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The First Amendment, Twitter, and Dr. Bandy Lee

BY [RENISHA RICKS](#) /ON APRIL 12, 2021

Did Dr. Bandy Lee Engage in Protected Speech When She Rendered an Opinion about Alan Dershowitz's Mental Health Condition on Twitter?



Photo by Joshua Hoehne on Unsplash

Background

There is a raging debate about whether Yale University in terminating Dr. Bandy Lee's contract violated her constitutional rights to the freedom of speech.¹ At the center of this controversy is Alan Dershowitz, a criminal defense attorney and Harvard Law School professor emeritus who, in July 2019, proclaimed his innocence against sexual misconduct allegations on national television.² Specifically, Dershowitz stated that "[David Boies] has an enormous amount of chutzpah . . . to challenge my perfect, perfect sex life . . ."³ Months later, on Twitter, Professor Richard Painter compared Dershowitz's use of the term "perfect" to describe his sex life with President Trump's use of the same term to describe his phone call with Ukrainian President Volodymyr Zelensky.⁴ This tweet prompted Dr. Lee to reply that: "[T]his might be dismissed as [an] ordinary influence However, given the severity and spread of 'shared psychosis'

among just about all of Donald Trump's followers, a different scenario is more likely."⁵ Subsequently, Dershowitz complained to Yale officials that Dr. Lee had diagnosed him with a mental disorder without conducting a formal exam, which constituted a violation of the ethics rules adopted by the American Psychiatric Association ("APA") in most jurisdictions.⁶ In May 2020, Yale opted not to renew Dr. Lee's contract, emphasizing her repeated violations of APA ethics rules.⁷ This year, Dr. Lee filed a lawsuit against Yale claiming, *inter alia*, that her termination was unlawful under the First Amendment.⁸ According to the lawsuit, Dr. Lee's tweet is entitled to First Amendment protection "since she was acting on a citizen's duty to contribute her gifts to society, including her professional training and knowledge, not as a psychiatrist under private employment."⁹ However, the lawsuit fails to address two key facts: (1) Private employers, like Yale, have a right to impose restraints on certain speech or behavior;¹⁰ and (2) the First Amendment only protects speech from government censorship.¹¹

The First Amendment

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹²

Case Law: Similar Facts, Different Outcomes

There remains a problem in determining whether Dr. Lee's tweet qualifies as protected speech under the First Amendment.¹³ Therefore, the next point for legal analysis is case law. *Pickering v. Bd. of Educ.* and *Connick v. Myers* are two of the most important cases composing a framework for answering this difficult question.¹⁴ In *Pickering*, a high school teacher wrote a letter to the local newspaper, where he complained about a proposed tax increase to generate revenue for the school district that was under consideration by the school board.¹⁵ The school board terminated Pickering because it determined that his letter adversely affected employee morale, and its ability to operate within that particular school district.¹⁶ Pickering sued the school board, arguing, *inter alia*, that his letter to the editor was protected under the First Amendment.¹⁷ The Supreme Court examined Pickering's letter, which stated that, "I must sign this letter as a citizen, taxpayer and voter, not as a teacher."¹⁸ The Court determined that the plain language of Pickering's letter made it clear that he did not act in his professional capacity as a teacher when he wrote and sent the letter to the editor; rather, Pickering acted as a private citizen on a matter of public concern.¹⁹ Specifically, the Court rejected the notion that this case presented circumstances in which the State could terminate a government employee because he breached his confidentiality duty with regard to his superiors.²⁰ The Court held that "absent proof of false statements knowingly or recklessly made by [Pickering], a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."²¹ Therefore, Pickering's letter qualified as protected speech under the First Amendment.²²

In *Connick v. Myers*, by contrast, the Supreme Court held that an employee's speech was outside of the ambit of the First Amendment.²³ In that case, Sheila Myers, an Assistant District Attorney, was selected to be transferred to a new division of the criminal court.²⁴ However, Myers intended to remain in her current division and voiced her opposition to management on several occasions.²⁵ Myers then created a questionnaire to survey her colleagues about the transfer policy after her request to remain in the same division was denied.²⁶ The questionnaire was viewed as an insubordinate act, which led to Myers' dismissal from the Assistant District Attorney's Office.²⁷ The Court determined that the Assistant District Attorney's Office did not violate Myers' free speech rights under the First Amendment.²⁸ The Court reasoned that Myers had not acted as a private citizen when she developed and distributed the questionnaire; rather, she acted within her professional capacity as an attorney in efforts to undermine authority.²⁹

The Court also reasoned that if government employees, like Myers, were afforded free speech protection under the First Amendment each time they commented on an internal matter that was not of public concern, government offices could not carry out key functions and the court system may implode.³⁰ Thus, Myers' questionnaire could not be characterized a matter of public concern.³¹

Analysis of Lee v. Yale Univ.

In *Yale Univ.*, Dr. Lee has argued that her comments should not be construed as a diagnosis of Dershowitz's mental health condition; rather, her comments were in reference to a series of conditions that may flow from a person of influence to others as a result of "emotional bonds."³² In other words, Dr. Lee's public comments were about the "widespread phenomenon of 'shared psychosis.'"³³ To satisfy her case, Dr. Lee has also argued that Yale obstructed her free expression when, in January 2020, it warned that her faculty appointment would be terminated if "her [public] behavior d[id] not change."³⁴

Contrarily, Yale will argue that, unlike *Pickering*, Dr. Lee did not express a desire to be regarded as a private citizen contributing to public debate when she wrote and sent a statement on Twitter.³⁵ Yale will also argue that both *Pickering* and *Myers* shed light on the fact that Dr. Lee rendered an opinion about Dershowitz's mental condition "on the basis of her psychiatric knowledge and judgment,"³⁶ as few private citizens would be able to suggest an inference of "shared psychosis"³⁷ from the use of a common term.³⁸ Most importantly, Dr. Lee admitted that she rendered an opinion on the basis of "her professional training and knowledge."³⁹ Assuming that the analysis stopped here, based upon these factual arguments Yale would argue that Dr. Lee cannot prove her case on the obstruction of free expression, and therefore her speech rights were not violated under the First Amendment.

Additionally, as Dershowitz noted, the present case indicates that Dr. Lee violated the Goldwater Rule by offering a medical opinion about him without performing an

examination.⁴⁰ The Goldwater Rule provides that: “[I]t is unethical for a psychiatrist to offer a professional opinion unless he or she has conducted an examination and has been granted proper authorization for such a statement.”⁴¹ Yale might argue that ethics rules adopted by the APA required Dr. Lee to abstain from activity that may be protected under the Constitution in other instances.⁴² For example, if an attorney disclosed confidential communications between herself and her client, it is unlikely that she could avoid professional discipline by using the First Amendment as a shield.⁴³ Yale might also argue that Dr. Lee’s conduct on Twitter undermines the psychiatric profession at large because it is “self-serving,”⁴⁴ placing personal convictions ahead of ethics rules.⁴⁵

However, one may still hold the position that Dr. Lee had a “duty to warn”⁴⁶ others about Dershowitz’s purported condition to prevent or to raise awareness about mental health issues.⁴⁷ The duty to warn emerged from *Tarasoff v. Regents of Univ. of Cal.*,⁴⁸ where a psychotherapist failed to control the conduct of her patient or to warn others of the threat of violence against the victim.⁴⁹ The Supreme Court of California determined that a duty may arise in cases between a doctor and a dangerous patient.⁵⁰ In *Yale Univ.*, by contrast, Dr. Lee never developed a “special relationship”⁵¹ with Dershowitz to determine if he in fact suffered from psychosis or was a dangerous person. As such, a court would be reluctant to apply the *Tarasoff* decision to the present case where a doctor-patient relationship does not exist.⁵² Therefore, *Yale Univ.* does not support Dr. Lee holding a “duty to warn”⁵³ the public about Dershowitz’s alleged disorder.

Conclusion

All things considered, a court would likely hold that Yale University did not violate Dr. Bandy Lee’s free speech rights under the First Amendment because she acted in her professional capacity as a psychiatrist and not as a private citizen speaking on matters of public concern when she tweeted about Alan Dershowitz’s mental health.⁵⁴

Renisha Ricks is a Second Year Law Student at the Benjamin N. Cardozo School of Law and the incoming Managing Editor of the Cardozo Arts & Entertainment Law Journal. Renisha is interested in speech, Media Law, and the First Amendment. Renisha’s student Note was recently selected for publication in Volume 40 of the Cardozo Arts & Entertainment Law Journal. In the Note Renisha explores what information on the Internet qualifies as from the news media under the False Claims Act. Renisha is also a current Teaching Assistant for the Lawyering and Legal Writing Center, and member of the Trial Team. Renisha will intern with the United States District Court for the Southern District of New York this summer.

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shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”)

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