IS ACADEMIC FREEDOM IN MODERN AMERICA ON ITS LAST LEGS AFTER *GARCETTI V. CEBALLOS*?

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I. INTRODUCTION

Many students who have recently attended institutions of higher education can attest to the fact that sex has become a commonplace discussion in university classrooms across the country. Sex in higher academia appears to be discussed in almost every context—from sociology, to biology, to psychology, and even English classes.[1] What is not always so clear, however, is what constitutes curriculum and what constitutes an inappropriate, or even unlawful, digression by a professor.[2] When deviation from the academic material occurs in this manner, the potential for concerns about sexual hostility and harassment is raised.[3]

This paper argues that the doctrine of academic freedom and the associated protections formerly afforded to university faculty members' speech have been greatly eroded by the 2006 decision in *Garcetti v. Ceballos*.[4] This decision leaves faculty members, especially those who are non-tenured, more vulnerable to adverse employment decisions with little institutional and legal recourse. Additionally, *Garcetti* has the ability to discourage university employees from speaking out against institutional policies, procedures, and programs, while simultaneously suppressing discussion of contentious topics, such as sex, in the classroom. In making these arguments, this article highlights the current bright-line rule pertaining to public employees' free speech rights as pronounced in *Garcetti*, where the Supreme Court of the United States held that public speech made pursuant to official duties receives no First Amendment

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[1] *See* John E. Matejkovic & David A. Redle, *Proceed at Your Own Risk: The Balance Between Academic Freedom and Sexual Harassment*, 2006 BYU EDUC. & L.J. 295, 295 (2006).

[2] *See id.* at 296.

[3] *Id.*

[4] 547 U.S. 410 (2006).

protections.[5] At first glance this result might seem helpful to both students and administrators in that it appears to discourage tangential and potentially controversial non-academic dialogue by faculty members in the classroom. The majority, however, failed to anticipate the variety of ways in which this decision inappropriately leaves public employees in compromising situations. For these reasons, *Garcetti*'s significantly broad and over-inclusive holding seriously erodes the principles and purposes of academic freedom[6] while forever changing the face of college classrooms in America.

Part II of this article explores how academic freedom is currently understood by looking at various definitions put forth by academics, the American Association for University Professors (AAUP), and the University of North Carolina. Part III examines the judicial underpinnings of academic freedom and addresses how academic freedom has been defined and established by the Supreme Court of the United States, as well as the legal protections it is afforded. Part IV assesses the constitutional protections afforded to university faculty members' speech before *Garcetti*, specifically looking at professors' ability to teach sexually-based curricula. Part V details the Supreme Court's decision in *Garcetti* by analyzing the majority and dissenting opinions. Part VI observes the implications that *Garcetti* has on academic freedom by analyzing cases from various circuits and examining what these decisions mean for

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[5] *Id.* at 422–26. Although *Garcetti* did not resolve the implications that the decision potentially has on employees' free speech rights and academic freedom, it is important to note that Justice Kennedy, writing for the majority, noted that an argument could be made that academic freedom is afforded greater constitutional protections. He wrote:

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. 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.

Id. at 425.

[6] *See* Robert S. Rosborough IV, *A "Great" Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court's Decision in* Garcetti v. Ceballos, 72 ALB. L. REV. 565, 595–96 (2009); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 1000 (2009).

professors' current free speech rights. Part VII discusses recommendations for colleges, universities, and professors in protecting their academic freedom and free speech rights after *Garcetti*. Lastly, Part VIII concludes with a summary of public employees' free speech rights as well as professors' ability to teach sexually-based academic material going forward.

II. ACADEMIC FREEDOM OVERVIEW

What exactly is academic freedom? Is academic freedom the unique liberty protection afforded to faculty members, by virtue of their role as an academic, to seek the truth?[7] Is it best understood as the autonomy given to professors to be academic investigators and the abilities to share their findings freely?[8] Is academic freedom a unique protection afforded to individual faculty members or to university institutions as a whole?[9] Is it a constitutionally protected guarantee or merely a special consideration of the Constitution to be evaluated by the courts?[10] Academic freedom is difficult to comprehend and often appears to have a rotating definition depending on whom one is speaking to. The legal parameters of academic freedom remain even more elusive, as it is a topic that has been more thoroughly discussed among professors and scholars in academia than defined through judicial precedent or court decisions.[11]

Perhaps put most generally, academic freedom is the principle behind which to encourage professors "to search for the truth, communicate their findings without substantive filters, and encourage others to do the same."[12] It is a unique protection afforded to professors and faculty members, by virtue of their role as an academic, which is not otherwise afforded to all other public employees.[13] In theory, this protection is supposed to protect faculty members from institutional intrusion while at the same time shielding the university employing the faculty members

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[7] *See* Rosborough, *supra* note 6, at 571.

[8] *See 1940 Statement on Academic Freedom and Tenure*, AM. ASS'N U. PROFESSORS (Oct. 26, 2006, 12:49 PM), http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm [hereinafter *1940 Statement*].

[9] *See* Rosborough, *supra* note 6, at 570–71.

[10] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[11] *See* Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 2007 BYU EDUC. & L. J. 83, 84 (2007).

[12] Rosborough, *supra* note 6, at 571.

[13] *See id.* at 570.

from unnecessary outside intrusion.[14] Although academic freedom is frequently seen as a cloak of protection afforded to university faculty, it is by no means an "absolute right," meaning it does not provide faculty with protection from all university regulations and policies.[15]

The AAUP has also been actively involved in defining the scope of academic freedom since its inception.[16] The AAUP initially issued a report in 1915 in which it addressed the topic of academic freedom.[17] It later combined this report with its 1940 Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments.[18] Commentators note, "The AAUP focused on . . . professor[s] as . . . teachers and investigator[s] who had the right to interpret and communicate [their] conclusions without being subject to interference, molestation, or penalty."[19] The AAUP subsequently held that "membership in the academic profession carries with it special responsibilities."[20] These responsibilities dictate that professors should:

> (1) [be] guided by a deep conviction of the worth and dignity of the advancement of knowledge, . . . (2) encourage the free pursuit of learning in their students; . . . (3) [be obligated by a] common membership in the community of scholars; . . . (4) seek above all to be effective teachers and scholars; . . . (5) [be subject to the same] rights and obligations of other citizens.[21]

Not surprisingly, individual universities generally possess the liberty to define academic freedom as they wish, usually in a manner that is consistent with their institutional values.[22] For example, the following is a

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[14] *See id.* at 570–71.

[15] *Id.* at 571.

[16] *See* DeMitchell & Connelly, *supra* note 11, at 87–88.

[17] *See id.*; *1940 Statement*, *supra* note 8.

[18] *See* DeMitchell & Connelly, *supra* note 11, at 87–88; *1940 Statement*, *supra* note 8.

[19] DeMitchell & Connelly, *supra* note 11, at 88.

[20] *Statement on Professional Ethics*, AM. ASS'N U. PROFESSORS, http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm (last visited Sept. 18, 2011) [hereinafter *Statement on Professional Ethics*].

[21] *See* DeMitchell & Connelly, *supra* note 11, at 88–89 (quoting *Statement on Professional Ethics*, *supra* note 20).

[22] *See* The Univ. of N.C., *Academic Freedom and Responsibility of Faculty*, THE CODE/POLICY MANUAL, Ch. 100.1, Sec. 601, http://www.northcarolina.edu/policy/index.php?pg=vs&id=4431 (last visited Oct. 7, 2011).

quote from the University of North Carolina's policy manual defining its academic freedom policy:

> It is the policy of the University of North Carolina to support and encourage full freedom, within the law, of inquiry, discourse, teaching, research, and publication for all members of the academic staffs of the constituent institutions. Members of the faculty are expected to recognize that accuracy, forthrightness, and dignity befit their association with the University and their position as men and women of learning. . . .
>
> The [u]niversity and its constituent institutions shall not penalize or discipline members of its faculties because of the exercise of academic freedom in the lawful pursuit of their respective areas of scholarly and professional interest and responsibility.[23]

III. JUDICIAL UNDERPINNINGS OF ACADEMIC FREEDOM

Although judicial opinions have reflected recognition of the importance of academic freedom, courts have been careful not to legally specify its precise parameters.[24] Instead, courts seem to often rely on the infamous and elusive "I know it when I see it" approach as laid out in *Jacobellis v. Ohio*[25] when deciding academic freedom cases.[26] Yet, despite limited judicial parameters to the exact legal understanding of it, academic freedom has been a concept periodically addressed in American courts throughout the last century.[27]

The 1957 case of *Sweezy v. New Hampshire*[28] proved to be foundational in the framing of academic freedom.[29] In that case, the New Hampshire legislature authorized the state attorney general to investigate

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[23] *Id.*

[24] *See* DeMitchell & Connelly, *supra* note 11, at 84.

[25] 378 U.S. 184, 197 (1964).

[26] *See generally* Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 971 (9th Cir. 1996); Vega v. Miller, 273 F.3d 460, 466 (2d Cir. 2001); Silva v. Univ. of N.H., 888 F. Supp. 293, 312 (D. N.H. 1994).

[27] *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[28] 354 U.S. 234 (1957).

[29] Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 57 (2008).

public activities that might be considered "dissident" or rebellious under the New Hampshire Subversive Activities Act of 1951.[30]

The New Hampshire attorney general subsequently investigated Sweezy because of his known political views in relation to a lecture that he gave at the University of New Hampshire.[31] Sweezy refused to answer questions about his lecture and political views and was ultimately found to be in contempt of court.[32] The New Hampshire Supreme Court upheld this outcome,[33] but the Supreme Court of the United States reversed and held that the actions taken against Sweezy constituted a violation of academic and political freedoms, among other things.[34] The case was not, however, decided on academic freedom grounds specifically; rather, the Court held that New Hampshire's actions violated the Due Process Clause of the Fourteenth Amendment and infringed upon Sweezy's First Amendment rights.[35]

Even so, the Court took the opportunity to highlight the importance of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new

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[30] *See Sweezy*, 354 U.S. at 236–37.

[31] *Id.* at 243.

[32] *Id.* at 244–45.

[33] *Id.* at 245.

[34] *Id.* at 250. The Supreme Court stated, "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.*

[35] *Id.* at 254–55.

> maturity and understanding; otherwise our civilization will stagnate and die.[36]

Ten years later in 1967, the Supreme Court once again reviewed the boundaries of academic freedom in *Keyishian v. Board of Regents*.[37] That case involved an action brought by faculty of the State University of New York challenging the State's teacher loyalty laws that required public university employees to disclose whether they were or had been a member of the Communist party.[38] The requirement was designed to prevent the appointment and retention of employees who the university determined to be "subversive."[39] The Court once again sidestepped the issue of having to fully define the boundaries of academic freedom, and ultimately held that making employees sign a statement declaring that they were not Communists was a violation of their First Amendment rights.[40] Nevertheless, the Court did conclude that academic freedom was a "special concern of the First Amendment."[41] The Court held that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[42]

The Supreme Court's decisions in *Sweezy* and *Keyishian* confirmed that academic freedom is, in fact, a "special concern of the First Amendment."[43] These decisions also left open many questions about the parameters of academic freedom, including whether it is an individual or institutional right (or both).[44] For example, a university may set its curriculum, but the individual faculty members are generally free to

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[36] *Id.* at 250.

[37] 385 U.S. 589 (1967).

[38] *See id.* at 591–93.

[39] *Id.* at 592.

[40] *See id.* at 604.

[41] *Id.* at 603.

[42] *Id.*

[43] *See* Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 133 (2009).

[44] *Id.*

advocate their position within the field of study.[45] Even less clear is the extent to which a university may override faculty members when disagreements arise pertaining to the content of the academic material.[46] Previous lower court decisions have suggested that when this dispute is over sexually based material, faculty members will usually have their speech protected, so long as the speech can be reasonably related to a pedagogical objective.[47]

IV. CONSTITUTIONAL PROTECTIONS AFFORDED TO UNIVERSITY EMPLOYEES' SPEECH PRE-*GARCETTI*

Apart from academic freedom concerns, it makes sense that a government employer should be able to limit the speech of its employees in some contexts.[48] After all, the government is an employer, and like any other employer, must be given some authority to regulate the speech of its workers more closely than the speech of its citizens.[49] Before the Supreme Court's decision in *Garcetti*, courts would implement the "*Pickering/Connick*"[50] two-part test for determining whether a public employee's speech was protected by the First Amendment.[51] Courts would assess first whether the comment made by the employee related to a matter of public concern and second whether the statement proved to be the motivating factor in an unfavorable employment decision.[52] In practice, this test proved to be much more favorable to university faculty than the test put forward in *Garcetti*.[53] Under the *Pickering/Connick* test, the government employer would prevail only if it could demonstrate that the employment decision would have been the same regardless of the employee's speech and that the employer's interest in maintaining workplace efficiency outweighed the employee's free speech rights.[54]

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[45] *Id.* at 134.

[46] *Id.*

[47] *See generally* Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Silva v. Univ. of N.H., 888 F. Supp. 293 (D.N.H. 1994).

[48] Tepper & White, *supra* note 43, at 147.

[49] *See id.*

[50] Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983).

[51] Tepper & White, *supra* note 43, at 147.

[52] *Id.*

[53] *See id.*

[54] *Id.*

In *Pickering v. Board of Education*,[55] Pickering, a schoolteacher from Illinois, made comments in a public letter to a local newspaper in which he criticized how the school board raised revenue for the schools and how funds were allocated.[56] The school board subsequently terminated Pickering's employment for writing the letters.[57] Pickering then sued the board, claiming that his First Amendment right to free speech protected his letter.[58] The Supreme Court of the United States held that the proper inquiry when determining whether Pickering was afforded First Amendment protections was to look at the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[59] The Court stated that "statements [made] by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[60] In reaching this conclusion, the Court determined that teachers did have an interest in commenting on matters of public concern, and that this interest was not outweighed by the school district's interest in thwarting similar comments to be made by the general public.[61]

Later, in *Connick v. Myers*,[62] the Supreme Court once again reaffirmed its holding in *Pickering* by stating "that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[63] In that case, the respondent was an assistant district attorney in New Orleans who was transferred to another segment of criminal court, where she was asked to prosecute cases.[64] Vehemently disliking the decision of her superiors, she sent out a questionnaire to employees in the district attorney's office asking them for their opinion about various matters such as the "officer transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to

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[55] 391 U.S. 563 (1968).
[56] *Id.* at 564.
[57] *Id.* at 566.
[58] *Id.* at 567.
[59] *Id.* at 568.
[60] *Id.* at 574.
[61] *Id.* at 573.
[62] 461 U.S. 138 (1983).
[63] *Id.* at 140.
[64] *Id.*

work in political campaigns."[65] The attorney was subsequently terminated and brought an action in federal court claiming her dismissal was improper because "she had exercised her constitutionally protected right of free speech."[66]

In *Connick*, the Supreme Court held that the attorney's speech via the questionnaire was not a matter of public concern, and was therefore afforded no First Amendment protections.[67] The Court wanted to make clear that it was not, however, advocating that all governmental employee speech be protected.[68] It reiterated that a government employee's speech is only protected when speaking on a matter of public concern and not on a topic of personal interest.[69] The Court also attempted to answer the question of what constituted a matter of "public concern."[70] It held that public concern can be "determined by the content, form, and context of a given statement, as revealed by the whole record."[71]

*A. Making Sense of Free Speech Rights Pre-*Garcetti

Pre-*Garcetti* courts essentially did not look into the position that the employee held at the time the employee made the comments in question.[72] Rather, courts would analyze whether the employee's speech was a matter of public concern at the time that it was made to determine whether the government employer violated the employee's First Amendment protections by utilizing adverse employment actions.[73] In the university setting, this meant that if faculty members' speech was determined to be a matter of public concern and the faculty members subsequently suffered adverse employment decisions (such as not being promoted or being terminated), then those faculty members would be able to sue in federal

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[65] *Id.* at 140–41.

[66] *Id.* at 141.

[67] *Id.* at 146. The Court did, however, hold that Connick's question pertaining to work on political campaigns did touch on a matter of public concern, stating, "We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Id.*

[68] *Id.* at 147.

[69] *Id.*

[70] *Id.* at 147–48.

[71] *Id.*

[72] *Id.* at 146.

[73] *Id.* at 146–47.

court.[74] Disciplined or removed faculty members would be able to claim that the First Amendment protected the speech and the university violated their constitutional rights by taking adverse action against them.[75]

*B. Pre-*Garcetti *Academic Freedom and Faculty Members' Ability to Teach Sexually-Based Curriculum*

Many (but not all) pre-*Garcetti* courts appeared to demonstrate notable leniency in allowing professors, especially those who were tenured, to teach sexually-based academic material by upholding employees' First Amendment protections and reversing adverse employment actions.[76] In fact, many pre-*Garcetti* courts seemed to give these professors the benefit of the doubt in holding that their controversial speech should receive First Amendment protections.[77] In many of these decisions, if a court was able to link the sexually-based dialogue at issue to a legitimate academic purpose then academic freedom tended to insulate professors from wrongful termination and other forms of institutional backlash.[78] The discussion below highlights a few pre-*Garcetti* cases that have demonstrated these judicial trends.

Cohen v. San Bernardino Valley College[79] centered on the sexually explicit comments made by tenured English professor Dean Cohen during his remedial English course.[80] Professor Cohen's course material was generally of a sexual nature.[81] He assigned his students provocative essays "and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a 'devil's advocate' style."[82] During class discussions, Cohen also stated that he had previously written for Playboy and Hustler, and proceeded to share these articles with the students in the class.[83] Nearing the end of the semester, Cohen asked his students to write an essay defining pornography.[84] One of the female students found this assignment

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[74] Silva v. Univ. of N.H., 888 F. Supp. 293, 316 (D.N.H. 1994).

[75] *Id.* at 293.

[76] *See, e.g.*, Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); *Silva*, 888 F. Supp. at 332.

[77] *See, e.g.*, *Silva*, 888 F. Supp. at 313–14.

[78] Vega v. Miller, 273 F.3d 460, 466–67 (2d Cir. 2001); *Silva*, 888 F. Supp. at 313.

[79] 92 F.3d 968 (9th Cir. 1996).

[80] *Id.* at 969–70.

[81] *Id.* at 970.

[82] *Id.*

[83] *Id.*

[84] *Id.*

and its subject matter offensive and asked the professor for an alternative assignment, but Cohen refused.[85] After this incident, the female student ceased attending class and subsequently failed the course for the semester.[86] Thereafter, the student complained to the head of the college's English Department about Cohen's class, conduct, and statements, claiming sexual harassment.[87]

After a university hearing and investigation, the college found that Cohen was in violation of the school's sexual harassment policy and that his conduct had created a hostile classroom environment.[88] Cohen was not fired, but heavily sanctioned by the college.[89] His punishments included:

> (1) [Providing] a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines; (2) Attend[ing] a sexual harassment seminar within ninety days; (3) Undergo[ing] a formal evaluation procedure in accordance with the collective bargaining agreement; and (4) [A mandate to become] sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn.[90]

Cohen sued the college under 42 U.S.C. § 1983, claiming that his academic freedom and First Amendment rights were unconstitutionally violated.[91] The Ninth Circuit sidestepped Cohen's First Amendment claim in holding that the college's harassment policy was too vague to put Cohen on notice that he was in violation of it.[92] The court then reversed the lower court's

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[85] *Id.* This same female student claimed that she was offended earlier in the semester by the sexual nature of Cohen's comments and "his use of profanity and vulgarities . . . which she believed were directed intentionally at her and other female students in a humiliating and harassing manner." *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 971.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 970. In addition to the college, Cohen also sued the Board of Trustees, the Faculty Grievance Committee of the college, and various individual officials of the college. *Id.*

[92] *Id.* at 972.

decision, instead holding that the college sanctions did not violate the First Amendment and remanded the case to enjoin the college from implementing further sanctions against Cohen.[93]

In *Silva v. University of New Hampshire*,[94] the District Court of New Hampshire upheld a faculty member's right to be free from adverse employment decisions by the university employer, after daring to teach a sexually-based curriculum.[95] *Silva* involved a tenured professor, Donald Silva, who taught a technical writing course entitled "Communications 212" at the University of New Hampshire.[96] At the start of the course, Silva stated, "I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject."[97] A few days later, Silva used an analogy of a belly dancer when lecturing.[98] He later stated in court testimony that he used this analogy "to illustrate how a good definition combines a general classification (belly dancing) with concrete specifics in a metaphor (like jello shimmying on a plate) to bring home clearly the meaning to one who wishes to learn this form of ethnic dancing."[99] A few students complained about the overtly sexual nature of the class.[100] After an investigation, the University found Silva to have violated the University's sexual harassment policy and subsequently suspended him for a year without pay.[101] Silva sued the university under Section 1983 alleging a violation of his First Amendment rights. He also brought a number of state law claims.[102]

In determining whether Silva had a valid First Amendment claim, the district court applied the *Pickering/Connick* test.[103] While assessing the applicable scope of academic freedom, the court stated that the right to free speech did not give professors the freedom to write and say whatever they felt like.[104] Rather, regulations and sanctions "must depend on such

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[93] *Id.* at 973.
[94] 888 F. Supp. 293 (D.N.H. 1994).
[95] *Id.* at 330.
[96] *Id.* at 297–98.
[97] *Id.* at 299.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 309–10.
[101] *Id.* at 311.
[102] *Id.* at 297.
[103] *Id.* at 314.
[104] *Id.* at 313.

circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and the concededly valid educational objective, and the context and manner of presentation."[105] Ultimately, the court determined that Silva's statements did deserve First Amendment protections.[106] The court held that the comments made during lecture were "not of a sexual nature," and that Silva did have a protected liberty interest in his job.[107]

In *Vega v. Miller*,[108] the Second Circuit Court of Appeals deviated somewhat in holding that a non-tenured professor was not afforded First Amendment protections for his sexually-based speech.[109] In that case, Edward Vega, a non-tenured track professor at New York Maritime College, taught a six-week summer course for pre-freshman prior to matriculation into the college.[110] During this course, Vega led a word association exercise where he asked students to choose a word and would invite the class to think of related words which he would then write on the blackboard.[111] The students chose the word "sex" and proceeded to call out related words and phrases, some of which were crude and sexually suggestive.[112] Although after the conclusion of the exercise Vega contends he "cautioned the [class] that use of the [terminology] would alienate . . . readers, at no point did he attempt to curtail the vulgarity" or discontinue the exercise.[113] No student complained about the exercise, but college administrators found out about it when investigating another unrelated matter.[114] Vega was subsequently terminated for the inappropriate nature of this exercise and the sexually explicit comments that were generated because of it.[115] Vega filed suit under Section 1983, claiming that his termination violated his First and Fourteenth Amendment rights.[116] On

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[105] *Id.*

[106] *Id.* at 314.

[107] *Id.* at 312–13, 318.

[108] 273 F.3d 460 (2d Cir. 2001).

[109] *Id.* at 468. The court stated that "the Defendants could reasonably believe that in disciplining Vega for not exercising professional judgment to terminate the episode, they were not violating his clearly established First Amendment academic freedom rights." *Id.*

[110] *Id.* at 462.

[111] *Id.* at 463.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 464.

appeal, the Second Circuit held that the case was to be dismissed on qualified immunity grounds for Vega's First Amendment claim.[117] Although *Vega* varies from the proposition offered in the previous two cases above, this decision likely turned on the fact that Vega was a non-tenured professor at a notoriously conservative college, as well as the fact that the court claimed that it could not tie the continuation of the exercise to any legitimate pedagogical purpose.[118]

V. AN OVERVIEW OF *GARCETTI V. CEBALLOS*

The United States Supreme Court's 2006 decision in *Garcetti v. Ceballos* heavily erodes the relatively lenient pre-*Garcetti* standard regarding the acceptability of faculty members' free speech rights concerning sexually-based discussion. Although the long-term consequences of *Garcetti* remain to be fully seen, recent case law suggests that faculty members are now afforded less protection for their "official speech" than ever before.[119]

In *Garcetti*, Richard Ceballos was a deputy district attorney in Los Angeles, California, when a defense attorney contacted him about an ongoing criminal case.[120] The defense attorney claimed there were serious misrepresentations in an affidavit used to secure a search warrant.[121] After looking at the affidavit, Ceballos determined that the document did contain some fatal inaccuracies.[122] Ceballos questioned the officer who was the affiant and remained unsatisfied with his answers.[123] Ceballos then brought the misrepresented affidavit to the attention of his supervisors.[124] He also prepared a memorandum on the inaccuracies, which recommended

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[117] *Id.* at 468–69.

[118] *See id.* at 471 n.13. In his dissent, Judge Jose Cabranes vehemently disagreed with the majority's opinion in *Vega* stating: "Today the loser is a college teacher in a conservative academic setting who used an 'alternative' teaching technique with profane effect. In the future, the major losers are likely to be 'traditionalist' and unconventional college teachers, whose method or speech is found offensive by those who usually dominate our institutions of higher learning." *Id.*

[119] *See generally* Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2009); Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008); Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal 2007).

[120] Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

[121] *Id.* at 413.

[122] *Id.* at 414.

[123] *Id.*

[124] *Id.*

dismissal of the case based on the inconsistencies.[125] Later, Ceballos met with his supervisors to discuss the memorandum in what later proved to be a "very heated" discussion of the case.[126] His supervisors subsequently refused to drop the charges and the Lieutenant sharply criticized Ceballos for the way that he handled the matter.[127] The case went to trial and Ceballos was called as a witness to testify and to communicate his perceptions of the affidavit.[128] Ceballos averred that after testifying for the defense, he was subjected to a series of retaliatory employment measures, which included reassignment, a transfer of work locations, and denial of a promotion.[129]

Ceballos subsequently filed a claim under Section 1983 and asserted violations of his First and Fourteenth Amendments due to the adverse employment actions he endured.[130] The lower court granted the defense's motion for summary judgment and held, among other determinations, that Ceballos was not entitled to First Amendment protection for his memorandum.[131] In applying the *Pickering/Connick* test, the Ninth Circuit Court of Appeals reversed, holding that Ceballos' memorandum involved a matter of public concern was therefore protected by the First Amendment.[132] The court held that "[t]he mere fact that a public employee exposes individual wrongdoing or government misdeeds when making a regular as opposed to a special report does not, by itself, result in the denial of First Amendment protection."[133] In weighing the factors, the Ninth Circuit determined that public employees hold a unique position, by virtue of their knowledge and experience gained through employment, placing them in a fair position to comment on matters of public concern.[134]

The Supreme Court of the United States, however, disliked the Ninth Circuit's result in *Garcetti* and overturned the decision.[135] In disregarding decades of judicial precedent, the Court held that the controlling factor to

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 414–15.

[129] *Id.* at 415.

[130] *Id.*

[131] *Id.*

[132] *See* Garcetti v. Ceballos, 361 F.3d 1168, 1173 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (2005).

[133] *Id.* at 1177.

[134] *Id.* at 1175.

[135] *Garcetti*, 547 U.S. at 417.

be examined in the case was "that [Ceballos'] expressions were made pursuant to his duties as a calendar deputy."[136] The Court established a bright-line rule 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."[137]

The Court reasoned that restricting the speech of public employees, and the knowledge that they possess by virtue of their employment, does not infringe on "any liberties the employee might have enjoyed as a private citizen."[138] Rather, "It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[139] Thus, the Supreme Court appeared to be saying that speech by government employees is afforded First Amendment protections if made as a private citizen, as opposed to in one's official capacity.[140] Hence, the Court focused on the fact that the memorandum in question was written pursuant to Ceballos' "official duties" when it determined that his speech was not worthy of First Amendment protections.[141]

In deciding *Garcetti*, the Supreme Court essentially "attempted" to keep the framework of the *Pickering/Connick* test for determining a public employee's free speech rights, but added an element to the inquiry that had the effect of making the analysis virtually unrecognizable and novel.[142] The Court held that lower courts should still ask first whether the employee

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[136] *Id.* at 421.

[137] *Id.*

[138] *Id.* at 422.

[139] *Id.* Although purely dicta, the Court gave great weight to the concept of the government as employer when determining employees' free speech rights, noting:

> Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.

Id. at 422–23.

[140] *See id.* at 421–22.

[141] *See id.* at 421.

[142] Tepper & White, *supra* note 43, at 147–48.

was speaking "as a citizen on a matter of public concern" and second "whether the government employer had an adequate justification for treating the employee differently from any other member of the general public."[143] However, in determining the first prong of the *Pickering/Connick* test, courts must also consider whether the employee was making the contentious speech pursuant to the employee's official duties.[144] If so, the first prong of the *Pickering/Connick* test is not satiated and the employee is not afforded First Amendment protections.[145]

A. Dissenting Opinions in Garcetti v. Ceballos

The decision in *Garcetti* was extremely contentious, as evidenced by the four dissenting justices.[146] In his dissent, Justice Stevens advocated for the creation of an exception to the majority's decision.[147] He maintained that First Amendment protections should occasionally be provided to employees who choose to speak out pursuant to their authorized duties.[148] Furthermore, Justice Stevens concluded that although some employee speech may be unwelcome by the employer, it might be the only means of exposing problems regarding institutional functioning.[149]

In Justice Souter's dissent, with which Justice Stevens and Justice Ginsberg joined, he strongly advocated against the bright-line rule adopted by the majority, especially in cases of "official wrongdoing and threats to health and safety."[150] Furthermore, Justice Souter argued that there appears to be no justification for the arbitrariness of the lines drawn by the majority.[151] Lastly, Justice Breyer appeared to express the sentiment implied by the other dissenters that the majority's bright line rule was too much of an "absolute," especially in the area of First Amendment issues where there are rarely any "absolutes."[152] Justice Breyer was particularly bothered by the fact that Ceballos' speech was intimately intertwined with

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[143] *Garcetti*, 547 U.S. at 410.
[144] *Id.* at 421. *See also* Tepper & White, *supra* note 43, at 147.
[145] *Garcetti*, 547 U.S. at 421.
[146] *Id.* at 426–46.
[147] *See id.* at 426 (Stevens, J., dissenting).
[148] *See id.*
[149] *Id.*
[150] *Id.* at 428.
[151] *Id.* at 430.
[152] *See id.* at 448–50.

the legal profession, specifically his duty to disclose misleading evidence presented to the court.[153]

VI. IMPLICATIONS FOR ACADEMIC FREEDOM AFTER *GARCETTI*

Although the facts of *Garcetti* had nothing to do with higher education or academic freedom, the implications of the decision have the potential to wreak havoc in higher academia. Read broadly and pessimistically, it is possible that *Garcetti* stands for the proposition that faculty members are afforded no First Amendment protections from adverse employment decisions made by university employers.[154] An emerging and more radical interpretation of *Garcetti* argues that if individuals work for the government, they check their First Amendment rights at the door.[155] The seriousness of this threat cannot be understated and has led "the AAUP's Committee A on Academic Freedom and Tenure to form a subcommittee to suggest actions to be taken in both public and private colleges and universities to preserve academic freedom even in the face of judicial hostility or indifference."[156] It is with this understanding that this article argues that *Garcetti* not only chills the discussion of controversial topics in the classroom but also discourages faculty members from speaking out against institutional policies, procedures, and programs. Additionally, *Garcetti* has the effect of leaving faculty members, most notably non-tenured faculty, particularly vulnerable to adverse employment actions taken by the university.

As some academics have pointed out, it is conceivable under *Garcetti* that a public university could unnecessarily reprimand or even dismiss faculty members simply over disagreements about class lectures, research, and publication because this speech would take place pursuant to their official capacity.[157] Perhaps even more disturbing, *Garcetti* says nothing

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[153] *Id.* at 446–47. Justice Breyer noted that "the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished." *Id.* at 446.

[154] *See generally* Harvey Gilmore, *Has* Garcetti *Destroyed Academic Freedom?*, 6 U. MASS. ROUNDTABLE SYMP. L.J. 79, 98 (2011).

[155] *Id.*

[156] *Protecting the Independent Faculty Voice: Academic Freedom After* Garcetti v. Ceballos, AM. ASS'N U. PROFESSORS, http://www.aaup.org/AAUP/comm/rep/A/postgarcetti report.htm (last visited Oct. 7, 2011) [hereinafter *Protecting the Voice*].

[157] *See* Rosborough, *supra* note 6, at 589.

about the protections afforded to a faculty member's speech concerning faculty governance, which would appear to be part of an employee's "official duties."[158] Thus, it would seem as though faculty members could potentially suffer adverse employment action, with little recourse, simply by making statements concerning the programs, policies, and procedures of the university institution.[159] This is concerning because, as Justice Stevens pointed out in his dissent in *Garcetti*, it is often public employees who are in the best position to expose institutional problems and affect change by bringing awareness to the problems.[160]

Although *Garcetti* is a relatively new decision with its implications on academic freedom not yet fully realized, lower courts applying *Garcetti* seem to be bolstering the theory that employees' free speech rights are being eroded while furthering the premise that academic freedom may be becoming more of a fiction than reality for university faculty members.[161] In the 2007 case of *Hong v. Grant*,[162] Hong, a "full" professor,[163] claimed that he was denied a merit salary increase because he choose to speak out critically regarding hiring and promotion decisions of other University of California, Irvine (UCI) professors.[164] Hong claimed that UCI's actions constituted a violation of his First Amendment rights.[165] The District Court for the Central District of California held that "UCI is entitled to *unfettered discretion* when it restricts statements an employee makes on the job and according to his professional responsibilities."[166]

The 2008 decision in *Renken v. Gregory*,[167] by finding in favor of the university employer when determining a faculty member's free speech rights, proved to be another post-*Garcetti* case in which the courts appeared to further the notion that academic freedom is becoming more

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[158] Jan Blits, *Hidden (and Not-So-Hidden) New Threats to Faculty Governance*, 1 AAUP J. OF ACAD. FREEDOM 1, 10 (2010).

[159] *Id.*

[160] *Garcetti*, 547 U.S. at 427.

[161] *See generally* Gorum v. Sessoms 561 F.3d 179 (3d Cir. 2009); Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008); Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal 2007).

[162] 516 F. Supp. 2d 1158 (C.D. Cal 2007).

[163] *Id.* at 1161. Hong went from being an assistant professor at the time he was hired in 1987 to a full professor in the Department of Chemical and Biochemical Engineering and Materials Sciences in 1993. *Id.*

[164] *Id.* at 1164.

[165] *Id.*

[166] *Id.* at 1168 (emphasis added).

[167] 541 F.3d 769 (7th Cir. 2008).

elusive.[168] There, Kevin Renken, a tenured professor at the University College of Engineering and Applied Sciences (CEAS), spoke to the dean of the college complaining that a National Science Foundation (NSF) grant given to him and his colleagues was mishandled by CEAS.[169] Renken claimed that in response to his complaint, CEAS retaliated by reducing his pay and revoking the grant.[170] The Seventh Circuit Court of Appeals applied *Garcetti* and held that "Renken made his complaints regarding the University's use of NSF funds pursuant to his official duties as a University professor."[171] Therefore, the court held that "his speech was not protected by the First Amendment."[172]

Lastly, in the 2009 case of *Gorum v. Sessoms*,[173] Gorum was a tenured professor at Delaware State University (DSU) who, pursuant to a university audit, admitted that he changed the grades of forty-eight students in the Mass Communication Department from failing or incomplete to passing.[174] Gorum admitted to changing the grades but contended that he received appropriate approval to do so.[175] After internal procedures were followed, DSU terminated Gorum's employment.[176] Gorum brought a First Amendment claim alleging that the university's reason for termination was a pretext, as prior to President Sessom's election, Gorum spoke out against him as a candidate for the position.[177] Similar to the previous decisions, the Third Circuit Court of Appeals adopted a rather restrictive interpretation of faculty members' First Amendment rights.[178] The court ultimately held that Gorum's First Amendment rights had not been violated by DSU and that his speech was not related to scholarship or teaching.[179]

To complicate matters further, because controversial topics such as sex are more likely to receive negative attention, complaints, and investigation

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[168] *Id.* at 775.
[169] *Id.* at 770–72.
[170] *Id.* at 773.
[171] *Id.* at 775.
[172] *Id.*
[173] 561 F.3d 179 (3d Cir. 2009).
[174] *Id.* at 182.
[175] *Id.*
[176] *Id.* at 183.
[177] *Id.*
[178] *See Protecting the Voice*, *supra* note 156.
[179] *Gorum*, 561 F.3d at 187.

by a university[180] which could jeopardize a professor's employment, the Supreme Court's decision in *Garcetti* could easily dissuade professors from discussing such topics in the classroom. A university could easily make the argument that professors are leading contentious discussions that deviate from the curriculum pursuant to their authority, and use that argument as a legitimate basis for terminating the employee,[181] leaving the professors without a job and with little legal recourse. In light of this line of reasoning, some scholars have argued that *Garcetti* could even compel faculty members to adopt the views of their employer.[182] Thus, *Garcetti* has the ability not only to quell in-class discussions and lectures about controversial topics but also to dissuade professors from speaking out on matters of public concern in the face of university disapproval. These topics include those which might ultimately be appropriate for the faculty members to address.[183]

A. Garcetti *and the Effects on Faculty Tenure*

It is important to consider the distinct effects that *Garcetti* could have on both tenured and non-tenured faculty. The AAUP believes that "the purpose of tenure is to facilitate academic 'freedom of teaching and research and of extramural activities' and to provide 'a sufficient degree of economic security to make the profession attractive to men and women of ability.'"[184] Tenure is an academic process that "protects academic employees from dismissal absent serious misconduct, incompetence, or financial exigency."[185]

In the setting of higher education, tenure is a function by which academic freedom is bolstered and job security is provided to faculty members who complete and pass the probationary period of their employment.[186] Once probation is successfully completed and a faculty member becomes tenured, the employee can only lose their job for cause pursuant to proper due process procedures.[187] Although not all university professors are tenured, all public professors enjoy the ability to work

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[180] *See, e.g.*, Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990).

[181] *Id.*

[182] *See* Rosborough, *supra* note 6, at 591.

[183] *See id.* at 592.

[184] Tepper & White, *supra* note 43, at 127. *See also 1940 Statement*, *supra* note 8, at 3.

[185] Tepper & White, *supra* note 43, at 127 (citing Hulen v. Yates, 322 F.3d 1229, 1242–43 (10th Cir. 2003) (per curiam); Mayberry v. Dees, 663 F.2d 502, 514 (4th Cir. 1981)).

[186] *Id.* (citing Grimes v. E. Ill. Univ., 710 F.2d 386, 388 (7th Cir. 1983)).

[187] *Id.* (citing *1940 Statement*, *supra* note 8, at 4).

pursuant to the privileges of academic freedom.[188] It is also important to note that simply because a professor goes through the tenure review process does not mean that the professor will be granted tenure.[189]

With regard to termination of tenure cases, courts have overwhelmingly upheld the decisions of universities, provided that their decisions were made pursuant to proper internal institutional procedures.[190] Despite this, once tenured, higher educational institutions generally have very strict procedures in place that limit situations in which tenured faculty can be removed, and rigorous standards in place for the removal process.[191] The real problem that the decision in *Garcetti* poses is to the continued employment of non-tenured professors. As statistics suggest, the number of tenured professors at universities has rapidly decreased over the last few decades.[192] One sources notes: "In 2007 . . . contingent faculty members comprised almost sixty-nine percent of faculty employees."[193] Compared to their tenured counterparts, non-tenured professors have significantly less employment protections afforded to them by the university and the legal system.[194] Non-tenured professors can be terminated for just cause, financial stringency, and abolition of their position, among other reasons.[195]

In light of the fact that *Garcetti* does not afford faculty members' First Amendment protections for speech made pursuant to their official duties, the Supreme Court decision makes it that much easier to terminate a non-

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[188] *Id.* at 127–28.

[189] *Id.* at 134.

[190] *Id.* at 135–36.

[191] *Id.* at 174. *See, e.g.*, *Policy on Disciplinary Suspension or Termination of Academic Faculty*, U. VA. (May 6, 2009), http://www.virginia.edu/provost/docs_policies/disciplinary.html.

[192] Tepper & White, *supra* note 43, at 175. "From 1975 to 2007, the percentage of full-time tenured and tenure-track faculty declined from 56.8% to 31.2% of university academic employees. Along with the decline of appointments leading to tenure has been the rise of contingent faculty—faculty who teach part-time or full-time but without tenure." *Id.* at 175–76.

[193] *Id.* at 176.

[194] *Id.* at 175.

[195] *See, e.g.*, *Policy: Employment of Non-Tenure-Track Faculty*, U. VA. (Feb. 24, 2006), https://policy.itc.virginia.edu/policy/policydisplay?id=HRM-003. Just cause may include "professional incompetence, unacceptable performance after due notice, unethical or unlawful conduct, misconduct that interferes with the capacity of the employee to perform effectively he requirements of employment, and falsification of credentials or experience." *Id.*

tenured professor who is afforded little to no institutional and legal recourse. This consequence of *Garcetti* has the ability to seriously undermine the foundation upon which tenure rests. If one of the main purposes of tenure is to safeguard academic freedom, but tenured professors are offered no protection for their speech, then the foundation for tenure becomes null and academic freedom becomes void.[196] This problem is magnified in the case of any non-tenured professors who dare to discuss controversial topics, such as sex, in their classroom.[197]

Not only do these professors run the risk of their speech being viewed as highly contentious but also they are afforded few, if any, protections for daring to discuss such topics; thus, the incentive for engaging in these discourse rapidly dwindles.[198] Non-tenured professors, therefore, never have the chance to truly take advantage of their academic freedom protections in the presence of adequate employment safeguards and are not truly free from interference and molestation by the university.[199]

VII. RECOMMENDED ACTIONS FOR COLLEGES, UNIVERSITIES, AND PROFESSORS

In the face of the Supreme Court's decision in *Garcetti*, the most important step that tenured and non-tenured faculty can take to ensure greater job security, defend tenure, and protect academic freedom, is to join unions.[200] Unions have remained consistently effective in defending these protections.[201] Among the many benefits, unions allow faculty to secure contractual and legal claims against college administrations.[202] Unions also help "increase the legislative influence and political impact of the academic community as a whole by maintaining regular relations with state and federal governments and collaborating with affiliated labor organizations," and "reinforce[ing] the collegiality necessary to preserve the vitality of academic life under such threats as deprofessionalization and fractionalization of the faculty, privatization of public services, and the

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[196] *See* Rosborough, *supra* note 6, at 589, 592.

[197] *See* Tepper & White, *supra* note 43, at 128.

[198] *Id.* at 172.

[199] *See id.*

[200] *AAUP Unionism: Principles & Goals*, AM. ASS'N U. PROFESSORS, http://www.aaup.org/AAUP/programs/bargaining/aaup-unionism.htm (last visited Oct. 7, 2010) [hereinafter *AAUP Unionism*].

[201] *Id.*

[202] *Id.*

expanding claims of managerial primacy in governance."[203] Thus, by encouraging faculty members to join unions, especially non-tenured employees, the security of academic freedom is strengthened. When faculty members are afforded greater freedom in their publications, research, and teaching, as well as in their ability to actively and constructively partake in administrative issues and decisions, the underlying mission of academic freedom in public universities, as well as larger notions of democracy can truly be served through this exercise of free speech.

Further, public university employees need to be educated on any state law causes of action that they might have if they are terminated or suffer adverse employment actions.[204] Faculty members also need to be aware of any state-law retaliatory termination provisions as well as any state constitutional protections that they might be afforded.[205] Many states have constitutional provisions comparable to the First Amendment which might take more expansive views and afford greater free speech protections to public employees than the federal law permits.[206] Additionally, if state laws are "less friendly" to the free speech protections of public employees, then individuals can be proactive in joining organizations that lobby state legislatures for greater protections of professors' free speech rights, especially in light of *Garcetti's* narrow holding.[207]

VIII. CONCLUSION

Academic freedom still remains a largely elusive concept that appears to be better discussed and understood in academic literature than through actual practice.[208] Although the Supreme Court of the United States has yet to define the precise scope and boundaries of academic freedom,[209] it remains a long-standing principle that is highly regarded by the Supreme Court and understood as a "special concern" of the First Amendment.[210]

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[203] *Id.* In 1985, the AAUP formed the Collective Bargaining Congress to essentially strengthen the bargaining power and potential of the several AAUP chapters across the country. Since this time, the AAUP has formed a distinct sense of unionism that addresses the concerns of academics nationwide. *Id.*

[204] *See* Tepper & White, *supra* note 43, at 178–79.

[205] *Id.* at 178.

[206] *Id.* at 179.

[207] *Id.*

[208] DeMitchell & Connelly, *supra* note 11, at 84.

[209] *Id.*

[210] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

In assessing the First Amendment rights of public employees before the decision in *Garcetti*, courts implemented the *Pickering/Connick* test for determining whether an employer violated a public employee's free speech rights.[211] This more liberal test would essentially ask whether the employee was speaking "as a citizen on a matter of public concern" and "whether the government [employer] had an adequate justification for treating the employee differently from any other member of the general public."[212] In relation to professors who utilized sexually-based material in teaching their curricula, this pre-*Garcetti* standard for First Amendment protections generally produced rather liberal results, often upholding professors' free speech rights.[213]

Yet, this standard changed with the 2006 decision in *Garcetti*,[214] when the Supreme Court of the United States established a bright-line rule stating that "when public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."[215] In following this test, determinations will not only have the effect of suppressing discussion of controversial topics in the classroom but also will discourage faculty members from speaking out against institutional policies, procedures, and programs.[216] Furthermore, the decision in *Garcetti* left faculty members, especially non-tenured faculty, especially vulnerable to adverse employment actions taken by universities.[217]

Not only does *Garcetti* provide a much easier standard for holding that an employee's free speech rights are not protected[218] but also it renders non-tenured faculty members uniquely vulnerable by virtue of the fact that they possess much less job security, further discouraging dialogue about sex and other controversial topics.[219] Of course, the deleterious effects of

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[211] Tepper & White, *supra* note 43, at 147.

[212] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[213] *See generally* Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Silva v. Univ. of N.H., 888 F. Supp. 293 (D.N.H. 1994).

[214] *See Garcetti*, 547 U.S. at 410.

[215] *Id.*

[216] *See* Rosborough, *supra* note 6, at 591.

[217] *See generally AAUP Unionism*, *supra* note 200.

[218] *See* Gilmore, *supra* note 154, at 98.

[219] *See generally AAUP Unionism*, *supra* note 200.

Garcetti could be greatly remedied by faculty members joining unions and by the greater protections sometimes offered by state laws.[220]

For these reasons, it is very probable that the Supreme Court will further define the boundaries of academic freedom and the scope of First Amendment rights afforded to public university faculty. *Garcetti* has the power to radically alter the concept of academic freedom and forever change classroom life. Given that the highly controversial, 5-4 decision in *Garcetti*, this topic is ripe for further judicial clarification.[221]

Even Justice Kennedy noted in the majority opinion that there may be an argument that academic scholarship invites further constitutional interests that were not addressed by the facts of *Garcetti* or the holding of the Court's opinion.[222] Thus, the Supreme Court will likely take up the issue and clarify public faculty members' free speech rights in the near future.

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[220] *See id.*; Tepper & White, *supra* note 43, at 178–79.

[221] *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[222] *Id.* at 425 ("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.").