

Negotiating Academic Freedom: A Cautionary Tale

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In recent years, there has been a growing concern among academics that traditional protections of academic freedom have been eroded by increasingly intrusive and somewhat ill-informed court decisions. The most recent and prime example of this is the *Garcetti v. Ceballos* decision by the US Supreme Court and, more alarmingly, its progeny in other courts. Those decisions, and their implications, are the subject of a recently released AAUP special report, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*.² In brief, the *Garcetti* decision said that in the course of carrying out one's public employment responsibilities, an employee did not have First Amendment protections of free speech outside the classroom. While the case revolved around the whistle-blowing and subsequent punishment of a Los Angeles assistant district attorney (Ceballos), the AAUP saw the potential peril of the case and filed an amicus brief. If faculty speech were similarly constrained, academic freedom and the faculty role in shared governance would be in tatters. Faculty could not safely exercise their critical role in shared governance, or explore controversial subjects within their fields, without the threat of retribution or restraint. The Supreme Court apparently took note of the AAUP's brief, commenting that its decision in *Garcetti* did not necessarily speak to the issue of academic

freedom in higher education classrooms, where other important considerations may be involved. Despite this caveat, as noted in the AAUP report, other courts have rendered decisions on this topic, often to ill effect. This article is not intended to review all of those cases; the AAUP report does it well, as does the AAUP's "Legal Round-Up: What's New and Noteworthy for Higher Education" (2010) and "Annual Legal Update."³ The focus here, instead, is on the possible spread of an even broader range of arguably bad or restrictive court decisions into academic freedom contract language or faculty handbooks. This is a case study and a cautionary tale.

To date, the reaction to various court decisions inimical to the protection of academic freedom has been to decry them and illustrate their threat. The concern has been that as similar cases arise and go to court, one bad court decision may spawn others. The spread of such decisions would be incremental, via future court cases, as the influence of court precedents often is. However, there is, potentially, a faster track by which bad court decisions could find their way into the daily lives of faculty. This would be through contract negotiations or the unilateral implementation of new academic freedom language by boards of trustees.

The last place one might expect such harmful legal precedents on academic freedom to appear would be in academic contract language in collective bargaining agreements. If one peruses the academic freedom articles of AAUP (and other) contracts around the country, there are often commonalities. Frequently, these articles directly quote or paraphrase language from the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* and, sometimes, the 1966 *Statement on Professional Ethics*.⁴ They are, however, far weaker on ensuring faculty involvement in shared governance, as would be warranted after the *Garcetti* decision.

A recent development at the University of Akron suggests how ill-conceived court precedents could filter into a university administration's negotiations over academic freedom or into a faculty handbook on a nonunionized campus. Such developments are not unique to this one institution, and are but a preview of the tenor of faculty-administration relations throughout the nation. For faculty concerned about protecting academic freedom in an

increasingly hostile environment, these developments should be understood and taken seriously. The final text of the academic freedom article resulting from the 2005 collective bargaining agreement between the University of Akron administration and Akron-AAUP belies the twenty-six-month battle to preserve the principle.

In its first contract negotiation lasting from fall 2003 until December 2005, the University of Akron chapter of the American Association of University Professors (Akron-AAUP) faced numerous obstacles. While first negotiations are often drawn out, given that all topics are on the table and university administrations may be somewhat resentful at having lost a collective bargaining election, the twenty-six months for the University of Akron's first negotiation was still somewhat unprecedented. What was particularly surprising, however, was that it took all twenty-six months to get agreement on the Akron-AAUP's proposed contract language on academic freedom. This language drew upon pre-existing university rules relating to academic freedom and professional ethics, which themselves drew liberally from the AAUP. Prior to the establishment of a faculty union at the University of Akron, the existing university rule 3359-20-03 stated:

(B) Academic freedom.

The University of Akron subscribes to the following statements from the "academic freedom and tenure" document as presented in the quarterly "Academe" publication of the American Association of University Professors:

- (1) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- (2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be

clearly stated in writing at the time of the appointment. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their 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.⁵

Prior to the establishment of collective bargaining in 2003, the University of Akron's University Rule #3359-20-03.7, "Guidelines for Initial Appointment, Reappointment, Tenure, and Promotion of Regular Faculty," favorably cited AAUP's 1940 *Statement on Professional Ethics* as one of the written standards defining professional conduct. The university's board of trustees approved this rule, as it does all university rules prior to their publication. Notably, 3359-20-03.7 was rescinded after the negotiation of the first collective bargaining contract. That original language read as follows:

3359-20-03.7 Guidelines for initial appointment, reappointment, tenure, and promotion of regular faculty.

- (F) Procedures for reappointment, tenure, and promotion of regular faculty
 - (d) Professional conduct as defined in written standards including but not limited to the following:
 - (i) Sexual harassment policy rule 3359-11-13 of the Administrative Code
 - (ii) Conflict of interest, conflict of commitment, scholarly misconduct, and ethical conduct policies and procedures rule 3359-11-17 of the Administrative Code

- (iii) Affirmative action policy rule 3359-38-01 of the Administrative Code
- (iv) Alcohol policy rule 3359-47-01 of the Administrative Code
- (v) Drug-free workplace policy rule 3359-47-02 of the Administrative Code
- (vi) *“Statement on Professional Ethics” as published by the American association of university professors* [italics added]
- (vii) Other professional ethics policies as approved by the American Association of University Professors Committee B On Professional Ethics published by the American Association of University Professors.⁶

The faculty proposal sought to legally codify in the contract the AAUP academic freedom and ethics language previously endorsed by the university administration in the university rules. However, the university administration balked. In response to the academic freedom language, the university’s negotiating team, comprised in part of four lawyers, proposed to insert numerous words and phrases that significantly altered and, arguably, diminished the protections of the article. Many of the additions used key phrases that alluded to various unspecified court decisions that had undermined academic freedom. The apparent intent of inserting the catchphrases was to interject into the contract language referents to distinctive court decisions that constrained or delimited academic freedom. To an untrained reader of such a contract article, the words and phrases in context may have seemed somewhat unexceptional. However, the cases to which they referred, and the restrictions that the language would have allowed into the contract, were anything but benign, especially when considering previous actions by the administration in the aftermath of the collective bargaining election. In the summer of 2003, the university’s board of trustees removed key committee responsibilities from the faculty senate, including any presence by bargaining unit faculty on both the budget and

planning and the facilities committees. It was clear to all involved that the university's administration was interested in restricting faculty involvement in governance matters.⁷

The Akron-AAUP's contract proposal on academic freedom read as follows, with language taken both from the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1966 *Statement on Professional Ethics*:

ARTICLE 4

Academic Freedom, Rights, and Responsibilities

Section 1.

The parties subscribe to the following statements drawn from the 1940 *Statement of Principles on Academic Freedom and Tenure* (Sections 2–4 below), and from the *Statement on Professional Ethics* (Section 5 below), both issued by the American Association of University Professors.

Section 2

Faculty members are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon a prior understanding with the authorities of the institution. The principles of academic freedom and freedom of inquiry shall be interpreted to include freedom of expression in both traditional print and newly-emerging electronic formats such as the creation of digital images, web sites, or home pages.

Section 3

Faculty members are entitled to freedom in the classroom (including the virtual classroom) in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject.

Section 4

College and university faculty are citizens, members of a learned profession, and members of an educational institution. When they speak or write as citizens, they should

be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and members of the institution, 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.

Section 5

A. Members of the Bargaining Unit, guided by a deep conviction of the worth and dignity of the advancement of knowledge, shall recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and state the truth as they see it. To this end Members shall devote their energies to developing and improving their scholarly competence. They have an obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They shall practice intellectual honesty. Although Members may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.

B. As teachers, Bargaining Unit Faculty shall encourage the free pursuit of learning in their students. They shall hold before them the best scholarly and ethical standards of their discipline. Bargaining Unit Faculty shall demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Members of the Bargaining Unit shall make every reasonable effort to foster honest academic conduct and ensure that their evaluations of students reflect each student's true merit. They shall avoid any exploitation, harassment, or discriminatory treatment of students. They shall acknowledge significant academic or scholarly assistance from students. They shall protect students' academic freedom.

C. As colleagues, Bargaining Unit Faculty have obligations that derive from common membership in the community of scholars. Members of the Bargaining Unit shall not discriminate against or harass colleagues. They shall respect and defend the free inquiry of associates. In the exchange of criticism and ideas Members shall show due respect for the opinions of others. Bargaining Unit Faculty shall acknowledge academic debts and strive to be objective in their professional judgment of colleagues.

This language, or paraphrases of it, is found frequently in both collective bargaining agreements and faculty handbooks around the country. A perusal of contracts and handbooks in Ohio, for example, shows that these paragraphs or the equivalent ideas are ubiquitous.⁸ These academic freedom statements do not always cite the source as the AAUP, but the borrowed language is unmistakable. Even a review of faculty contracts around the country, from the AAUP, National Education Association (NEA), and American Federation of Teachers (AFT) higher education bargaining units reveals a similar pattern.⁹ The AAUP language on academic freedom is often directly borrowed or paraphrased, with or without attribution. We note that while academic freedom language is likely ubiquitous in both collective bargaining contracts and in faculty handbooks for non-unionized faculties, the extent to which policy/contract language is mindfully enforced is an empirical question recently underscored in AAUP's recommendations to protect the faculty voice (see, for example, Action Items from AAUP's "Speak Up Speak Out" campaign at <http://www.aaup.org/AAUP/programs/protectvoice/actionitems/default.htm>). Furthermore, the recent *Garcetti* decision underscores how even the AAUP's traditional academic freedom language may be insufficient to ensure full faculty involvement in shared governance on campuses.

Even during the unfolding drama of negotiations, the University of Akron's counterproposal on this standard academic freedom language was surprising. One would hope and expect that agreement on academic freedom would be easy, especially given that the

university in this instance had previously endorsed the language and documents in question. Yet the university's first counterproposal was expansive in its attempt to redefine the parameters of academic freedom. While this may have been a negotiating ploy, proposing something bad to either trade or lose in fact-finding, the danger was real. The administration's counterproposal is included below, section by section, accompanied in each case by a deconstruction of its language and its implications.

Section One

The university administration's counterproposal on Section One of the Akron-AAUP proposal read as follows, with added university language in italics.

Section 1. The parties subscribe to the following statements, drawn *in part*, from the 1940 Statement on Principles on Academic Freedom and Tenure, as issued by the American Association of University Professors; *and in part, from controlling legal precedents concerning academic freedom since the publication of that statement as well as First and Fourteenth Amendment Constitutional guarantees that apply at state universities and impact the rights and responsibilities of faculty, students and the institution.*

Controlling Legal Precedents

First and foremost among the issues here was the university administration's insertion of the phrase "controlling legal precedents" into contract language that would set the parameters underlying this freedom. Exactly what are controlling legal precedents, and which ones are "controlling"? The problems with this are many, but they are not readily apparent. First, no controlling legal precedents are specified, leaving a huge and vague hole in the contract on arguably the most important protection of academic freedom in American higher education. Nor did the university specify, in its first counterproposal, from which courts such precedents could be taken. Subsequently, the university negotiating team revised its proposal to specify precedents from the US Supreme Court and the Sixth Circuit Court of Appeals, which covers

Ohio. At this earlier point in time, however, faculty members were faced with the prospect that the University could trawl for decisions from any jurisdiction that arguably might apply, thus potentially limiting faculty academic freedom. There is nothing in the university's language on controlling legal precedents to prohibit such action. Furthermore, how these might be applied, either after an alleged violation or before one occurs, is not specified. This prospect could cast a "pall of orthodoxy" on the faculty (to quote Justice Brennan's comment in the Supreme Court's decision in *Keyishian v. Board of Regents of the State University of New York*), exactly the opposite effect of a commitment to academic freedom.

Even after the university revised its position to specify precedents from the US Supreme Court or Sixth Circuit Court of Appeals, it did not specify which precedents would or would not apply. There are two problems with this position. First, this leaves open-ended the occurrence and utilization of future Sixth Circuit decisions. Second, even when there is an arguably relevant decision, such decision provides the minimum required of the relevant parties, not the maximum. There is nothing to prevent the University from adopting a broader standard for the protection of academic freedom, as the AAUP's 1940 *Statement* does, than might be drawn from a particular court decision. Hypothetically, if the Sixth Circuit Court of Appeals were to render a decision that faculty researching pornography would have to get their topics approved by the university administration (e.g., *Urofsky v. Gilmore*), would they necessarily implement that decision? If they attempted to, would the circumstances in the current case be parallel? Who would decide?

Second, controlling legal precedents are usually determined by judges and lawyers who are trying to apply prior court decisions to the varying circumstances of a particular case. Therefore, it is not necessarily obvious in the abstract when a controlling legal precedent applies. A precedent "must have a similar question of law and factual situation" in order to be controlling.¹⁰ Furthermore, precedents can be conflicting. Different courts may and do reach conflicting decisions on seemingly similar issues. For example, the Tenth Circuit Court of Appeals has reached different decisions on whether faculty members criticizing administrations

were speaking to “matters of public concern” and, therefore, were protected by their academic freedom. As Donna Euben, former AAUP counsel, noted, in *Clinger v. New Mexico Highlands University*, “the Tenth Circuit ruled that a professor's speech involving a no-confidence vote was unprotected.”¹¹ That is, the speech was not deemed to be about matters of public concern. Yet the same court, in *Gardetto v. Mason*, ruled that a professor’s support of a no-confidence vote and against the university president’s reduction in force plan was, indeed, a matter of public concern and thus protected speech.¹² In a 2004 article on conflicting precedent, Mark Levy notes that while intracircuit conflicts should not exist, they do, and different courts deal with this fact in varying ways:

It is the court en banc that has the responsibility to resolve disagreements among panels and only the full court can overrule a previous panel decision. In practice, however, this issue has arisen with some frequency. For example, a panel might overlook a prior decision or attempt to distinguish it on grounds that a subsequent panel finds unconvincing. Faced with this problem, courts have adopted differing approaches to deal with it.¹³

Levy proceeds to identify how various appeals courts follow different principles in resolving such conflicts, such as a “first in time” rule as opposed to a “correct position” rule. The important point, for our purposes, is that there is nothing completely clear about how precedents are designated or followed.

Ultimately, the university’s use of the phrase “controlling legal precedent” connotes a level of certainty as to 1) what the precedents are, and 2) which ones apply in a particular case, a certainty that is not reflected in legal practice. Lawyers spend a lot of time “distinguishing” cases, such that an alleged controlling precedent cited by the other side is distinguished from the existing controversy, in order to claim that the decision in fact is irrelevant. Conflicting precedent is especially relevant in academic freedom cases, where Circuit Court of Appeals decisions have conflicted with understandings from other Circuit Courts or even the Supreme Court. For example, the decision of the Fourth Circuit Court of Appeals in *Urofsky v. Gilmore*

held that there existed no faculty First Amendment right to academic freedom (more on this later), which is contrary to what most observers believe was established by other courts and the Supreme Court.¹⁴ That said, the *Garcetti* decision subsequently spawned court decisions that did in fact restrict faculty academic freedom in the area of shared governance.

Furthermore, applying a standard of controlling legal precedents would require that an arbitrator in a contract grievance have the legal expertise to adjudicate what the controlling legal precedents are and if they apply in a particular set of circumstances. If an arbitrator were not fully prepared to judge the legal basis for a controlling legal precedent, then the parties would be forced to take a grievance to the court system. This defeats the purpose of a contract, which should be self-contained as much as possible.

Industry Norms

There are further problems with the controlling legal precedent standard in Section One. In contract negotiations, once a contract article is no longer negotiable it may become subject to mediation and fact-finding. In fact-finding, one consideration of the fact-finder is the “industry norm.” In this instance, what is the industry norm for academic freedom in higher education in Ohio and nationally? In fact, there is no other academic contract in Ohio that places such restrictions on the academic freedom of its faculty. The phrase “controlling legal precedent” (or “legal precedent” or “precedent”) is found in no other Ohio contract. Similarly, no other contract article on academic freedom in Ohio refers to any court as a basis for setting limits on academic freedom. Nor does any other contract in Ohio insert a reference to the US Supreme Court into its academic freedom language. Beyond that, language on academic freedom rights in faculty handbooks at non-unionized campuses, such as Ohio State, Miami University, and Ohio University, includes no reference to controlling legal precedents, any lower or appeals court, or the US Supreme Court.

In a search of the online contracts of all AAUP-affiliated bargaining units with websites listed on the national AAUP website, not one of these contracts used the phrase “controlling

legal precedent” or “legal precedent” or “precedent” in the language of the academic freedom contract article.¹⁵ Nor do these contracts mention any circuit court of appeals or the US Supreme Court.

Similarly, a search of the academic freedom contract language for a sample of comparable institutions with AFT and NEA bargaining units found not a single academic contract that inserted “controlling legal precedent,” “legal precedent,” or “precedent” into the academic freedom article. Nor do any of these contracts mention any circuit court of appeals or the US Supreme Court. In Google , searching under 1) “academic freedom” in conjunction with 2) either “controlling legal precedent” or “legal precedent” and 3) “collective bargaining agreement” or “CBA” retrieved not a single academic contract with this language in an academic freedom contract article (as of November 2009). Nationally, then, there is no other academic contract that attempts to qualify the academic freedom of its faculty based upon references to controlling legal precedents or a particular circuit court of appeals. Nor do any of them mention the US Supreme Court.

Beyond this lack of precedent for such language in an academic freedom contract article, the parties in academic collective bargaining agreements usually agree to a separability article that guarantees that if any part of the contract is found to be inconsistent with existing law, it can be withdrawn and renegotiated without negating the rest of the contract. In light of this, there is no need for references to court decisions in the abstract. In fact, it is hard to imagine a particular exercise of faculty academic freedom that would lead to a preemptive ban by an administration based upon a newly decided court case.

First and Fourteenth Amendments

The university added into Section One of the Akron-AAUP’s proposal references to the First Amendment and the Fourteenth Amendment to the US Constitution. There is nothing in the faculty’s contract proposal that contravenes, nor could it contravene, the First Amendment to the Constitution. In fact, the Supreme Court has stated that academic freedom deserves special

protection as part of the First Amendment.¹⁶ Nothing in the Akron-AAUP proposal, which had been prior university language on academic freedom, limits First Amendment rights.

Furthermore, the Fourteenth Amendment is, for practical purposes in this context, supportive of due process and equal protection. Yet the contract itself provides for the due process required to administer the contract and grieve violations of it. Nothing in the contract can contravene either amendment. Therefore, the references to the First and Fourteenth Amendments are gratuitous.

No other contract in Ohio or in the country inserts references to the First and Fourteenth Amendments into the well-established academic freedom language that is invariably drawn from the AAUP statement. We searched the website-posted contracts of all AAUP-affiliated bargaining units with sites listed on the national AAUP website (see <http://www.aaup.org/AAUP/about/cbc/colbargainchap.htm>). Not one of these contracts referred to the First or Fourteenth Amendments in the language of the academic freedom contract article.

Beyond this, however, it should be noted that the AAUP's position on academic freedom predates court decisions attempting to apply the First Amendment, for example, to academic settings. These decisions began to appear in the 1940s and 1950s, notably in the *Sweezy v. New Hampshire* case. But the AAUP position was first articulated in its 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*.¹⁷ This was the precursor to the 1940 *Statement*. More importantly, the AAUP position on academic freedom is not rooted in the First Amendment, but rather in evolving professional norms of higher education. As Donna Euben argues, the two are not coextensive.¹⁸ It is true that courts have begun to weigh in on academic freedom issues. However, the protections of the 1940 *Statement* should apply to public and private institutions alike, and they are in fact more protective of academic freedom than some US Supreme Court decisions. The recent *Garcetti v. Ceballos* decision, discussed elsewhere in this paper, is a case in point.

In its reply brief prior to fact-finding, the university argued that the insertion of references to the First and Fourteenth Amendments provided a supplement to the AAUP language and

was, therefore, more protective of academic freedom. Similarly, the university argued that the reference to the Sixth Circuit Court of Appeals, which covers Ohio, was appropriate, and in any event the Akron-AAUP was unable to cite a single case decided by either court that had undermined academic freedom. In fact, the *Garcetti v. Ceballos* decision is the most recent Supreme Court decision that undermines academic freedom. While the Sixth Circuit Court had issued no such decision utilizing *Garcetti*, to our knowledge, it could at any time. If and when it did, as in the Fourth Circuit's decisions in *Urofsky v. Gilmore*, would the university impose that decision on the faculty? Or would it adopt a broader and more tolerant view of academic freedom? The problem with the university's position is that it could do whichever it wants. Academic freedom would only be as secure as the next bad decision, and the university's assertion that the case law and facts are similar to campus circumstances and, thus, controlling. The university's position, then, was that since the Sixth Circuit had not yet issued a threatening decision, or a contradictory set of decisions on the same issue, there is no problem. However, this is incorrect. In *Parrate v. Isibor*, in 1989, the Sixth Circuit Court of Appeals ruled, in effect, that academic freedom resided, at least in part, with the institution.¹⁹ Furthermore, as of this writing, the Sixth Circuit has indeed issued a recent *Garcetti*-related opinion, *Fox v. Traverse City Area Public Schools Board of Education*.²⁰ In brief, the court argued:

The Sixth Circuit held that Fox's complaints were not protected speech under *Garcetti*, noting that "speech by a public employee made pursuant to *ad hoc* or *de facto* duties not appearing in any written job description is nevertheless not protected if it 'owes its existence to [the speaker's] professional responsibilities.'" It determined that Fox's complaints "'owed [their] existence to" her teaching responsibilities and were therefore not protected. The court also relied on the fact that Fox's complaints were directed solely to her supervisor, rather than the general public, distinguishing other cases where plaintiffs had been successful on the grounds that they involved speech "outside the ordinary chain of command."²¹

The important point here is that this rather expansive view of what is *not* protected as a matter of public concern, and what *is* an “ad hoc or de facto” duty of one’s job, could include any number of faculty activities. Participation in campus committee work, on an as-needed or ad hoc basis, could qualify, putting faculty at risk for punishment if they express critical views of an administrator or the institution. Yet this is, in fact, what faculty members are supposed to do in a shared governance environment: express their honest views based upon their expertise. Shared governance, along with freedom in one’s teaching and research, is the third leg of the stool of academic freedom. Using the above Sixth Circuit decision, an institution such as the University of Akron could constrain the legitimate exercise of academic freedom.

Student Academic Freedom

Further on in its added language to Section One, the university refers to the academic freedom of students and the institution. As for students, the added reference to their academic freedom is both redundant and potentially damaging to the academic freedom of faculty members in the exercise of their responsibilities. The reference to students is redundant because it is referenced already in Section 5.B, which is included in the contract proposal of the Akron-AAUP’s and had been agreed to by the university. Section 5.B states:

As teachers, Bargaining Unit Faculty shall encourage the free pursuit of learning in their students. They shall hold before them the best scholarly and ethical standards of their discipline. Bargaining Unit Faculty shall demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Members of the Bargaining Unit shall make every reasonable effort to foster honest academic conduct and ensure that their evaluations of students reflect each student’s true merit. They shall avoid any exploitation, harassment, or discriminatory treatment of students. They shall acknowledge significant academic or scholarly assistance from students. They shall protect students’ academic freedom.

This same language, taken from the AAUP's *Statement of Professional Ethics*, is included verbatim in the Wright State University and University of Toledo contracts, and by citation in the Kent State University contract. The Akron-AAUP proposal provided clear ethical obligations in the contract protecting students' academic freedom, and it explicitly mentioned fairness in student evaluation, as well as avoidance of harassment, exploitation, and discriminatory treatment. These are core elements of student freedom as articulated in the AAUP's *Joint Statement on Rights and Freedoms of Students*.²² In addition to these rights, students also have the right to reserve judgment on the information they learn in the course of their studies. Most campuses have, or should have, procedures in place for students to lodge a complaint if and when they may have been harassed or treated in a biased manner.

However, the allusion to student academic freedom in Section One has a more threatening referent. The so-called *Academic Bill of Rights*, as authored and circulated to state legislatures by David Horowitz and his supporters, argues for student academic freedom of a very different sort. It alleges ideological bias on the part of faculty, as indicated for example by political party registrations, and it seeks to impose balance on what is taught in college and university classrooms.²³ Inevitably, the determination of this balanced presentation of ideas would be by administrators or politicians. This is a clear violation of faculty rights to academic freedom, specifically their right to determine what to teach in their courses and how to teach it. Students do not have the right to be unchallenged in their coursework, nor to ask for alternative content that does not offend their sensibilities. Therefore, a loose reference in a contract article to the students' academic freedom could usher in some of the more sinister features of the academic bill of rights.²⁴ Interestingly, students testifying in the Ohio legislative hearings in favor of a proposed academic bill of rights had not, in fact, availed themselves of any campus procedure for student complaints.²⁵

Institutional Academic Freedom

The university also added in Section One a reference to the institution's academic freedom. Prior to this contract negotiation, the university had not seen fit to include language on the institution's academic freedom in the academic freedom section of the faculty manual. Institutional academic freedom is a somewhat unsettled, and in places, controversial, part of law and custom in academia. No other academic contract in Ohio mentions the concept of the institution's academic freedom in its contract article on this topic. Originally, institutional academic freedom referred to the institution's right not to have its autonomy in fulfilling its academic mission interfered with by outside bodies (e.g., the government). This was first implied by the US Supreme Court in a McCarthy-era case in the late 1950s, *Sweezy v. New Hampshire*.²⁶ This legitimate academic mission was defined as deciding what may be taught, how it may be taught, who may teach, and who may be admitted to study (Justice Felix Frankfurter in the *Sweezy* decision). Clearly, the faculty is central to the implementation of the first three of these, and it also makes suggestions about standards for admission to particular degree programs. Therefore, the university's or institution's academic freedom should, in part, reflect its right and obligation to protect these core functions performed by faculty. As Steven Poskanzer has noted:

Courts' willingness to defer to [institutional] policies is in large part a consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty admissions committees). In a very real sense, then, the *institutional* academic freedom recognized in many judicial opinions may be viewed as the sum of acts of *individual* faculty academic freedom. Conflict between these two notions may thus become illusory.²⁷

Are the faculty member's academic freedom and institutional academic freedom in conflict?

David Rabban notes that this has not been the case at the US Supreme Court level:

Bakke and *Widmar*, the first Supreme Court cases that recognized a distinctive category of institutional academic freedom under the First Amendment, did

not involve conflicts between universities and individual professors who asserted their own right to academic freedom. In fact, no Supreme Court case to date has presented such conflicts. The closest the Court has come to analyzing the tension between individual and institutional academic freedom is a footnote by Justice Stevens in *Regents of University of Michigan v. Ewing*, a 1985 case brought by medical student challenging a faculty decision to dismiss the student on academic grounds. “Academic freedom,” Justice Stevens noted, “thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”²⁸

Institutional Academic Freedom, *Urofsky v. Gilmore* and *Garcetti v. Ceballos*

The concept of “institutional academic freedom” became controversial when the Fourth Circuit Court of Appeals decided that faculty had *no* individual First Amendment right to academic freedom, but rather that it resided in the institution. Numerous scholars consider this decision aberrant and at odds with other courts and the Supreme Court, which have acknowledged the important protection of the academic freedom rights of individual faculty.²⁹ In the *Urofsky* decision, a faculty member in Virginia was prohibited, without prior approval, from having students access sexually explicit websites that were a legitimate part of his academic instruction on federal laws dealing with indecency. Similarly, faculty research in numerous subject areas would also be prohibited, without prior approval by campus authorities. The court of appeals supported the state law prohibiting the right to access such sites under the protection of academic freedom, saying that academic freedom resides with the institution.

The *Garcetti* decision, cited at the beginning of this piece, provides a further basis for eroding faculty academic freedom. In its assertion that public employees have no right to free speech in their employment, the Supreme Court privileged the employer or institution and its rights over those of its employees. In an academic context, however, the misapplication of the

Garcetti decision could lead to institutional control over the academic speech of faculty in the classroom, in their teaching and service, and in their participation in campus shared governance. Defenders of academic freedom have pointed out that for academics the execution of their jobs requires academic freedom in all of the contexts identified above. This is, in fact, a unique feature of the role of academics in this country's higher education system. Here, the oft-cited example of judges applies. Faculty members are, like judges, the appointees of those who put them in their position, but they are not their employees. Their position requires an independence of judgment that necessitates their insulation from political whim and influence. Similarly, faculty members are hired to freely explore and create knowledge, and to share it with their students and the broader academic community. They are also expected to participate in shared governance relating to the academic mission of the institution, on which they have first-hand knowledge. None of these goals, which are requirements of the position, can be achieved without faculty independence and insulation from political influences.

Section Two

The university's counterproposal for Section Two is below, with its added language in italics.

Section 2. Faculty members are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; *and, subject further to institutional rules respecting scientific and academic misconduct in research, rules respecting human subjects research, and institutional rules respecting the protection of intellectual property.* Research for pecuniary return should be based upon a *prior* understanding with the authorities of the institution. *Inasmuch as University faculty are state employees, the principles of academic freedom and freedom of inquiry shall be interpreted to include freedom of expression as guaranteed by the First and Fourteenth Amendment to the US Constitution, in both traditional print and newly-emerging electronic formats such as the creation of digital images, web sites, or home pages, but subject to computer use policies of the University and applicable state and federal law.*

In Section 2, the university administration inserts numerous limits on academic freedom, yet these are not, nor should they be, academic freedom constraints. Notably, this section states that freedom to do research and publish should be subject to or limited by rules on academic misconduct, human subjects, intellectual property, and computer use policies.

Academic Misconduct

Academic misconduct appears elsewhere in the contract as a possible trigger for disciplinary action, subject to due process for dealing with alleged violations. If such misconduct were proven, leading to someone being fired, then their academic freedom is a moot point. However, if there were some other form of discipline, and the faculty member continued to teach in the classroom, should they not still be allowed academic freedom in their teaching and research? Why would one form of punishment be to limit their ability to teach their best?

Human Subjects Review

As for human subjects, campuses abide by federal requirements for human subjects reviews. This is not an academic freedom issue. If faculty members who need institutional review board approval do not get it, then their grant proposal or research proposal will be in jeopardy. If a faculty member has undertaken research without such approval, then this may trigger misconduct provisions that should be handled elsewhere in the contract.

Intellectual Property and Computer Use Policies

Finally, the reference to intellectual property is gratuitous in that 1) it does not relate to the guarantee of academic freedom, and 2) it is typically dealt with in an intellectual property contract article elsewhere in a contract.

Since the First and Fourteenth Amendments have been discussed elsewhere, we should next examine the reference to “computer use policies of the University and applicable state and

federal law” as another proposed limit on academic freedom. First, how do computer use policies run afoul of academic freedom? Which policies are being referred to? What exactly are the applicable federal and state laws? Since they are not specified, nor their impact on academic freedom explicated, one is left with the university administration’s vague permission to shop for such laws. Given the Fourth Circuit court’s decision in *Urofsky v. Gilmore*, the University administration may have a court decision at hand that could limit, by “applicable state and federal law,” computer use. While the *Urofsky* decision applied to a Virginia state law, it would not be unreasonable to worry that other states could adopt similar statutes, or that a university may view it as a “controlling legal precedent.”

Beyond this, it should be pointed out that court decisions allow, but do not necessarily compel certain actions by the institution. In referring to e-mail privacy, Donna Euben notes that “[w]hile the law may allow a university to restrict faculty privacy in e-mail communications, the law does not require it to do so.”³⁰ As Euben goes on to note, some universities, such as Rensselaer Polytechnic Institute or the University of Michigan, have policies that go out of their way to protect electronic communications and network usage as part of the environment for academic freedom and the unfettered pursuit of knowledge.

In fact, while computer use policies ought to be mostly irrelevant to the exercise of academic freedom, at the very least they should be supportive of it.³¹ If they are not, the policies themselves should be changed, not the guarantee of academic freedom. As the AAUP argues in its *Academic Freedom and Electronic Communications*:

Academic freedom, free inquiry, and freedom of expression within the academic community may be limited to no greater extent in electronic format than they are in print, save for the most unusual situation where the very nature of the medium itself might warrant unusual restrictions—and even then only to the extent that such differences demand exceptions or variations.³²

If a faculty member engages in misconduct by downloading child pornography onto their university computer, unrelated to their academic research and teaching, then such behavior

might run afoul of state law or any academic misconduct provisions in the contract. But it is not an academic freedom issue. On the other hand, if a scholar is researching pornography on the Internet as part of their research agenda, then the university and its computer use policies should be fully supportive of such legitimate research. This particular issue, of course, was at the root of the *Urofsky v. Gilmore* case in Virginia.

Section Three

Section 3. Faculty members are entitled to freedom in the classroom (including the virtual classroom) in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no *rational* relationship to their subject, and not to engage in conduct or introduce matter in the classroom not germane to the subject matter. *While a faculty member's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising institutional curriculum requirements for courses or programs of study approved by the faculty and institution, a student's right to learn in a hostile-free environment or the institution's right to provide a hostile-free learning environment. Individual faculty have a responsibility to their profession, students and the institution to maintain and demonstrate current competency in their subject area, and the institution and its faculty have a responsibility to assist individual faculty who may need special assistance with respect to either subject matter or teaching skills.* [italics added]

Section three of the administration's counterproposal takes aim at academic freedom in the classroom. First, the university says that controversial matter must bear a "rational" relationship to the subject being taught. What constitutes a rational relationship to the subject may very well be in the eyes of the beholder. A faculty member teaching educational sociology who explores Marx's theory of surplus value may be deemed to have violated this requirement by some observers. Yet from a conflict perspective within the sociology of education, raising such questions is perfectly legitimate. Furthermore, who should be judging the faculty

member's exercise of their academic freedom within their field: their peers, or administrators and politicians?

This section further states that academic freedom is paramount in the academic setting, yet then proceeds to enumerate all of the ways in which it is not paramount. Faculty committees recommend the curricula, but faculty members should have discretion as to how their teaching best teaches that course material or curriculum. The phrase "hostile-free environment" is an allusion to 1) those lawsuits that some students are bringing against professors who teach subjects that offend their sensibilities or prior beliefs (e.g., teaching about evolution to a student whose religion does not believe in it), and 2) other cases where it becomes debatable whether the instructor's teaching has infringed upon the student's supposed freedom not to be challenged or offended by the course material. In either case, it is not the job of faculty members to avoid challenging or even, potentially, offending students at all costs. It is their job to present the course material as their professional expertise and training would dictate.³³ If doing so is considered creating a hostile environment, then faculty have no academic freedom. Ultimately, it is up to faculty members on retention, tenure, and promotion committees to judge the competency of their colleagues, and reputable universities have processes to accomplish just that. Furthermore, the AAUP's own statement on the rights of students prohibits discriminatory grading or harassment.

Finally, the reference in this section to the institution and faculty assisting individual faculty who need special assistance is, potentially, a Trojan horse. It opens up the possibility of post-tenure review and the ongoing administrative review of faculty performance, other than through existing, faculty-driven mechanisms such as retention, tenure, and promotion processes; merit raises; graduate faculty status criteria; grant applications; program accreditation; and teaching load assignments. The "institution" is not an expert on chemical engineering; one's chemical engineering colleagues are. Peer review is manifested in all of the above contexts and is faculty driven. In any event, neither lack of competence nor lack of teaching proficiency should be pretexts for encroaching on one's academic freedom. If a faculty

member were truly incompetent in their field, their colleagues would either not tenure them or, if already tenured, move to remove them. As for teaching proficiency, this is why many campuses today have teaching and learning centers where faculty members can engage in continual improvement of their teaching skills. Campuses also have student evaluations, as well as peer evaluations, that are considered in the retention, tenure, and promotion of faculty. These may also have implications for external program accreditation. Having said all of this, demonstrably poor teaching is not an excuse to remove one's academic freedom.

Section Four

Section 4. College and university faculty are citizens, members of a learned profession, and members of an educational institution. When they speak or write as citizens *on matters of public concern*, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and members of the institution, 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. [Italics added]

In Section Four, the university administration inserted the phrase "on matters of public concern" to delimit a faculty member's freedom to speak as a citizen or member of the profession and institution. This phrase alludes to the "balancing test of relative employee and employer interests" as set forth by the Supreme Court in the *Pickering v. Board of Education* decision.³⁴ The employee's interest is in free speech, and the employer's interest may be in an efficient workplace. Here, and in a number of subsequent cases (e.g., *Connick v. Myers*), the test is whether an employee's comments on an issue are on a matter of broader public concern and interest, and therefore protected as part of their free speech and academic freedom. Or, alternatively, their statements might be considered more of a personal matter, or pursuant to

their employee duties, and thus not protected. As Chris Hoofnagle and others argue, the court did not specifically define what constitutes a public concern, and this vagueness becomes even more problematic in cases involving higher education. While the courts have a widely varying track record in deciding this issue, an argument can be made that the parameters are too narrow for higher education. That is, even issues on internal campus governance, while not readily compelling or interesting to the public, may nonetheless be critical in the successful operation of a higher educational institution and, thus, a matter of public concern. Given the historical and contemporary importance of faculty involvement in campus shared governance, therefore, courts should allow a far wider range of campus issues to be matters of public concern. That said, since courts to date have not been suitably sensitive to the appropriate range of faculty involvement in teaching, research, and shared governance, the insertion of a “matters of public concern” standard into a contract poses potentially serious limitations on academic freedom.

Section Five

Section 5

A. Members of the Bargaining Unit, guided by a deep conviction of the worth and dignity of the advancement of knowledge, shall recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and state the truth as they see it. To this end Members shall devote their energies to developing and improving their scholarly competence. They have an obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They shall practice intellectual honesty. Although Members may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.

B. As teachers, Bargaining Unit Faculty shall encourage the free pursuit of learning in their students. They shall hold before them the best scholarly and ethical standards of their discipline. Bargaining Unit Faculty shall demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Members of the

Bargaining Unit shall make every reasonable effort to foster honest academic conduct and ensure that their evaluations of students reflect each student's true merit. They shall avoid any exploitation, harassment, or discriminatory treatment of students. They shall acknowledge significant academic or scholarly assistance from students. They shall protect students' academic freedom.

C. As colleagues, Bargaining Unit Faculty have obligations that derive from common membership in the community of scholars. Members of the Bargaining Unit shall not discriminate against or harass colleagues. They shall respect and defend the free inquiry of associates. In the exchange of criticism and ideas Members shall show due respect for the opinions of others. Bargaining Unit Faculty shall acknowledge academic debts and strive to be objective in their professional judgment of colleagues.

D. *Violation by a bargaining unit member of the principles of academic freedom as outlined in this article may be grounds for discipline, up to and including termination.* [Italics added]

Finally, in Section 5.D, the university initially proposed that violations of the academic freedom article by a faculty member could lead to discipline, including termination. This is rather surprising, based upon the history of academic freedom. Since the founding of the AAUP and the promulgation of its principles of academic freedom, it has been administrations, donors, industrialists, and politicians who have been at the forefront of infringing on academic freedom. However, the university's phrasing here does make some sense, given that its proposed language in the other sections of the article sets so many constraints on the academic freedom of the faculty. Therefore, were that language in the contract, faculty would in fact be much more at risk of violating its provisions.

There were four counterproposal iterations between Akron-AAUP and the administration from 2003 until the final agreement to the existing contract language in late 2005. However, in the 2009 contract negotiations, the administration submitted its original 2004 proposal once again briefly, then withdrew it.

Conclusion

Since the university's proposals reviewed in this paper were never agreed to, and the AAUP chapter effectively fought them off, one could question whether they needed to be critiqued in this manner. Arguably, we could have let "sleeping dogs lie." However, it is important to remember the lessons learned from the *Academic Bill of Rights* (ABOR) debate. Rather than hope that the ABOR would not come to our state legislature or campus, faculty mobilized to critique it for the danger that it was.³⁵ That effort led to the defeat of the legislative proposals to date. Were that effort not undertaken, one wonders how that legislation would have fared, and what impact it would have had on the academic freedom rights of faculty. Furthermore, at the beginning of its negotiations on a second contract, beginning in spring 2009, the Akron-AAUP was once again presented with the same language that the university proposed in its first negotiation. Though this proposed language ultimately was withdrawn, it does indicate the ideological staying power of these attempts to constrain faculty academic freedom.

To take liberties with an old Chinese proverb: bad ideas have feet. It is better to be alert to and oppose such ideas early, rather than to be forced to win back lost rights and freedoms after the fact.

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Notes

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