



Defending Academic Freedom in the Age of *Garcetti*

BY JOAN DELFATTORE

As the 2006 Supreme Court decision in *Garcetti v. Ceballos* continues to reverberate in academe, the best way for faculty members to defend their academic freedom is not through the courts but through clear university policies.

Let us begin with a reality check. Consider these three scenarios:

- “Magnus Zancudo,” a neuropsychology professor at a public university, publishes an article in which he attributes the underrepresentation of women in engineering to the physiological inferiority of the female brain. Does the First Amendment shield him from the wrath of administrators who consider his conclusions inconsistent with the university’s interests? Many academics would say yes.
- Administrators wish to grant tenure to a popular assistant professor, but a faculty committee led by Zancudo finds the candidate’s scholarship insufficient. Under the First Amendment, is Zancudo subject to discipline for opposing the administration in this matter? Many academics would say no.
- Zancudo criticizes the scholarly achievements of the successful candidate for the presidency of his university. Does the First Amendment prevent the new president from retaliating? Many academics would say yes.

In reality, it is unclear whether the First Amendment protects any of those activities.

The reason for using a public university in these scenarios is that the First Amendment applies only to government-run institutions. It states, “Congress shall make no law . . . abridging the freedom of speech.” Although the First Amendment originally

affected only federal action, twentieth-century Supreme Court rulings have caused it to encompass all levels of government. It does not apply to private universities, where the academic freedom of faculty members is defined by internal policies.

Because public universities are government-run institutions, it has long been assumed that the First Amendment does protect the academic freedom of their faculties. But that assumption, based on weak evidence to begin with, may not survive the effects of a 2006 Supreme Court decision, *Garcetti v. Ceballos*.

The dispute leading up to *Garcetti* began when Richard Ceballos, a deputy district attorney in California, concluded that a search warrant had been based on faulty information. He wrote a memorandum advising his supervisors that the case should be dismissed, but they disagreed, and a heated discussion ensued. Ceballos was subsequently reassigned to a less desirable position and denied promotion, and he claimed that his supervisors were retaliating against him for his speech, thus violating his First Amendment rights.

The Supreme Court disagreed. In a five-to-four decision, the court ruled that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” According to the

court, Ceballos's supervisors had the authority to penalize him for his advisory memorandum because it "was written pursuant to Ceballos's official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."

Justice David Souter protested that *Garcetti* might affect "even the teaching of a public university professor" and expressed the "hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" The court's majority responded with what has been called the "*Garcetti* reservation": "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."

Because of the *Garcetti* reservation, it is unclear whether the First Amendment applies to public universities, and, if it does, what it covers. In particular, and critical to faculty governance, does "speech related to scholarship and teaching" include faculty speech on such matters as faculty appointments and promotions, course staffing, and administrative policies and competence?

A series of lower-court decisions soon removed any doubt about whether some courts would apply *Garcetti* to professors in public universities. One of these cases, *Hong v. Grant*, arose when Juan Hong, a professor of chemical engineering and materials science at the University of California, Irvine, was denied a merit raise. While his self-acknowledged lack of publications may have been a contributing factor in the decision to deny him a raise, he asserted that he was being penalized for criticizing two colleagues in peer reviews, for objecting to the handling of a hiring offer, and for protesting the use of adjunct faculty. Citing *Garcetti*, a federal district court declared in 2007 that even if Hong was denied a raise in retaliation for his speech, the First Amendment offers no remedy because he spoke in the course of his duties.

The US Court of Appeals for the Ninth Circuit also ruled against Hong, but on the ground that "all of the university officers that Hong has sued in their individual capacities are entitled to qualified immunity" from being sued for the exercise of their professional discretion—in this case, for determining that Hong did not merit a raise. By contrast with the district court's unreversed application of *Garcetti*, the appeals court took the position that "it is far from clearly established today, much less in 2004 when the university officers voted on Hong's merit increase, that university professors have a First Amendment right to comment on faculty administrative matters without retaliation." Having decided the case on the basis of qualified immunity, the Ninth Circuit—like the Supreme Court in *Garcetti*—decided to "leave the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case." Although preferable to the district court's reasoning, this decision does nothing to resolve the uncertainty surrounding First Amendment protection for faculty academic freedom.

One response to *Garcetti* and its progeny has been to seek to bolster First Amendment protection for academic freedom. While this approach is certainly reasonable, it is not the only possible alternative or, perhaps, the best one. The core problem is that insofar as academic freedom is defined in terms of First Amendment law rather than as a professional standard, decisions about its scope and operation will be made by courts, not by academics.

Contrary to widespread belief, that approach did not work well even before *Garcetti*. Consider, for example, the 1989 case *Parate v. Isibor*. Natthu Parate was an untenured associate professor in the School of Engineering and Technology at Tennessee State University when the dean of his college, Edward Isibor, ordered him to raise the grade of a student who had, among other things, cheated on an examination and presented false medical excuses. Under protest and duress, Parate did so. Subsequently, university officials denied him travel funds and ordered him to change other students' grades and his overall grading policy. Isibor visited his class, shouted orders and insults, removed him as the instructor, and forced him to attend the class as a student. When the university did not renew Parate's contract, he sued.

The US Court of Appeals for the Sixth Circuit found that Isibor should have changed the grade himself instead of compelling Parate to do so, but otherwise it upheld the dean's authority to behave as he had. Like many other pre-*Garcetti* decisions, *Parate* assigns academic freedom not to the faculty but to the institution—that is, the administration. Although the *Parate* case is an extreme example with respect to the actions leading up to the nonrenewal of his contract, it is typical in its focus on determining who has the authority to make a particular decision, not whether the decision was correct or just.

If academic freedom were applied as a professional standard, an important step would be to ascertain whether Parate was in fact competent as an instructor—a judgment ordinarily involving consultation with faculty. Courts do not, and cannot, make such determinations. But to the extent that academic freedom is conceptualized as a First Amendment right, not as a professional standard, a key question is likely to be whether administrative authority supersedes faculty free speech. The answer to that question has often been yes in the past, and it is likely to remain so in the future.

Stepping Up to the Plate

A promising alternative to the First Amendment approach is to follow the example of private universities in defining academic freedom as a professional standard embodied in university policies. Courts have said that administrators at public universities *may* penalize faculty speech, not that they *must* do so. Indeed, the Supreme Court recommended in *Garcetti* that government employers who wish to protect employees' free speech should enact regulations for that purpose.

In the 2009 report *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, an AAUP subcommittee suggested three versions of model post-*Garcetti* academic freedom language to be adapted for use in university documents. Unlike court decisions, which tend to apply one-size-fits-all precedents to all academic freedom cases, this approach allows each institution to shape its own policies to reflect its individual

culture, values, and priorities. Collective bargaining agreements provide secure legal protection for such statements, which may also be embodied in faculty handbooks and other university documents. The AAUP website provides a chart showing the legal enforceability of faculty handbooks in the various states, and another chart on that website summarizes the academic freedom statements that several universities have already adopted in response to *Garcetti*.

Among these statements is one from my own institution, the University of Delaware, and I offer our experience in developing this policy as a case study that might prove useful to other universities. Although UD's effort took place in the context of negotiating a new collective bargaining agreement, the underlying issues pertain to the development of such statements no matter where they will be housed.

The UD chapter of the AAUP, of which I am currently the president, started off with a significant advantage: the university administration's wholehearted support for including an academic freedom provision in the collective bargaining agreement. Many of UD's top administrators, including its president, Patrick Harker, previously worked at Ivy League universities where the protection of academic freedom through institutional documents is the norm. As Lawrence White, vice president and general counsel at UD, explained, "There was unanimity early on that the *Garcetti* decision applies awkwardly in the higher education context. We recognized the wisdom in national AAUP policy statements on *Garcetti*. It honestly wasn't a difficult issue for anyone at the University of Delaware."

White himself served from 1982 to 1984 as associate secretary and staff counsel at the national AAUP, and in spring 2010 he published "Fifty Years of Academic Freedom Jurisprudence" in the *Journal of College and University Law*. I did not fully appreciate the value of having a general counsel who understands the importance of academic freedom until faculty members at other institutions told me that attorneys at their universities were advising administrators not to surrender any authority that *Garcetti* might give them. For such attorneys, White's article would make good reading. It is also useful to consider that once an administration silences any speech, it may be assumed that the university is endorsing whatever speech it fails to suppress. A university's real interest lies in fostering the exchange of divergent views on the understanding that the university itself does not necessarily endorse any of them and certainly does not endorse all of them.

In order to educate the faculty as a whole about the need for a post-*Garcetti* policy, our AAUP chapter co-sponsored a forum with UD provost Tom Apple, who describes academic freedom as "a prime tenet of the university." At the forum, AAUP senior counsel Rachel Levinson joined White in discussing legal decisions before and after *Garcetti*. As we had hoped, the event helped to spark widespread discussion of the importance of including academic freedom language in the new collective bargaining agreement.

One important matter that had to be resolved was the balance between the faculty senate and the AAUP chapter with respect to defining and enforcing academic freedom. UD's long-standing

academic freedom policy had been inserted into the handbook by the faculty senate, and the senate's Committee on Faculty Welfare and Privileges handles cases involving alleged violations of academic freedom. Although there was widespread agreement that the legal protection of the collective bargaining agreement is desirable in a post-*Garcetti* world, both the senate and the AAUP chapter considered it imperative to preserve an appropriate role for the Committee on Faculty Welfare and Privileges with respect to academic freedom.

In any negotiation of this kind, the background and attitudes of the chief participants are crucial to the outcome. A few brief examples may serve to illustrate how this worked at UD.

The current chair of the Committee on Faculty Welfare and Privileges is Jan Blits, a professor of education with significant knowledge of academic freedom matters. With education professor Linda Gottfredson, Blits resisted an attempt by an earlier UD administration to make the acceptance of grants conditional on the ideology of the funding agency. More recently, they challenged a controversial UD residence-life program. Although determined to preserve the role of his committee in academic freedom cases, he accepted the inclusion of academic freedom language in the collective bargaining agreement because of the legal protection that it would provide.

Other key participants included the chief negotiators for the AAUP chapter and for the administration. The AAUP team was led by Gerry Turkel, a professor of sociology and a national AAUP officer who had served on five earlier bargaining teams and was the chief negotiator for the 2008–10 collective bargaining agreement. The chief negotiator for the administration was Jennifer Davis, vice president for finance and administration, who shared White's views on academic freedom. Their expertise, the mature bargaining relationship that has evolved at UD since the AAUP chapter was formed in 1972, and the participation of national experts on academic freedom—both at UD and elsewhere—were all factors in the success of this endeavor.

Drafting the Academic Freedom Statement

Since the AAUP chapter and the administration agreed in principle on the need to insert academic freedom language into the new collective bargaining agreement, the next step was to determine exactly what the statement would say. As a starting point, the chapter took language from the AAUP's 2009 report: "Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to address the larger community with regard to any matter of social, political, economic, or other interest, without institutional discipline or restraint, save in response to fundamental violations of professional ethics or statements that suggest disciplinary incompetence."

We then edited this language in response to suggestions from colleagues across campus. In doing so, we did not mean to suggest that the AAUP language, developed by prominent First Amendment



University of Delaware Statement on Academic Freedom

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and other scholarly or creative activities, and to publish or otherwise disseminate the results. Academic freedom also encompasses the freedom to address any matter of institutional policy or action whether or not as a member of any agency of institutional governance. Faculty have the freedom to address the larger community with regard to any social, political, economic, or other interest. The freedoms enumerated in this policy apply without institutional discipline or restraint save for statements or actions that demonstrate disciplinary incompetence or that violate the University's Professional Ethics Statement (as edited on 2/12/99) or the University's standards pertaining to disruptive behavior (as adopted on

6/1/70). Alterations to these statements made subsequent to the signing of this Agreement do not affect the freedoms enumerated in this Article unless ratified by the UD-AAUP. Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that, when one is speaking as a citizen on matters of public interest, one is not speaking for the institution.

attorneys, would be insufficient to protect academic freedom in court. But we also had to provide UD faculty members with a statement that explicitly covered points that they considered important. To be sure that our revisions would not inadvertently introduce legal error into our statement, we consulted legal experts throughout the process.

Some of our changes involved the need for inclusivity: for example, acknowledging creative work and other scholarly activities that fall outside the traditional understanding of "research" as well as methods of dissemination that are not technically "publishing." We also changed "professors" to "faculty" to address the concerns of non-tenure-track instructors. In addition to making the language more inclusive, we made some of it stronger. We changed "should also have the freedom" to "have the freedom" and "statements that suggest disciplinary incompetence" to "statements that demonstrate disciplinary incompetence." Finally, the placement of the phrase "without institutional discipline or restraint" and of the provision beginning "save in response to" in the 2009 AAUP language suggests that both pertain only to public speech. We moved them to a different section of the statement to clarify that they also pertain to scholarship, teaching, and shared governance.

The administration accepted the statement with only a few proposed changes. One was that the reference to professional ethics and disciplinary incompetence was deleted and replaced with "save for violations of the University's Professional Ethics Standards or the University's standards pertaining to Disruptive Behavior." We liked the reference to specific UD policies, but we wanted to refer to the *current* versions of those policies because future changes should not automatically become exceptions to the collective bargaining agreement's coverage of academic freedom. We also objected to deleting the reference to disciplinary incompetence, since that is not covered by the policies on ethics and disruptive behavior, and we wanted to ensure that academic freedom could not become a shield for substandard work.

The administration also wanted to add a sentence from a University of Minnesota policy: "Academic responsibility implies the faithful performance of professional duties and obligations,

the recognition of the demands of the scholarly enterprise, and the candor to make clear that, when one is speaking on matters of public concern, one is not speaking for the institution."

We objected that the clause beginning "the candor to make clear" might suggest that faculty members bear the entire burden of informing the public that we do not speak for the institution, whereas the university should share that responsibility. We also pointed out that if the obligation to disclaim depends on the *content* of speech—whether it is of public concern—that could disproportionately affect faculty members who teach and do research on such topics.

Our solution was to shift the focus from the content of the speech to the role of the speaker by inserting the phrase "as a citizen" after "when one is speaking." Legal decisions, including *Garcetti*, distinguish between speech that is part of one's job and speech as a citizen outside one's job. Of course, we first made sure that "as a citizen" would not exclude faculty members who are resident aliens.

The administration accepted our revisions, and the collective bargaining agreement, approved by 96 percent of the AAUP members voting, went into effect on July 1, 2010. The final academic freedom language appears in the sidebar. In November 2010, the faculty senate inserted similar language into the faculty handbook to replace the old academic freedom statement, and we continue to work on clarifying the respective roles of the chapter and the senate in enforcing academic freedom at UD.

The early AAUP leaders fought hard for academic freedom nearly a century ago, when professors who were dismissed for expressing their scholarly and public views had little recourse. An ironic testament to their success is the degree to which many faculty members have come to take academic freedom for granted or been content to leave its protection to the courts. Vilified though *Garcetti* has been, if it reinvigorates faculty nationwide to take an activist approach to academic freedom once again, the effect will be to strengthen the free exchange of views that is essential to the quality and integrity of American higher education. ■