

ACADEMIC FREEDOM RECONSIDERED¹

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Despite the fact that academic freedom as a concept has been recognized in the United States for nearly a century, there is a fair amount of disagreement about its boundaries. Academic freedom in and of itself is not a legal doctrine.

Protection for academic freedom is often included in faculty handbooks, collective bargaining agreements, or university policies. It is also contractual at both public and private institutions. And the First Amendment provides some protection against government interference from the outside or, at public colleges, from administrators or colleagues from the inside.

Judicial developments over the past few years, however, have limited the free speech rights of faculty at public institutions in significant ways. These limitations are troubling because the courts that are applying them are ignoring the significance of the free exchange of ideas, the importance of a faculty member's role in speaking candidly in matters of academic governance, and the real harm that is done when faculty must choose between their ideas and their jobs.

These cases also make public colleges and universities a less attractive place to spend one's faculty career in that many private colleges, to which the First Amendment does not apply, are not burdened with these limitations if they include protections for academic freedom in their handbooks or policies.

The concept of academic freedom began in Europe in the middle ages, and came to the U.S. relatively late. In 1915, a group of faculty created the AAUP and

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developed a “General Statement of Principles” that discussed a trinity of academic freedom protections:

- For scholarly inquiry
- For teaching
- For extramural speech and action

The statement also spoke of the responsibilities of academics:

- To conduct scholarly inquiry with integrity
- To teach in a fair and judicial manner that includes a range of opinions
- To avoid hasty or unverified or exaggerated statements in extramural speech and action

This statement became encoded in the AAUP’s *1940 Statement of Principles on Academic Freedom and Tenure* that is included in the faculty handbooks, policies, and collective bargaining agreements of many colleges and universities in the U.S.

With respect to freedom in teaching, the *1940 Statement* reminds us that faculty should be careful not to introduce into their teaching controversial matter which has no relation to their subject.

And with respect to a faculty member’s right to speak as a citizen, the *1940 Statement* reminds us that faculty member’s special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

There are two theories of academic freedom:

- Institutional – which involves protection from external influences
- Individual—which involves protection from external influences and from the attempts of administrators and colleagues to punish a faculty member for speech.

But only institutional academic freedom is fully recognized by U.S. courts – the famous quote from *Sweezy v. New Hampshire* (1957) focused on the institution’s freedom, not that of the individual faculty member:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. (Justice Frankfurter)

Internal conflicts about academic freedom tend to come from administrators, often responding to student complaints, or from faculty peers. In most cases, the courts have upheld administrative limitations on faculty conduct that was disruptive, insubordinate, or unprofessional—and which, of course, would typically not be protected by academic freedom under the AAUP’s definitions.

The courts have sided with faculty in a few cases where a professor was punished for classroom speech:

In *Levin v. Harleston* (1992), a public university created “shadow sections” for students who did not want to be taught by Professor Levin, who held unpopular and negative attitudes toward the intellectual ability of nonwhites, and whose writings on these subjects had created substantial controversy. The court ruled that these “shadow sections” violated Professor Levin’s free speech rights, and that there was no evidence that Levin had treated students unfairly or had compromised their educational opportunity.

And in two cases involving alleged sexual harassment by male faculty who used profane language in the classroom, insisted that students address sexual topics in their written assignments, and used sexual imagery in their teaching, federal courts ruled that this speech was protected by the first amendment and that the universities’ harassment policies were unconstitutionally vague and denied the professors their due process rights.

But when the faculty member attempts to characterize a conflict with either his or her colleagues or an administrator (such as a dean) over teaching style or grading or the material to be covered in a particular course as a limitation

of the faculty member's academic freedom or first amendment rights, the courts have almost always sided with the institution, not the individual faculty member.

For example, cases involving grading policies invariably result in a defeat for an individual faculty member who chooses not to follow the department's or school's grading policy. In *Lovelace v. Southeastern Massachusetts University* (1986), a faculty member's contract was not renewed when he refused to follow the request of the administration to lower the academic standards he was using to grade his students. The court rejected the faculty member's challenge to his nonrenewal, stating that "course content, homework load, and grading policy are core **university** concerns" and are policy decisions that are the province of the institution, not of individual faculty.

In *Brown v. Armenti* (2001), a professor sued the president of the California University of Pennsylvania after he suspended the professor from teaching a course. The professor had refused to change a student's grade from an F to an Incomplete, as the president had requested. The court rejected the professor's claim that his right to choose a student's grade was protected by academic freedom, stating that "[b]ecause grading is pedagogic, the assignment of the grade is subsumed under [one of the essential four freedoms], the university's freedom to determine how a course is to be taught."

And in *Edwards v. California University of Pennsylvania* (1998), a tenured professor was disciplined for failing to conform his course content to the department's syllabus. The court said that, for first amendment and academic freedom purposes, the *university* is the "speaker" in the classroom, and the professor is only its agent. Saying that the professor did not have a first amendment right to choose course materials, the court ruled that it was up to the university to decide what material the professor would cover in class. In this case, the department faculty had developed the syllabus for a multi-section course, and the court apparently viewed the professor's refusal to follow that syllabus as a form of insubordination.

With this background on the courts' limitations on individual academic freedom, I want to turn to what I view as an alarming development for faculty—and administrators as well—at public colleges and universities.

In 2006, the U.S. Supreme Court decided a case, *Garcetti v. Ceballos*, that sharply limited the first amendment free speech rights of public employees. The *Garcetti* case did not involve a faculty member, but an attorney in a public district attorney's office who was discharged for making statements with which his supervisor disagreed.

The Court held, in a 5-4 vote, that the first amendment did not protect employees from discipline if they are speaking as an employee rather than as a member of the public. Perhaps anticipating a negative response to this opinion by the higher education community, Justice Kennedy, who wrote the majority opinion, said:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Note the tentativeness of the language. "There is some argument" that speech on scholarship or teaching deserves constitutional protection. This is not a ringing endorsement of academic speech—it is completely neutral. Note the exclusion of speech on governance or other institutional matters.

Despite the Supreme Court's suggestion that higher education could be a possible exception to the rule in *Garcetti*, lower courts have applied its reasoning to university faculty, and have ruled that discipline or other adverse actions taken against faculty, allegedly in response to their criticism of administrators or other speech related to their role as faculty members, is not protected by the first amendment.

The application of *Garcetti* to challenges brought by college faculty who allege that they were disciplined or discharged for criticizing the administration is particularly troubling because in the four cases (so far) that have applied *Garcetti* to higher education, none of the courts examined whether the speech at issue might have been protected by academic freedom, but applied *Garcetti*

mechanically and awarded summary judgment to the university, which means that the case was resolved in each university's favor without a trial.

In at least three of the four post-*Garcetti* cases that have addressed a claim by a faculty member, the institution, in my judgment, had sound academic reasons for the actions it took. And in two of the four cases, a faculty committee had made the initial decision that the faculty member had not met the required performance standards and deserved some type of sanction. It is not the outcome of these cases that troubles me, but the blind application of *Garcetti* to these cases by courts who completely ignored the potential academic freedom issues.

In *Hong v. Grant* (2007), a case brought against the University of California at Irvine, a professor of chemical engineering alleged that university administrators had violated his first amendment free speech rights when he was denied a merit salary increase because of his criticism of hiring decisions and his negative votes on certain faculty personnel decisions. In fact, it was a faculty committee in Hong's department that had recommended that he be denied the salary increase after reviewing his research record and his self-assessment that his research performance that year had been "minimal."

The court ruled that Hong's critical statements and negative votes on faculty hiring issues were part of his professional responsibilities as a professor, and thus, under *Garcetti*, were not protected by the first amendment. Echoing the words of *Garcetti*, the court ruled that **the university "is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."** That is a chilling statement.

But, of course, the university did not "restrict" Hong's speech; it followed the recommendation of his faculty peers who believed that his research record was inadequate to support a salary increase. And the four statements that Hong alleged were the basis for that denial—statements criticizing other faculty members' qualifications or performance—would have been protected by academic freedom, precisely *because* they were an appropriate subject for academic discourse.

So even though the outcome of the case may be correct because a faculty committee made the recommendation that the administration then followed, the court's reasoning is troublesome because it ignores the importance of the role of faculty peers in making personnel decisions. And, of course, it also ignores the fact that the statements that Hong made WERE protected by academic freedom, even though he was not denied a merit increase because of those statements.

In a second case, *Gorum v. Sessoms* (2008), a case brought against the president of Delaware State University, a professor of communications was terminated for violating the institution's policy against changing student grades. A faculty panel found that Professor Gorum had unlawfully changed student grades given by other professors 48 times, either raising them from failures to passing grades, or changing withdrawals or failures to passing grades, even for students who did not attend class and who did no work for the class.

Although the faculty hearing panel found that these violations had occurred and were a serious transgression, the panel recommended probation rather than termination. The president and Board of Trustees terminated Gorum. Gorum sued, alleging that his termination was in retaliation for three statements that he had made: two criticizing the president, and one in defense of a football player who had been suspended for carrying a gun on campus.

Again, the court read *Garcetti* narrowly and ruled that these statements were made in Gorum's capacity as a professor, so they were not protected by the first amendment. Ironically, each of these statements would have been protected by academic freedom, although the grade-changing, of course, would not have been.

So once more, the academic governance system worked with respect to the faculty panel's finding that Gorum had engaged in serious unprofessional and unethical behavior. But the court's reliance on *Garcetti* undermined the significance of the real academic freedom issues at stake. While the outcome was correct, in my judgment, the rationale for the outcome is troubling.

In a third post-*Garcetti* case, *Renken v. Gregory* (2008), an engineering faculty member sued his dean and other academic administrators when the University of Wisconsin at Milwaukee returned an NSF grant to the funding

agency because of a dispute between Professor Renken and the dean over how matching funds would be spent.

Renken had refused to sign a document that described how the matching funds would be used because he disagreed with the dean's interpretation of federal regulations. Renken accused the dean of violating federal regulations and contacted various administrators and faculty committees about the dispute, attacking the dean's integrity. He rejected the graduate dean's attempt to mediate the dispute and resolve the differences between Renken and the engineering dean.

Renken's lawsuit alleged that the university violated his first amendment rights by reducing his pay and terminating the grant because of his oral and written criticisms of the dean's requirements for the use of the matching funds. Despite the fact that Renken argued that his faculty job did not require him to apply for or obtain grants, the court ruled that obtaining a grant was a method of fulfilling Renken's teaching and research obligations, and thus any statements that he made in connection with the grant were job-related and not protected by the first amendment.

While most academics would consider a dispute over the use of grant funds to be protected by academic freedom, as long as the individual behaved in a civil fashion and did not violate federal or institutional regulations, that was not an issue in this case because the court determined that the statements had no first amendment protection.

And in the most recent post-*Garcetti* case, *Sadid v. Idaho State University* (December 2009), a professor was fired by Idaho State University after many years of disruptive and conflict-ridden communications with his dean and the university's president. Professor Habib Sadid, a professor of civil engineering, had disagreed publicly with decisions of the dean and president, and wrote letters to his faculty colleagues and the local newspaper that were sharply critical of these individuals and their leadership. Despite the finding of a faculty committee that his conduct did not violate institutional policies or professional standards, Sadid, a tenured professor, was discharged.

Sadid sued in state court, claiming retaliation for exercising his First Amendment rights as a private citizen. The trial judge ruled that the statements in question were not matters of public concern but were merely Sadid's "personal grievances" against the university related directly to his employment. Somewhat chillingly, the judge commented:

"Sadid should understand that he has limitations of his speech that he accepted when he became a public employee."

Citing the *Hong* case, the court awarded summary judgment for the university on all of Sadid's legal claims.

The *Garcetti* precedent has also been applied to several cases brought by public school teachers who claim they were dismissed in retaliation for complaints that they made. A very recent ruling that seems quite egregious occurred in *Weintraub v. Board of Education of the City of New York*, decided by the U.S. Court of Appeals for the Second Circuit on January 27th of this year—less than a month ago. According to the opinion, a fifth grade teacher asked the assistant principal discipline a disruptive student, who refused to do so. The teacher filed a grievance through his union, and alleged that the school district responded by giving him negative evaluations, wrongfully accused him of sexually abusing a student, and then fired him.

The trial court ruled that filing a grievance was not protected by the First Amendment, and the Second Circuit agreed. Because the teacher could use a grievance process that was not available to the general public, said the court, it was closely related to his job duties and thus not protected.

This ruling seems to indicate that a public employee who files a grievance loses the First Amendment's protections for the "speech" that expresses the grievance. Should this line of reasoning be adopted by other courts, it will chill the willingness of public sector employees to use grievance systems to address their objections to decisions made about their jobs. Needless to say, this is a very troubling outcome.

One federal trial judge has refused to apply *Garcetti* to a claim of a college professor that she was dismissed for classroom speech related to the subject

matter of her teaching. There has been no ruling on the merits, but in *Sheldon v. Dhillon*, a case brought against San Jose Community College, the court refused to award summary judgment to the college, saying that there had been no definitive ruling on whether or how *Garcetti* applies to alleged retaliation for speech that occurred while the professor was teaching. The opinion did not refer to *Hong*, a ruling by a trial court in the same circuit—the trial judge focused squarely on the issue of classroom speech, which was not at issue in *Hong*.

Given the fact that the Supreme Court expressly refused in *Garcetti* to discuss whether this new first amendment theory would apply to college faculty's speech related to "scholarship or teaching," the lower courts could have taken the opportunity to develop a thoughtful analysis of the interplay between faculty academic freedom and the institution's need to operate effectively.

I doubt that the parties gave these courts much help in this regard. There are no heroes here. In my judgment, several of these faculty plaintiffs misused the doctrines of academic freedom and free speech to attempt to reverse legitimate discipline for unprofessional conduct or refusal to comply with a reasonable administrative request. The grading dispute cases pitted an individual faculty member against departmental curriculum and evaluation decisions in most cases. The post-*Garcetti* cases involved either poor performance (*Hong*), outright violation of institutional regulations (*Gorum*), or a choice between complying with an administrative request or losing a grant (*Renken*). While the existence of misconduct is less clear in the *Sadid* case, it does not seem that Professor Sadid's behavior could be construed as constructive or collegial.

On the other hand, I suspect that the institutions defending against these claims focused on *Garcetti* as their primary defense rather than emphasizing that the negative actions—at least in two of the cases—were ratifying faculty recommendations. There was no one in these cases whose major concern was speaking up for the integrity of the original definition of academic freedom—which balances rights with responsibilities and demands that faculty behave in a temperate and restrained manner.

How can this problem be resolved? Some scholars argue that the courts should refuse to apply *Garcetti* to any case involving a college or university faculty member. I am skeptical of whether the Supreme Court would agree to carve out

such an exception—especially since the discipline given to the faculty members in at least two of these four post-*Garcetti* cases seems clearly justified and, in two of these cases, quite minor. Frankly, the fact that the first post-*Garcetti* higher education cases appeared to have so little merit and dealt with relatively trivial consequences for two of the professors does not bolster an argument that higher education deserves special treatment.

Instead of attempting to squeeze academic freedom claims into a badly-fitting (or now nonexistent) constitutional theory, I believe that academic freedom should be considered an implied contractual right of all faculty, whether or not they are tenured or tenure-track. Academic freedom is already a contractual right at many private and public colleges and universities. The 1940 Statement appears in the faculty handbooks or collective bargaining agreements of many institutions across the country. So at those institutions, academic freedom is an express contractual right.

It is in the interest of the entire academic community that the definition of academic freedom makes it clear that it extends to speech on research, teaching, governance, and other responsibilities of a faculty member to her department, her institution, and her discipline. The AAUP published a report late last year, “Protecting an Independent Faculty Voice: Academic Freedom After *Garcetti v. Ceballos*,” that provides sample contract language and a strong justification for protecting faculty against the limitations of *Garcetti*.

But even if an institution has not included specific academic freedom protections in a faculty handbook or collective bargaining agreement, another doctrine could be used. Courts have recognized a doctrine called “academic custom and usage” that suggests that there is a “common law” of academe—a set of expectations and rules that academics throughout the U.S. recognize.

Even on campuses where academic freedom is not an express contractual right, academic custom and usage could be used to argue that academic freedom is an implied contractual right of faculty (and students as well). This implied contractual right could also contain the basic components of due process for faculty whose genuine academic freedom rights may have been abrogated.

Making academic freedom a contractual right would put faculty at both public and private institutions on the same footing. Courts could look to the 1940 Statement—and the AAUP Code of Professional Ethics as well—to determine

- 1) whether the conduct at issue is actually protected by academic freedom and
- 2) whether the faculty member has conformed to the responsibilities that accompany the academic freedom rights.

Such an approach to academic freedom would protect only that conduct that the community of scholars had determined was worthy of protection and would reserve first amendment claims for situations that involve the government attempting to suppress or punish the speech of its citizens.

We can begin the process of contractualizing academic freedom by first reconsidering and re-establishing the doctrine of academic freedom as a balance of rights and responsibilities, and by resisting attempts to waste our capital as academics by labeling every conflict or disagreement as an academic freedom violation. Most of the disputes that I discussed this afternoon involved behavior that was an embarrassment to the institution and would not meet anyone's standard of appropriate professional conduct.

Secondly, we need to develop a clearer sense of which *academic* issues are appropriate for the protections of academic freedom, compared with the legitimate expectations we as academics hold for professional professorial behavior.

And thirdly, we need to do a better job of holding ourselves and our colleagues to high standards of behavior and scholarly performance—and to remember that as academics we have responsibilities as well as rights.