University Case*, UPI, Dec. 16, 2002, LEXIS, Nexis Library, UPI File [hereinafter *Judge Declines*]. The District Court, in dismissing USF's declarative suit, considered only judicial intervention, and did not address the merits of USF's or Al-Arian's claims. *Id.* at para. 8.

5. Also consider the case of the late Columbia University Professor Edward W. Said, an outspoken Palestinian advocate. *See* Karen W. Arenson, *Columbia Debates a Professor's 'Gesture*,*'* N.Y. TIMES, Oct. 19, 2000, at B3. When photographs were released that depicted him hurling a rock at an Israeli guardhouse from the Lebanese border, many demanded that Columbia denounce the action and reprimand Professor Said. *Id.* However, Columbia University issued a statement defending Said's right to academic freedom and freedom of expression, stating Said's gestures were protected because "'the stone was directed at no one; no law was broken . . . no criminal or civil action has been taken against Professor Said.'" *Id.* (quoting the Columbia University Provost's statement in the school newspaper).

6. *Id.*

7. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (discussing the need for universities to retain a right to control academic environment and curriculum).

8. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (discussing America's deep commitment to "safeguarding academic freedom" and defending the important First Amendment individual liberties).

In the specific case between USF and Al-Arian, other significant factors and considerations come into play. First, Al-Arian was a tenured professor at USF, a public university. His employer was the State of Florida, a government, as opposed to a private employer.[9] Second, the statements and actions that led to the "disruption" on USF's campus occurred outside the classroom, the campus, and Al-Arian's scope of employment.[10] Finally, although it is quite clear that a "disruption," in the form of threatening letters and phone calls, occurred following the *O'Reilly* appearance, it is important to consider both the true source of the alleged disruption,[11] and what actually constitutes an actionable disruption.[12]

The primary aim of this Note is to use the case of Sami Al-Arian as a framework[13] for an examination of the situation in which disruption and (perhaps unfounded) public outcry are cited to negate

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9. USF is one of eleven public universities in Florida. The state government, specifically the Division of Colleges & Universities within the Florida Board of Education, Colleges & Universities, operates USF and the other universities. *See* Board of Education, Tour Florida's Universities, *at* http://www.fldcu.org/univ_info/unitour.asp (last visited Oct. 13, 2003).

10. The initial spark for the public reaction was Al-Arian's appearance on *The O'Reilly Factor*. In addition, on October 28, 2001, television news magazine *Dateline NBC* showed a film clip from thirteen years earlier, in which Sami Al-Arian made strong anti-Israel remarks at a 1988 conference in Cleveland. Stephen Goode, *Free Speech vs. Campus Security*, INSIGHT, Feb. 13, 2002, *at* http://www.insightmag.com/main.cfm/include/detail/storyid/182119.html.

11. For example, in this case, the disruption might be more properly understood as the direct result of the regrettable actions of the "angry individuals outside of the University, who wished to see Professor Al-Arian sanctioned, fired, or harmed for his protected beliefs and affiliations." Halvorssen, *supra* note 2, at para. 5 (quoting FIRE president and University of Pennsylvania history professor Alan Charles Kors).

12. Courts invoke a balancing test between the public employee's right to free expression and the public employer's right to avoid undue disruption that might impair its ability to provide its services. *See* Waters v. Churchill, 511 U.S. 661 (1994); Rankin v. McPherson, 483 U.S. 378 (1987); Pickering v. Bd. of Educ., 391 U.S. 563 (1968). The balancing test, first formally delineated by the Supreme Court in *Pickering v. Board of Education*, is discussed in detail *infra* notes 63–87 and accompanying text.

13. On February 20, 2003 (after this Note had been written and submitted for publication), Sami Al-Arian was taken into custody by FBI agents. Al-Arian, along with seven others, were indicted on numerous charges, including terrorism-related crimes. *USF Professors Vow to Stand by Colleague*, UPI, Feb. 21, 2003, LEXIS, NEXIS Library, UPI File [hereinafter *USF Professors*]. This Note does not aspire to predict or in any way endorse the guilt or innocence of Sami Al-Arian. Further, while his story is used as a framework, the eventual fate of Al-Arian is not crucial to this Note's purpose regarding issues of legal and constitutional rights. *See* Addendum to Dangerous Thoughts?: Accounting For the Arrest of Sami Al-Arian, 15 WASH. U. J.L. & POL'Y 269 (2004).

so-called "academic freedom" and to censure a professor's right to free expression.[14]

Part I of this Note discusses the recent legal history of content-based regulation of speech, including the criteria for "content-based" classification and the resulting strict scrutiny test. Part II gives an overview of the "fighting words" doctrine, which provides for the unquestioned censorship of certain types of inflammatory speech falling entirely outside the protection of the First Amendment. Part III focuses on the history of academic freedom as a legal doctrine, particularly examining whether the freedom is vested in an individual instructor or in the academic institution. In Part IV, this Note discusses "disruption" as a means of justifying the restriction of a public employee's statements or expressions. Part V analyzes the law with respect to Al-Arian's case, concluding that his censorship is an inappropriate restriction of protected speech. In Part VI, this Note concludes by proposing that, in situations like this one, courts, public employers, and the State must take special care to maintain and defend the rights to which all Americans are entitled. While fear has played into the public's views in recent years, the ultimate responsibility of protecting constitutional freedoms will lie with the courts.

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14. In addition to the constitutional issues of free speech and academic freedom, there are a number of other issues that factor into the Sami Al-Arian case. These include questions of contractual obligations, collective bargaining guarantees for arbitration, and due process concerns. *See* Gonzalez, *supra* note 3, at para. 2; *Judge Declines*, *supra* note 4, at para. 2; Press Release, USF Chapter, United Faculty of Florida, Due Process [hereinafter Due Process], *at* http://w3.usf.edu/~uff/AlArian/IssuesProcess.html (last visited Oct. 14, 2003).

These issues, however, are beyond the scope of this Note. The purpose of this Note is *not* to suggest a specific outcome in the Al-Arian case, but rather to establish general guidelines for the protection of essential constitutional freedoms in the face of public distrust and disdain. In today's newly cautious and fearful America, these issues are of paramount importance anytime "disruption" is the cause for censure or dismissal from public employment, particularly within the academic realm.

I. CONTENT-BASED REGULATION OF FIRST AMENDMENT FREE SPEECH

That "Congress shall make no law . . . abridging the freedom of speech" is a deep-rooted maxim of American constitutional law.[15] Courts are willing to take great steps to protect the safety of this American freedom.[16] Therefore, any infringement on free speech "must be subjected to the most exacting scrutiny."[17]

A court's first step in analyzing the legitimacy of speech regulation is to determine whether the restriction is "content-based."[18] Traditionally, any regulation based on the content of the speech has been deemed content-based.[19] In recent years, even restrictions based on the speech's effect on listeners have been declared content-based.[20]

Once deemed to be a content-based restriction of free speech, the regulation survives only if it is narrowly drawn to further a compelling state interest.[21] A restriction is narrowly drawn when it

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15. U.S. CONST. amend. I.

16. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.") (citation omitted); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

17. *Boos*, 485 U.S. at 321.

18. Reasonable restrictions on only the time, place, or manner of speech, with complete disregard for the actual content of the speech, may be permissible. *See* United States v. Grace, 461 U.S. 171, 177 (1983). On the other hand, where a restriction is considered content-based, it will be upheld only after passing the court's strict scrutiny. *Boos*, 458 U.S. at 321.

19. *Boos*, 458 U.S. at 335–36 (Brennan, J., concurring in part and concurring in the judgment) ("The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it.").

20. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court held that regulations aimed solely at the "secondary effects" of speech or expression on the surrounding community are justifiable, content-neutral restrictions. In *Boos*, however, the majority distinguished a listeners' reaction from "secondary effects," reasoning that a regulation based on the former "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." 458 U.S. at 321. *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992).

21. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Another question to consider is how the courts will determine what constitutes a "compelling

"employs the least restrictive means" to promote its interest.[22] In addition, there must be a clear "nexus between the government's compelling interest and the restriction."[23]

The government bears a substantial burden when it regulates speech.[24] If the government can meet its burden by passing the strict scrutiny test, then the regulation may be upheld, despite the restriction it places on free speech.[25] In practice, however, it may be very difficult for the regulation to survive the strict scrutiny examination.[26] Therefore, content-based infringements on free speech are often declared unconstitutional.[27]

II. THE "FIGHTING WORDS" DOCTRINE

The strict scrutiny test is applied whenever there is a content-based restriction on speech protected by the First Amendment. Some

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state interest." In its simplist form, a definition might be sought by balancing the general interest in protecting free speech with the government's interest that is purportedly furthered by the restriction. *See* PSINET, Inc. v. Chapman, 167 F. Supp. 2d 878, 886 (W.D. Va. 2001) ("[T]he burden imposed by the government on speech must be outweighed by the benefits gained by the challenged [restriction].").

22. *PSINET*, 167 F. Supp. 2d at 886; *see also* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). Thus, where a less restrictive approach might have been equally (or more) effective in furthering the State's legitimate interest, the infringement on free speech does not satisfy strict scrutiny and is unconstitutional. *PSINET*, 167 F. Supp. 2d at 886 (citation omitted).

23. *PSINET*, 167 F. Supp. 2d at 886 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.") (citation omitted); *Sable Communications*, 492 U.S. at 126; Sweezy v. New Hampshire, 354 U.S. 234, 254 (1957).

24. Any content-based restriction on speech otherwise protected by the First Amendment is presumptively invalid. *See Sable Communications*, 492 U.S. at 126. To overcome this presumption, the government must not only allege a compelling state interest, but it must also show a nexus between the legitimate interest and the proposed restriction upon speech. "This burden is not insignificant." *PSINET*, 167 F. Supp. 2d at 884. The fact "that the Government's asserted interests are important in the abstract does not mean, however, that the [restriction upon speech] will, in fact, advance those interests." Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994) (quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985). Without this nexus, no compelling interest, no matter how great, will persuade the courts to permit a functionally unrelated restriction on free speech to stand. *Id.*

25. *PSINET*, 167 F. Supp. 2d at 884.

26. *Id.* at 884.

27. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992); *Sable Communications*, 492 U.S. 115; Boos v. Barry, 485 U.S. 312 (1985); *PSINET*, 167 F. Supp. 2d 878.

classes of speech, however, have traditionally been outside the Constitution's protection.[28] Among those classes of speech are "fighting words," defined as speech uttered with little or no expressive purpose and tending to cause a swift, violent response or an immediate breach of the peace.[29]

When the restricted speech constitutes fighting words, the strict scrutiny test is unnecessary.[30] Free speech is not an absolute freedom and fighting words are without First Amendment protection.[31] The difficulty in applying this doctrine is determining what speech is or is not "fighting words." It is unclear as to where unprotected speech ends and protected—even if offensive or inflammatory—speech begins.[32]

To determine the scope of the "fighting words" doctrine, one must first consider the role of free speech and the purpose for denying protection to certain narrowly defined classes of speech. One must apply a balancing test, weighing the value (if any) of the restricted

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28. *Chaplinsky v. New Hampshire* is the landmark case in defining unprotected classes of speech. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), *aff'g* State v. Chaplinsky, 18 A.2d 754, 91 N.H. 310 (N.H. 1941). In *Chaplinsky*, a man was convicted of violating a state statute when, in a face-to-face confrontation, he shouted strong and offensive epithets at a city marshal. *Id.* at 569.

29. Justice Murphy, delivering the opinion of the Court in *Chaplinsky*, offered the following rationale:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571–72 (footnote omitted). *See also* Hershfield v. Commonwealth, 417 S.E.2d 876, 879 (Va. Ct. App. 1992) ("[T]he words must 'by their very utterance provoke a swift physical retaliation and incite an immediate breach of the peace.'"); KENT GREENAWALT, FIGHTING WORDS 50–53 (3d ed. 1996) (suggesting that "fighting words" are those that are uttered with no expressive intent or purpose, but solely to inflict harm and to instigate a violent response).

30. The purpose of the strict scrutiny test is to protect individuals from governmental restrictions on constitutional freedoms. *See supra* notes 15–27 and accompanying text. When, as with fighting words, no constitutional freedom is guaranteed, the strict scrutiny test would serve no real purpose.

31. *See Chaplinsky*, 315 U.S. at 571 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

32. *See generally* GREENAWALT, *supra* note 29 (discussing the "fighting words" doctrine and its applicability).

speech against the benefit gained from the restriction.[33] However, there is a significant difference between this balancing test and the strict scrutiny balancing test. When applying strict scrutiny, the court focuses on the weight of the government's compelling interest.[34] On the other hand, in defining fighting words and other unprotected classes of speech, the court focuses on the speech, and its overall lack of weight or compelling purpose.[35]

It follows that, perhaps, "fighting words" must also be defined by the intent or purpose of the speaker.[36] To be censored, the targeted speech must do more than offend, it must be intended to provoke a physical and violent response from the person to whom the speech was directed.[37] The anticipated response must be immediate and imminent, thus requiring the target of the speaker's epithets to be present and in close proximity.[38]

A survey of the relevant case law illustrates a general rule for defining legitimately unprotected fighting words. To be outside the protection of the First Amendment, utterances must: (1) be directed at an individual or group; (2) be in the addressee's presence and "face-to-face"; (3) lack the intent to disseminate ideas; and (4) be intended

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33. *Chaplinsky*, 315 U.S. at 572.

34. The benefits derived from furthering a "compelling state interest" are balanced against the significant burden the proposed restriction or constraint places on free speech. PSINET, Inc. v. Chapman, 167 F. Supp. 2d 878, 886 (W.D. Va. 2001).

35. *See Chaplinsky*, 315 U.S. at 572.

36. In the case of Mr. Chaplinsky, for example, his utterance "was not useful or proper comment for bringing truth to light. [Rather, the utterance's] plain tendency was to further breach of order, and it was itself a breach of the peace." State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941), *aff'd*, 315 U.S. 568 (1942).

37. In Virginia, an abusive language statute is constitutional, and a conviction may be upheld when fighting words are uttered, such that "the use of such words under the circumstances are reasonably calculated to provoke a violent reaction and retaliation." Mercer v. Winston, 199 S.E.2d 724, 727 (Va. 1973) (upholding a conviction where the defendant cursed and shouted "violent abusive language" at a Richmond police officer during a public uprising). The Supreme Court roundly rejected a similar Georgia statute for "utterances where there was no likelihood that the person addressed would make an immediate violent response . . . ." Gooding v. Wilson, 405 U.S. 518, 528 (1972).

38. Hershfield v. Commonwealth, 417 S.E.2d 876, 879 (Va. Ct. App. 1992) (Benton, J., concurring) ("[T]he constitutional application of this statute depends upon whether 'fighting words' were spoken in [the addressee's] presence"). The Supreme Court "has never upheld a conviction for fighting words that don't involve face-to-face encounters . . ." Jeffrey Rosen, *Fighting Words*, LEGAL AFF., May-June 2002, at 16, *available at* WL 2002-JUN LEGAFF 16.

to provoke an immediate and violent response from the addressee, so as to constitute an instant breach of the peace.[39]

III. ACADEMIC FREEDOM AND ITS LIMITATIONS

The Supreme Court often describes the doctrine of academic freedom as "a special concern of the First Amendment."[40] As such, the judiciary generally cautions the government against restricting individuals' rights in this area.[41] Yet, as with most constitutional freedoms, academic freedom is not absolute.[42] Therefore, lines must be drawn to determine when academic freedom is entrusted to the professor and when control is vested elsewhere, such as with the academic institution or the State.

A. Statements Within the Classroom

Teacher-based academic freedom is grounded in the fundamental purpose of the classroom: To serve as a "marketplace of ideas."[43]

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39. *Hershfield*, 417 S.E.2d at 879–80 (Benton, J., concurring) (citations omitted) (providing one of the most comprehensive judicial definitions of fighting words).

40. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id.; *see also* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991).

41. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (holding that the liberties of academic freedom and political expression are "areas in which [the] government should be extremely reticent to tread").

42. "By now, most have come to accept it as a fact of life that the members of a different profession—the judiciary—will have much to say about what academic freedom does and does not cover. " Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1, 1 (1993). Courts have held that academic freedom is not an expressly guaranteed constitutional freedom: "Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right." *Bishop*, 926 F.2d at 1075.

43. *Keyishian*, 385 U.S. at 603 ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (alteration in original)).

Because the academic university is "characterized by the spirit of free inquiry," members of the institution implicitly bear the right "to examine, question, modify or reject traditional ideas and beliefs."[44] Within the classroom, however, even members of the academic profession acknowledge that limits exist.[45] For example, the American Association of University Professors ("AAUP") prohibits professors from acting unprofessionally or dishonestly and from engaging in "meaningless scholarship."[46] Outside the classroom, the profession recognizes the need for professors to be "duty-bound to preserve the dignity of their calling."[47]

The courts, however, have held that, in many respects, academic freedom is actually vested in the university, rather than in the individual professors.[48] In *Bishop v. Aronov*, the Eleventh Circuit Court of Appeals held that a university classroom is not an open forum during instructional class time.[49] While it is possible for an institution to create an open forum in its facilities, it may also restrict the use of such facilities whenever it deems it necessary.[50]

With regard to in-class activities, courts have repeatedly held "that universities and schools should have the freedom to make decisions about how and what to teach."[51] Perhaps the most repeated judicial explanation of university control over the classroom is found in

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44. *Sweezy*, 354 U.S. at 262.

45. Metzger, *supra* note 42, at 2.

46. Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 241 (2002) (citing AAUP, GENERAL DECLARATION OF PRINCIPLES, 1915, *reprinted in* 2 AMERICAN HIGHER EDUCATION 860 (Richard Hofstadter & Wilson Smith eds., 1961)).

47. Metzger, *supra* note 42, at 2.

48. The Supreme Court has been reluctant "to trench on the prerogatives of state and local educational institutions" and has taken on a "responsibility to safeguard [the institutions'] academic freedom. . . ." Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985). The Court further noted: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12 (citations omitted); *see also* Bramhall & Ahrens, *supra* note 46, at 244.

49. 926 F.2d 1066, 1071 (11th Cir. 1991).

50. While overruling the district court's opinion that a classroom is necessarily an open forum, the Eleventh Circuit opinion quoted *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988), which held a school classroom is not, *per se*, an open forum for the unbridled exchange of ideas. *Bishop*, 926 F.2d at 1071

51. Bd. of Regents v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring), *quoted in* Bramhall & Ahrens, *supra* note 46, at 244.

Sweezy v. New Hampshire, where the Supreme Court emphasized the "four essential freedoms" of the institution.[52] These freedoms, which include the determination of who may teach and what may be taught, apply to in-class speech; however, the rules are different for speech outside the classroom.[53]

B. Out-of-Classroom Statements and Restrictions

Even when an employee addresses his statements to the general public, outside of the classroom, the State, as an employer, maintains certain interests and authority over its academic employees.[54] However, this control is far less pervasive than control over in-class speech. In these cases, courts have framed the issue much like content-based free speech cases, relying less on principles of academic freedom and more on balancing individual and state interests to reach a conclusion.[55]

IV. THE DISRUPTION DOCTRINE

Disciplinary action for public teachers' and professors' statements made outside the scope of employment are hardly "academic freedom" cases. Rather, these scenarios are reviewed like those of

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52. The Supreme Court enumerated the "four essential freedoms" to explain the legal basis and meaning of "academic freedom," as it applies to universities. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand in South Africa stating "the four essential freedoms" of a university are to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

53. In regulating in-class utterances, courts look to "the 'basic education mission' of the school which gives it authority by the use of 'reasonable restrictions' over in-class speech that it could not censor outside the classroom." *Bishop*, 926 F.2d at 1074 (quoting *Kuhlmeier*, 484 U.S. at 266–67).

54. "While neither teachers nor students 'shed their constitutional rights to [free speech] at the schoolhouse gate[,]' the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 1072 (citations omitted) (brackets in original).

55. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) The goal of out-of-school speech cases "is to arrive at 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." *Id.*

other public employees who are terminated for sharing their views.[56] The employee's protections and rights depend upon the nature of the utterance or action and the disruption of the public employer's ability to efficiently provide public services.[57]

A. The State's Rights as an Employer

In cases like Al-Arian's, where an individual brings a constitutional claim against his public employer, the State is forced to play a peculiar role. The State, as sovereign, ordinarily cannot encroach on an individual's speech rights.[58] However, when the State acts as an employer, courts have granted the State greater latitude to limit employees' expression.[59]

When acting as an employer, the State serves a dual function: it must abide by the Constitution and it must effectively provide public services to the citizenry.[60] The Supreme Court has repeatedly recognized a "common sense realization" that public employers cannot operate "if every employment decision became a constitutional matter."[61] Curiously, however, courts have also held that a State may not discharge an employee with total disregard for

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56. *Compare Pickering*, 391 U.S. 563 (examining a public schoolteacher's right to publicly criticize his district's financial policies), *with* Connick v. Myers, 461 U.S. 138 (1983) (considering an incendiary questionnaire distributed by an assistant district attorney to co-workers), *and* Rankin v. McPherson, 483 U.S. 378 (1987) (addressing comments made by a clerk in a county constable's office regarding an assassination attempt on the President of the United States). Each of these cases applied the same basic test, balancing the right of the employee to speak on matters of public concern with the state's right as employer, to ensure the efficiency of the public services it offers.

57. *See Pickering*, 391 U.S. at 568–73.

58. *See supra* notes 15–27 and accompanying text. This rule holds true except in those cases in which either the restriction complies with a strict scrutiny judicial standard, *supra* notes 15–27, or the actions or utterances fall within a class of speech outside the First Amendment's protection, *supra* notes 28–39 and accompanying text.

59. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671 (1994) ("[W]e have always assumed . . . that the government as employer indeed has far broader powers than does the government as sovereign.").

60. *Rankin*, 483 U.S. at 378, 384.

61. *Connick*, 461 U.S. at 143 (footnote omitted). As an illustration, consider a D.M.V. employee who is repeatedly rude to customers. The State, as employer, must have the ability to remedy the situation, even though such a "non-rudeness" standard set by the State, as sovereign, would be "almost certainly too vague when applied to the public at large." *Waters*, 511 U.S. at 673 (citations omitted).

her constitutionally protected speech rights.[62] This dichotomy gives the judiciary the task of resolving the balance between two substantially competing interests.

B. The Pickering *Balancing Test*

When a public employee comments on matters of public concern, his free speech rights are generally protected and must be balanced against the State's interest in effectively providing public services without substantial disruption.[63] In *Pickering v. Board of Education*, the Supreme Court addressed a teacher's out-of-school statement criticizing his public employer.[64] In holding for the teacher, the Court employed a two-part test to determine the validity of this type of employee speech restriction.[65]

The first prong of the test requires a showing that the restricted statements addressed a "matter of public concern."[66] The burden then shifts to the State to show that its interest, as an employer, in promoting the efficiency of its public services outweighs the employee's free speech rights.[67] The Court, in *Pickering*, suggested several factors that may create a substantial State interest, many of

62. *Rankin*, 483 U.S. at 383 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). In *Perry*, a teacher was ordered reinstated after being terminated for publicly voicing opinions on his college's potential elevation to four-year status. The Supreme Court held that the employee's freedom of speech was violated if his termination was based on his criticism of administration policies. 408 U.S. at 598.

63. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

64. *Id.* at 564–67. Marvin Pickering, a schoolteacher, published a letter in a local newspaper criticizing his school district employer for mishandling revenue-producing proposals. *Id.* at 564. After a full hearing, the Board of Education determined that his letter was detrimental to the efficient operation of the schools. *Id.* at 566–67. The Board dismissed Pickering, stating that such action was necessitated by the "interests of the schools." *Id.* at 565.

65. *See generally id.* at 568–73.

66. *Id*. at 568–70; *see also* Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). While this first prong was barely addressed in the *Pickering* opinion, it has been the central issue in a number of other cases. *See, e.g.*, *Rankin*, 483 U.S. at 384–87; *Connick*, 461 U.S. at 143–49. Though only sporadically addressed in *Pickering*, the Court indicated that the teacher-employee's published statements clearly addressed matters of public concern, making detailed analysis unnecessary. *Pickering*, 391 U.S. at 570–72.

67. *Pickering*, 391 U.S. at 568.

which addressed workplace disruption.[68] Thus, the State must produce adequate evidence of a resulting disruption.[69]

Although the *Pickering* balancing test is, theoretically, easy to apply, there has been a great deal of debate over its definitions. Parties, and Justices of the Supreme Court, often disagree about what constitutes "public concern" and what situations create an "adequate disruption."[70]

1. Defining "Matters of Public Concern"

For at least a half-century, public employers were treated like private employers with respect to personnel decisions. The employer was generally permitted to place any conditions it deemed necessary on employment, even if these conditions invaded constitutional freedoms.[71] However, beginning in the 1950s, and continuing through the *Pickering* decision in 1968, the Court struck down restrictions that "sought to suppress the rights of public employees to participate in public affairs."[72]

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68. *Id.* at 569–73. All but one of the Court's factors in *Pickering* dealt with various forms of disruption. *Id.* This notion of disruption is central to the University of South Florida's argument against Sami Al-Arian, which claims that his statements or actions directly interfered with the school's ability to offer its public services. *See supra* notes 3–4 and accompanying text.

The one factor dealing less directly with disruption involves an employee's remarks that "are so without foundation as to call into question his fitness to perform his duties." *Pickering*, 391 U.S. at 573 n.5. When such a situation arises in public universities, even the AAUP recognizes this restriction, requiring that the instructor possess honesty and a sense of duty to the profession. Bramhall & Ahrens, *supra* note 46, at 241; Metzger, *supra* note 42, at 2.

69. *Rankin*, 483 U.S. at 388.

70. For example, in *Rankin v. McPherson*, 483 U.S. 378, compare the majority opinion, *id.* at 379–92, with the dissenting opinion, *id.* at 394–401. Justice White and Justice Scalia completely disagree as to whether comments made by a public employee regarding the assassination attempt on President Ronald Reagan constituted remarks regarding a matter of public concern. Justice White, writing for the majority, reasoned that speech regarding the life and death of the President "plainly dealt with a matter of public concern." *Id.* at 386–87. Justice Scalia, however, disagreed with this analysis, arguing that the statements, when taken in context, could not "be fairly viewed as lying within the 'heart' of the First Amendment's protection." *Id.* at 396–98 (Scalia, J., dissenting).

71. *See Connick*, 461 U.S. at 143–44. Justice Holmes coined a commonly quoted maxim: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

72. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); Cramp v. Bd. of Public Instruction, 368 U.S. 278 (1961); Cafeteria Workers v.

Despite the recent crackdown on oppressive speech restrictions, the Court does not allow the First Amendment to fully shield public employees from reprimand for all of their speech.[73] In fact, speech regarding purely private or personal matters is not free from restriction in the public workplace.[74] Though the Court is quick to note that speech on private matters is not wholly without protection, it has reasoned that a "federal court is not the appropriate forum" in which to review such cases.[75]

The Court has taken different approaches to determine whether an employee's speech or actions related to a matter of public concern. Sometimes, the Court focuses on the intent of the actor.[76] Other times, the Court looks directly to the statement's content.[77] Fortunately, the Court has expressly renounced the position that the actor's specific viewpoint affects the degree of his First Amendment protection.[78] Despite these various factors and approaches, however,

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McElroy, 367 U.S. 886 (1961); Torcaso v. Watkins, 367 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); *Connick*, 461 U.S. at 144–45 (citing Wiemann v. Updegraff, 244 U.S. 183 (1952)).

73. *Connick*, 461 U.S. at 149 ("[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.").

74. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994).

> [W]e have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters.

Id. This laissez-faire attitude of the Court rests upon the policy that, when possible, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

75. *Connick*, 461 U.S. at 147; *see also Rankin*, 483 U.S. at 384 n.7.

76. In *Connick v. Myers*, the Court denied respondent's claim that her actions were related to a matter of public concern, holding that her statements were more aptly characterized as an extension of a dispute with her superiors. 461 U.S. at 148.

77. In *Rankin v. McPherson*, where the respondent commented on the Reagan assassination attempt, the majority held that her statements dealt with a matter of public concern. 483 U.S. at 386. Justice Marshall reasoned that she was having a conversation addressing the government's current policies and was commenting on a "matter of heightened public attention." *Id.*

78. "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387. Statements criticizing public policy must be protected "to give freedom of expression the breathing space it needs to survive." *Id.* (quoting Bond v. Floyd, 385 U.S. 116, 136 (1966)). This would not hold true if the *Rankin* respondent's statement had amounted to a credible *threat to kill* the President, as such expression is always outside the protection of the First Amendment. 483 U.S. at 386–87.

the Court's conclusions often indicate a reliance on common sense and intuition.[79]

2. Disruption to the Efficient Function of the Public Employer

Once the actor shows that his contested speech related to a matter of public concern, the State bears the burden of justifying the termination on valid grounds.[80] Generally, the State can meet this burden by showing a disruption to the employer's ability to provide public services efficiently through its employees.[81] Courts have found that a disruption may arise from either a resulting impediment to the employee's "proper performance of his daily duties," or an "interfer[ence] with the regular operation" of the public employer's business.[82]

The Supreme Court has recognized many types of disruption.[83] Statements or actions may undermine the employee's superiors' or management's authority.[84] This lack of authority will often lead to increased difficulty in maintaining discipline in the workplace.[85]

79. Consider the *Rankin* Court's statement, quoting the Court of Appeals' decision: "[T]he life and death of the President are obviously matters of public concern." *Id.* at 385 (citation omitted). Sometimes, as in this case and the *Pickering* case, reliance on common sense and intuition take the place of a detailed analysis into the issue of public concern.

80. *Rankin*, 483 U.S. at 388.

81. *See, e.g.*, *Rankin*, 483 U.S. at 388. It is also interesting to note that the strength of the showing of disruption required in any given case is directly tied to the statement's degree of involvement in matters of public concern. *Connick*, 461 U.S. at 152.

82. Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968) (finding that the teacher-employee's public statements were permissible and free from restriction because they led to neither of these detrimental results).

83. "We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationship for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties." *Rankin*, 483 U.S. at 388 (citing *Pickering*, 391 U.S. at 570–73).

84. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 680–81 (1994). In *Pickering*, where the Board of Education claimed damage to its professional reputation, it feared an undermining of authority in the form of "controversy and conflict among the Board, teachers, administrators, and the residents of the district." *Pickering*, 391 U.S. at 570. The Court noted a lack of evidence to support an allegation of damage to reputation, but seemed to suggest that, if substantiated, such a finding would be significant in a review of the employer's actions. *Id.*

85. *See Connick*, 461 U.S. at 151 (citing Arnett v. Kennedy, 416 U.S. 134, 168 (1974)); Pickering, 391 U.S. at 569–70 (suggesting statements impeding the maintenance of discipline might be actionable by the public employer).

Further, the Court has stressed the importance of considering whether the terminated employee's behavior jeopardized the harmonious functioning of important close working relationships between co-workers.[86] In sum, the Court generally bases its analysis on the contested statement's direct interference with relationships between various members of the workplace community.[87]

C. Reliance upon Third-Party Reports of Employee's Statements or Conduct

While much of the relevant case law addresses situations in which the employer heard the employee's statements,[88] situations exist in which the employer must rely on third-party reports of the employee's conduct.[89] The Court has generally acknowledged that, although reliance of this sort is tantamount to decision-making based on hearsay, the evidentiary rules of ordinary judicial procedure are not reasonably applicable to everyday life or personnel decisions.[90] Yet, permitting reliance on third-party reports poses the significant threat of restricting properly protected speech.[91]

In a concurring opinion in *Waters v. Churchill*, Justice Souter explained that such a risk is tolerable, but only under certain

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86. *Connick*, 461 U.S. at 151–52.

87. *Id.*; *see also Rankin*, 483 U.S. at 388 (listing various recognized forms of disruption previously considered by the Supreme Court).

88. *See, e.g.*, *Rankin*, 483 U.S. 378 (concerning an employee's remarks, which she later admitted to her supervisor); *Connick*, 461 U.S. 138 (concerning a employee-written questionnaire distributed to co-workers); Perry v. Sindermann, 408 U.S. 593 (1972) (concerning a public disagreement about policy between a professor and his public college employer); *Pickering*, 391 U.S. 563 (concerning a letter to the editor, written by the employee, published in a local newspaper).

89. A prime example is *Waters v. Churchill*, 511 U.S. 661 (1994). Waters, a nurse, had a discussion with a second nurse, describing serious problems in her department. *Id.* at 665. This dissuaded the second nurse from transferring into the department. *Id.* A third nurse overheard the conversation and reported it to the supervisor, who investigated the situation and eventually terminated Waters's employment. *Id.* at 664–66.

These "third-party report" situations are presumably common, and the issue certainly arises when analyzing the dispute between USF and Sami Al-Arian. Many of Al-Arian's "statements" were actually allegations of his beliefs and actions, attributed to him by Bill O'Reilly. *See supra* notes 1–2 and accompanying text.

90. *See Waters*, 511 U.S. at 675–77. "What works best in a judicial proceeding may not be appropriate in the employment context." *Id.* at 676.

91. *Id.* at 683–84 (Souter, J., concurring).

conditions.[92] First, the public employer must undertake a "reasonable investigation" into the situation to establish the actual facts.[93] After the investigation, the employer should, in good faith, conclude that the report is a true and accurate reflection of the employee's disruptive speech or actions.[94] Justice Souter believed that if either of these elements was missing, then the employee's free speech rights were violated.[95] These additional precautions are necessary to safeguard the First Amendment's primary goal of "full protection of speech upon issues of public concern."[96]

V. ANALYSIS

Those who have denounced USF's termination of Sami Al-Arian as a great injustice—including other USF faculty, the Foundation for Individual Rights in Education ("FIRE"), certain members of the media, and Al-Arian himself—have typically framed the situation in terms of academic freedom.[97] Although this may be proper in the "professional" sense, it may not be an appropriate analysis under constitutional law.[98] In a legal sense, the four "essential" academic

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92. *Id.* at 684. After satisfying these criteria, however, an employer may validly terminate an employee, even where the substantive information that forms the basis of such termination turns out to be incorrect. *Id.* at 679.

93. *Id.* at 677, 679.

94. *Id.* at 684 (Souter, J., concurring). This second element of analysis, requiring the employer to actually believe the report concerning the employee's alleged misconduct, is found only in Justice Souter's concurring opinion. *Id.* at 682–83. The plurality opinion—and thus, the current law—merely requires a reasonable investigation into the allegations of the third-party report.

95. *Id.* at 684–85 (Souter, J., concurring).

96. *Id.* at 684.

97. *See* Eric Boehlert, *The Prime-Time Smearing of Sami Al-Arian*, SALON.COM (Jan. 19, 2002), *at* http://www.salon.com/tech/feature/2002/01/19/bubba/index.html (on file with the Washington University Journal of Law & Policy); Halvorssen, *supra* note 2; *Fire Scholar*, *supra* note 2, at A18; Press Release, USF Chapter, United Faculty of Florida ("UFF"), Why Freedom for Academics? [hereinafter Freedom for Academics], *at* http://w3.usf.edu/~uff/AlArian/IssuesAcadFree.html (last visited Jan. 19, 2003) (on file with the Washington University Journal of Law & Policy).

98. "[C]onstitutional and professional definitions of academic freedom are separate and distinct." Rob Brannon, *AAUP Says USF Court Case Will Have No Effect*, THE ORACLE (Nov. 18, 2002) (quoting an AAUP statement at its semiannual meeting on November 2, 2002), *available at* http://www.usfovacle.com/vnews/display.v/ART/2002/11/18/3dd8ec962984f (on file with the Washington University Journal of Law & Policy).

freedoms are vested in the university,[99] and individual professors enjoy little or no protection regarding what they teach. Further, "academic freedom" generally applies only to those statements made within the university community and within the professor's scope of employment.[100] USF acknowledged that Al-Arian's actions and statements were "unrelated to [his] University duties."[101] As a result, the legal doctrine of academic freedom is not relevant to the Al-Arian case.

If Al-Arian's statements could be classified as "fighting words," other analysis would be moot. Fighting words fall into a class of "unprotected" speech, having no First Amendment freedoms protection.[102] Fighting words, however, are very narrowly defined, requiring (1) face-to-face confrontation,[103] and (2) provocation of swift physical retaliation and immediate breach of the peace.[104] Thus, only "personally abusive epithets" are generally considered "fighting words."[105] Under this approach, Al-Arian's comments do not qualify as fighting words. The immediate cause of the public's outburst, the *O'Reilly Factor* broadcast, did not include anything akin to fighting words.[106] Neither do the circumstances surrounding his comments in

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99. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting Statement, Conference of Senior Scholars, University of Cape Town and University of Witwatersand 10–12); *see also supra* note 52 and accompanying text. Recall that the Supreme Court has declared that, as a general rule, "academic freedom" is vested in the institution, granting the institution the right to determine what is taught, in what manner, and by whom. *See supra* notes 48–53 and accompanying text.

100. *See supra* text accompanying note 55.

101. Gonzalez, *supra* note 3.

102. *See supra* notes 28–29 and accompanying text.

103. *See supra* note 38 and accompanying text.

104. *See supra* note 37 and accompanying text.

105. Hershfield v. Commonwealth, 417 S.E.2d 876, 879–80 (Va. Ct. App. 1992) (Benton, J., concurring).

106. It was Al-Arian's purported intent to appear on the show in order to discuss the peaceful side of Islam with the frightened American public in the aftermath of the September 11th terrorist attacks. James O. Castagnera et al., *Tenure Under Attack in 2002*, 18 No. 4 TERMINATION EMP. BULL. 3 (Apr. 2002).

If anyone uttered fighting words during that interview, it was Bill O'Reilly himself, who tried to provoke Al-Arian with accusations of ties to terrorism. Al-Arian spent most of the interview trying to defend himself against the accusations. For a partial transcript of the interview, see FOX News Channel, *Transcript: O'Reilly Interviews Al-Arian in September 2001* (Aug. 22, 2002) [hereinafter *Transcript*], *at* http://www.foxnews.com/story/0,2933,61096,00.html (on file with Washington University Journal of Law & Policy).

Cleveland in 1988 satisfy the criteria, as those statements merely espoused Al-Arian's views on the Palestinian conflict, which, while unpopular and controversial, are nevertheless protected under the First Amendment.[107]

Unable to rely on academic freedom or the fighting words doctrine, USF is left with a public employer First Amendment free speech case and, thus, the *Pickering* balancing test applies.[108] USF has implicitly conceded that Al-Arian's speech addressed matters of public concern.[109] Thus, it must bring a claim that the speech has unacceptably disrupted the public services and education it provides, begetting a compelling state interest for Al-Arian's termination.

USF relied on a third-party report of Al-Arian's statements: Bill O'Reilly's allegations of terrorist connections.[110] USF purported to investigate the events that led to the alleged disruption,[111] but when relying on third-party reports, the investigation and conclusion drawn must be objectively reasonable in light of the record.[112] Such reasonableness is questionable here, because USF's conclusions were not drawn from official or reliable sources.

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107. These statements delivered at a convention, were made in Arabic to a crowd of Palestinian supporters. *See Transcript*, *supra* note 106; Castagnera et al., *supra* note 106. The statements, controversial though they may be, were certainly not intended to provoke swift physical retaliation against the speaker. Rather, Al Arian's presumed intent was to share his political views with others who agreed with him. The fighting words doctrine is not intended to target this type of utterance. *See supra* note 36–38 and accompanying text (discussing the need for specific intent in defining "fighting words").

108. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568–73 (1968).

109. *See* Gonzalez, *supra* note 3. Gonzalez, an attorney retained by USF, noted that R.B. Friedlander, USF's Interim General Counsel, directed him to "place overriding emphasis on Dr. Al-Arian's unquestionable right to engage in protected free speech on matters of public concern." *Id.*

110. Gonzalez admits that the alleged disruption was a result of the "public reaction to what Dr. Al-Arian said during his appearance." Gonzalez, *supra* note 3, at paras. 5–6. More precisely, as Al-Arian did little but defend himself during the interview, the public reacted more to what Bill O'Reilly said about Al-Arian during his appearance than anything else. *See generally Transcript*, *supra* note 106.

111. *See* Gonzales, *supra* note 3, at para. 6 (citing USF's September 27, 2001 announcement of Al-Arian's placement on paid leave of absence, pending investigation).

112. Waters v. Churchill, 511 U.S. 661, 677–79 (1994); *see also supra* notes 93–95 and accompanying text. Although the requirement of "actual belief" is a mere suggestion from Justice Souter's concurring opinion in *Waters v. Churchill*, the plurality opinion specifically mandates that the employer reach its conclusion reasonably and in good faith. 511 U.S. at 677.

Even a casual investigation into the Al-Arian situation raises suspicion. Despite O'Reilly's repeated allegations and accusations, no terrorist-related charges had been brought against Al-Arian at the time of his termination.[113] O'Reilly is further impeached by the other misinformation he produced during the interview.[114] Even Al-Arian's strong comments made at the 1988 Cleveland convention have been explained repeatedly, and perhaps reasonably, by Al-Arian as symbolic and political rhetoric.[115] Simply put, the truth of the allegations to which the public responded is at the least uncertain, if not altogether unlikely.

However, if one assumes that the investigation and conclusion were objectively reasonable and reached in good faith, we must address the alleged cause of the disruption to USF's public services. USF cites concern for the security of Al-Arian and the campus, decreases in charitable giving from donors and alumni, and difficulty in recruiting new faculty as the primary sources of disruption.[116] Judging from the factual evidence, USF overestimated the continuing alarm over security. An attorney for USF claimed that the USF Police Department was unable to guarantee the safety of Al-Arian or others.[117] Admittedly, twelve death threats against Al-Arian were telephoned to USF in the days following the *O'Reilly Factor* appearance.[118] Yet, no death threats were received after early October

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113. *See* Halvorssen, *supra* note 2. While Al-Arian was arrested on February 20, 2003, at the time of his termination, investigations had not revealed any ties to terrorist activities. *See supra* note 13; *see also* Addendum, *supra* note 13.

114. For example, he adamantly insisted that Tariq Hamdi—an acquaintance of Al-Arian's and former graduate student at USF—was on the FBI's "list of suspected terrorists." *See Transcript*, *supra* note 106. However, this allegation was "simply not true." Boehlert, *supra* note 97, at para. 54. In fact, Fox producers admitted to at least one reporter that they "felt like O'Reilly got blindsided." *Id.* at para. 51 (quoting John Sugg, senior editor of an Atlanta newspaper).

115. *See Transcript*, *supra* note 106 (comparing his comments about "jihad" and "revolution" with those made by President George W. Bush about a "crusade" against terrorism in the days following the September 11th attacks). In determining a speaker's intent, it is necessary to consider the audience and the surrounding circumstances. *See* Gooding v. Wilson, 405 U.S. 518, 528 (1972) (rejecting the application of the "fighting words" doctrine to "utterances where there was no likelihood that the person addressed would make an immediate violent response.").

116. *See* Gonzalez, *supra* note 3, at para. 11.

117. *Id.* (citing a report from the USF Police Department).

118. *Id.* Gonzalez maintained that a number of other angry individuals made phone calls

2001.[119] The cessation of credible threats, particularly given that USF waited until mid-December to terminate Al-Arian,[120] lends serious doubt to the school's claim of precarious campus safety.

USF's assertion of hampered fundraising as a cause for Al-Arian's termination is derisory and unfounded for three reasons. First, despite all the case law delineating relevant factors for disruption, no case has suggested that a decrease in funding is pertinent.[121] Second, there has been a nationwide trend in decreased donative giving since September 11, 2001 and the start of the recessed economy.[122] Finally, the factual evidence suggests that USF may be under as much pressure to retain Al-Arian as it is to fire him.[123]

USF also cited "difficulties in recruiting" new faculty, particularly in Al-Arian's College of Engineering.[124] It seems more likely that new faculty refrain from joining USF because of the constraint on Al-Arian's rights than because of his particular views.[125] The greatest harm to faculty recruiting will occur when USF gains a reputation for

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that did not threaten harm, but were merely "abusive in tone and content." *Id.*

119. USF Police Sergeant Klingebiel supposedly reported this information at the December 19, 2001 USF Board of Trustees meeting that immediately preceded President Genshaft's statement regarding the decision to terminate Al-Arian's employment. *See* Press Release, USF Chapter, UFF, The Truth About Sami Al-Arian's Firing [hereinafter The Truth], *at* http://w3.usf.edu/~uff/AlArian/January/XmasFact.html (last visited Oct. 14, 2003). Any genuine "threat," therefore, existed for no more than a few a weeks—if at all.

120. *See* Genshaft, *supra* note 4.

121. *See, e.g.*, Waters v. Churchill, 511 U.S. 661 (1994); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968). The Court, instead, has focused most of its disruption analysis on damage to vital interpersonal relationships within the workplace. *See supra* notes 80–86 and accompanying text.

122. *See* The Truth, *supra* note 119, at para. 2.

123. At least one dean has acknowledged the presence of "a lot of pressure on the president from both groups—those who favor and those who do not favor the firing." Castagnera, *supra* note 106 (internal quotations omitted) (quoting "the dean of one of the colleges at South Florida"). Although some alumni have cited the "Al-Arian situation" as the reason for withdrawing financial support, this does not necessarily imply that these individuals all are siding with USF in the controversy. Gonzalez, *supra* note 3, at para. 13.

124. Gonzalez, *supra* note 3, at para. 13.

125. Despite finding a colleague's views disagreeable or even "abhorrent," faculty members typically defend the colleague's rights in order to promote "a free and open discussion." The Truth, *supra* note 119. At least one senior administrator resigned in protest of Al-Arian's termination and the USF Faculty Union voted to condemn the school's decision. Halvorssen, *supra* note 2, at para. 4.

restricting its professors' rights.[126] The AAUP, a powerful and influential organization in the academic world, has stated that it would vote on a censure of USF if it fires Al-Arian in violation of the AAUP's guidelines for academic freedom.[127] The censured label, which is semi-permanent,[128] may dissuade other reputable professors from bringing their knowledge and research to USF.[129] This, of course, will only exacerbate the "disruptions" of which USF complains.[130]

VI. PROPOSAL

The University of South Florida's actions will create a very dangerous precedent of censorship. USF admitted that Al-Arian's termination was in response to the public reaction to his *O'Reilly Factor* appearance.[131] This is dangerous, to say the least.[132] Members of FIRE insist that USF is creating a precedent for a "thug's veto" of unpopular viewpoints.[133] USF, the State, and the courts that upheld

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126. Susan Greenbaum, USF Professor of Anthropology, Letter to the Editor, *Faculty May Jump Ship Due to BOT*, THE ORACLE, Jan. 9, 2003 (on file with the Washington University Journal of Law & Policy).

127. Brannon, *supra* note 98, at para. 14. The AAUP will hold its national meeting in early June 2003, at which time there will be a vote of whether or not to censure USF. *Id.*

128. USF would have to wait at least one year to have the label removed, and then only if it proves that the termination was proper or offers an apology and reinstates Al-Arian. *Id.* at para. 15.

129. The AAUP censure "may make it difficult to garner research and donation dollars . . . to attract the best students . . . [and to hire] the best teachers and professors, who may not want to be associated with a censured university." Opinion, *Take Censure Most Seriously*, THE ORACLE, Nov. 19, 2002, at para. 6 [hereinafter *Censure*] (on file with the Washington University Journal of Law & Policy).

130. *See* Greenbaum, *supra* note 126, at para. 6. The censure will harm the university's reputation during a time when it had seeing excellent growth. *Censure*, *supra* note 129, at para. 5.

131. *See supra* note 110 and accompanying text.

132. By firing Al-Arian in response to public demand, USF is "encouraging extremists" and is making a statement that "faculty can be punished for the misdeeds of others." The Truth, *supra* note 119.

133. FIRE President Alan Charles Kors wrote:

> [Firing Al-Arian] would allow a "heckler's veto" and would open the floodgates to arbitrary firing of all professors when some individuals, especially individuals willing to portray themselves as criminals, decide that they do not like the way that a professor talks, thinks, or appears. Indeed, it would create . . . the "USF thug's veto," which actively encourages the threat of violence to accomplish the dismissal of professors

the termination, are sending a message of acquiescence.[134] Regardless of the constitutionality of a thug's veto, which is highly questionable, it would result in the significant chilling of protected speech and would undermine the freedoms guaranteed by the First Amendment.

USF contended that Sami Al-Arian provoked this situation by appearing on the *O'Reilly Factor*.[135] In fact, the situation is simply one in which USF fell victim to the impatience and intolerance for diversity that arose out of the ashes of the September 11th attacks on the United States. Admittedly, Al-Arian's views are controversial, yet, under the First Amendment, opinions need not be popular to be protected.[136]

Our legal system is premised on a presumption of innocence, a presumption which is bypassed when an employer caters to the whims of the "vocal protests of those who have already judged" its employee.[137] If our Nation is to rebound from this dark moment, I propose that USF and other public employers, as well as the State of Florida itself, remember these principles and stand up to fight for the rights and freedoms of their public employees.

Universities, which claim to serve as a "marketplace of ideas,"[138] must establish or reaffirm policies of nondiscrimination. These policies should contain express provisions to deal with circumstances in which a professor's viewpoints spark criticism from the surrounding community. Education advances tolerance and understanding through contrasting viewpoints and the free discussion of ideas. Any university with a policy of repressing unpopular speech or controversial ideas, solely because of inconvenience, is not a university at all.

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disliked by any portion of the public.

Halvorssen, *supra* note 2, at para. 6.

134. By permitting the termination, governmental authorities are passively telling the public that it can quash disagreeable views by acting outrageously and making reckless (and sometimes illegal) threats.

135. *See* Marano, *supra* note 3, at para. 10.

136. *See* Rankin v. McPherson, 483 U.S. 378, 387 (1987); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

137. Halvorssen, *supra* note 2, at para. 8.

138. *See supra* note 43 and accompanying text.

The courts also play a significant role. It may be easier for an institution to wash its hands of the situation, rather than defend its employee's rights or rethink and redraft its employment policies. In cases where the system fails, as has been the case with Sami Al-Arian and USF, the courts must unequivocally strike down the employer's attempt to abandon its employee.[139]

VII. CONCLUSION

Permitting Al-Arian's termination from the University of South Florida tacitly recognizes a new compelling state interest for content-based speech restriction: prejudice. Such a state-sponsored policy is contrary to the Constitution and to the American ideal of freedom. While Americans' nerves were understandably rattled in the aftermath of September 11th, our inclination to hastily point fingers must be held in check. Our system of justice is based on equality and fairness, where all people deserve equal protection under the law. In order to remain strong, we must not let this change.

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139. This Note does *not* propose that employees should be reinstated when there *has* been clear wrongdoing. If Al-Arian had, in fact, been legitimately implicated in any terrorist acts *at the time of his termination*, USF should not be obligated to defend such actions. However, as indicated *supra* notes 110–30 and accompanying text, Al-Arian's alleged ties to terrorism were, at times, tenuous, at best. The true reason for termination seems simply to be inconvenience, which is unacceptable. *But see* Addendum, *supra* note 13.