THE ENEMY WITHIN: WHY FACULTY THEMSELVES ARE OFTEN THE GREATEST THREAT TO ACADEMIC FREEDOM

Dr. David Demers[1]

The greatest foes of academic freedom are university administrators obsessed with social order, conservative politicians who are opposed to progressive scholarly ideas, and special interest organizations that want to control the distribution of knowledge that might hurt them. The veracity of this three-part proposition and its corollary — that legal scholars, journalism professors and faculty leaders are the greatest defenders of academic freedom — is rarely challenged by scholars and legal experts who work with free-speech issues on campus. But I do not count myself among them. Over the past three decades, I have watched faculty with backgrounds in journalism or the law and Faculty Senate leaders do nothing when free-speech controversies erupt. Tepid support among faculty, I argue, is a far more important threat to academic freedom than the anti-free-speech actions taken by administrators, special interests, or conservative politicians. Much of the tepidness can be blamed on structural conditions in which professors work rather than weak morals. To combat this problem, structural changes in the form of rules, laws and judicial decrees are needed to encourage faculty to speak out, and such changes are only possible through organized social action, especially from pro-First Amendment organizations like FIRE and labor unions.

Political science professor Jeffrey Gerson had just told his students that flag burning is legal in the United States and now he was leading them outside to burn one.

It was March 11, 1991. Forty-two degrees. Chilly.

But Gerson's mind was on the day's lesson, not the weather. He was hoping the demonstration would "put a fire under the students and get them thinking."[2] That was not always an easy thing to do at the University of Wisconsin in River Falls. A survey of full-time UW-RF students showed that half of them spent fewer than six hours studying per week.[3]

Poor study habits bothered Gerson. This was his first year at UW-RF, and he was determined to make education a meaningful experience for this students.[4]

The 1991 Gulf War was in the news. So, to set the stage for a vibrant class discussion, he divided the students into two groups. One in opposition to the war and the other in support.

Gerson gave a short lecture on the U.S. Supreme Court decision in *Texas v. Johnson* (1989), which held that flag-burning was speech protected by the First Amendment.[5] He then escorted the students outside of South Hall.[6] As they gathered around, Gerson took a match from his pocket and carefully ignited the 4-by-6-inch American flag, which burned quickly.

Later, Gerson told a newspaper reporter: "It was a good class. I think people really got into the discussion on both sides. I think it was an effective teaching tool."[7] Many of his students agreed. "Once he burned the flag, people started talking about it," one said. "I think it was a very effective teaching method. It did spark discussion."

But at least one student wasn't pleased. She called her father, a county government official, who complained to the university's top administrator, Chancellor Gary Thibodeau. "If this guy wants to go burn a flag someplace, that's certainly his

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[2]Telephone interview with Jeffrey Gerson, November 29, 1999.

[3]A total of 1,368 students completed the College Student Experiences Questionnaire March 1-5, 1993. Source: Unpublished report prepared by Roger A. Ballou, Dean of Students, University of Wisconsin–River Falls (April 1993).

[4]Gerson had a one-year appointment at UW-RF while the university searched for a permanent hire. He was one of the applicants for that permanent position.

[5]*Texas v. Johnson,* 491 U.S. 397 (1989).

[6]Gerson forgot to take a flag, so he went back to the political science office to get a small one. Some students brought their own flags, but only Gerson burned one.

[7]Bill Gardner, "Prof's Flag-burning Ignites Controversy," *St. Paul Pioneer Press Dispatch* (March 13, 1991), p. 1A.

right," C. W. King, director of community programs for Chippewa County, told the *St. Paul Pioneer Press Dispatch* after contacting Thibodeau. "But, in his role as a professor, to force students to witness this kind of thing is an abuse of his position."[8]

Thibodeau quickly issued a written statement condemning Gerson for using "extraordinarily bad judgment in his choice of illustrations" and "offensive and insensitive" teaching methods.[9]

Gerson disagreed. Administrators, he said, "should be encouraging faculty to take chances and not try to stifle them."[10] An informal survey of 200 faculty by the UW-RF *Student Voice* newspaper backed him up: Six of ten supported his right to burn the flag.[11]

Gerson planned to burn another flag in a separate class three days later but changed his mind after more than 200 students protested outside of his classroom. They recited the Pledge of Allegiance, sang the national anthem and chanted "U-S-A." "Everyone was just out showing their true colors," one student protestor said. "There was a lot of patriotism today."[12]

In a letter to UW System President Kenneth Shaw, state Sen. Marvin Roshell (D-Chippewa Falls) suggested that "Gerson be returned to wherever he came from and not be invited back."[13] Roshell later questioned "whether academic freedom is the best thing we have" and described Gerson as "inept at his profession."

The law was on Gerson's side, of course — and so was the Faculty Manual, which explicitly protected the free-speech rights of professors. But none of that mattered.

On April 10, 1991, Gerson was informed that his one-year teaching contract would not be renewed and that he would not be a finalist for a permanent position in the department.

The head of the political science department later said the decision not to renew Gerson's contract was unrelated to the flag-burning incident. But he conceded that he could "probably not convince a lot of people of this." Gerson was one of them.[14]

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[8]Ibid.

[9]Ibid.

[10]Ibid.

[11]Student journalists telephoned more than 200 faculty. They also surveyed students, who, by a 6-to-4 margin, said the flag burning was inappropriate teaching tool. Source: Associated Press, "Faculty Back Professor Who Burned Flag," (March 24, 1991), p. 4C.

[12]Ibid.

[13]Ibid.

[14]Bill Gardner, "UW-River Falls Professor Who Burned Flag Loses Job," *St. Paul Pioneer Press Dispatch* (April 27, 1991), p. 11A. Also see Robert Justin Goldstein, *Burning the Flag: The Great 1989-1990 American Flag Desecration Controversy* (Kent, OH: Kent State University Press, 1996), p. 356, and Michael Welch, *Flag Burning: Moral Panic and the Criminalization of Protest* (New York: Walter de Gruyter, 2000), p. 84.

THE ENEMY WITHIN: A CASE STUDY

The greatest foes of academic freedom on campus are university administrators obsessed with social order, conservative politicians who are opposed to progressive scholarly ideas, and special interest organizations that want to control the distribution of knowledge that might hurt them.

The veracity of this three-part proposition and its corollary — that legal scholars, journalism professors and faculty leaders are the greatest defenders of academic freedom — is rarely challenged by scholars and legal experts who work with free-speech issues on campus.

But I do not count myself among them.

Over the past three decades, I have watched faculty with backgrounds in journalism or the law and Faculty Senate leaders do nothing when free-speech controversies erupt. In the flag-burning incident above, for instance, none of the faculty, including members of the journalism department and Faculty Senate, publicly criticized the chancellor for failing to support Gerson's First Amendment right to burn the flag. In fact, over the years I have even witnessed four journalism administrators — including a dean who was a mass communication law scholar — actively work to restrict free-speech on campus.

Tepid support for civil libertarian ideals among faculty, I argue in this paper, is a far more important threat to academic freedom than the anti-free-speech actions taken by administrators, special interests, or conservative politicians. Although faculty gleefully express their support for academic freedom in opinion polls, very few of them are willing to publicly defend that principle in public, especially when they believe they have something to lose or nothing to gain. The result is that administrative violations of free speech rights, such as the one exhibited by the UW-RF chancellor (and more to be revealed later), go unchecked, slowing whittling away at the principles of academic freedom and shared governance as university administrations centralize power even more.

To be sure, part of the tepidness stems from the fact that many faculty do not care very much about free speech. That issue does not ignite them or others to action the way racism, sexism and discrimination can. Some of us would even sacrifice our lives for these other causes. But who among us — even among journalism and mass communication law professors — would give our lives in defense of free speech and the First Amendment?

Okay, that may be asking too much. But how about giving up other things to defend the First, like a raise, good will with our bosses, a promotion, or even our jobs? My experience is that very few faculty are willing to sacrifice even the smallest of benefits to defend free speech. But what about tenured faculty? Don't they have more protection from retaliation? Aren't they more likely to stand up for free-speech?

Although tenure provides faculty with a right to due process, ironically, it has been my experience that tenure also

lessens the chances of faculty speaking out on controversial issues, because tenured faculty have been co-opted into the "privileged club" and now have a lot more to lose, financially and socially, should they end up on the wrong side of the administration.

Although all administrators and faculty have a (moral) choice when it comes to deciding whether to speak out on controversial issues or defend a colleague or a student for speaking out, I assert here that much of the blame for tepidness should be leveled at the structural conditions in which professors work rather than lack of moral fortitude. State law and university rules do not provide much protection for faculty who push the free-speech envelope, and let's be frank: Administrators wield a lot of power, and many do not hesitate to use that power to punish lower-level administrators and faculty, even if they prefer co-optation instead. As Machiavelli reveals, a Prince prefers to be loved and feared at the same time — but when the former is not possible, the latter will do quite nicely.

This paper presents what I informally call the "tepid theory of academic freedom" and offers several case studies in support, including two major free-speech lawsuits in which I played a central role and several other incidents in which deans and faculty have tried to restrict or punish faculty speech.[15] As a cautionary note, I must point out that case studies such as this can suffer from the problem of generalizability. I cannot quantitatively prove to you that my experiences apply to all universities in all places at all times. There are certainly exceptions, especially when the free-speech violation is highly egregious and it's easy for everyone to jump on the pro-speech bandwagon. But the vast majority of cases are more subtle, requiring faculty to weigh other kinds of evidence, such as whether an outspoken source has good motives.

Another caveat is that, as a participant observer, I concede that I am not representative of faculty in general. I have been a social activist all of my adult life, which means that I, as a former newspaper reporter and professor, have always been more willing than other faculty to speak out on issues of social injustice or public concern. In fact, to prove it, I am the only person I know who has been accused of being a "sociopath" when defending free speech. Try to top that one. In my defense, I prefer to think of myself as a watchdog for abuse of power in the academy — an antibiotic in search of pathogens. No institution in America, I assert, can be healthy if it punishes people for expressing ideas, opinions or knowledge, and all institutions need courageous people to serve as a check on aberrant executives and administrators.[16]

I also will argue in this paper that educating faculty on the importance of free speech and academic freedom is a laudable goal but one that offers a limited solution to problem of tepidness. Real change will come only when universities, courts and legislative institutions make substantive structural changes to laws, rules and policies that offer more protection for speech on the job — policies that expand due process, democracy and openness in decision-making. And these changes are most likely to come about through organized social action from Faculty Senates, faculty unions or organizations like the Foundation for Individual Rights in Education and the American Association of University Professors.

Finally, this paper will attempt to convey to the reader what it is like when a university tries to mob a faculty member who tries to combat social injustice or engage in controversial speech. Some workplace mobbing victims suffer from Post Traumatic Stress Disorder; some even commit suicide. I'll talk briefly about what saved me from falling off the deep end.

Like two bookends, my first major free-speech experience in the academy took place at the beginning of my academic career and the second began near the end. The former controversy revolved around this question: Can a university fire a faculty-adviser professor who helps students sue the university to obtain access to student evaluations of faculty?

The latter free-speech case addressed the question: Can a university fire a faculty member who implicitly criticizes administrators' policies and offers alternative plans for structuring an academic unit? That case ended with a Ninth Circuit Court of Appeals ruling that, for the first time, circumscribed the authority of a highly unpopular 2006 U.S. Supreme Court decision (*Garcetti v. Ceballos*), which restricted free-speech rights of public employees.[17] The only downside to the decision is that it only applies to nine Western states. In the rest of the country, faculty, like all other government employees, can be punished for speech uttered during service-related activities or during faculty meetings — a condition not well recognized even in the academy.

HELPING STUDENTS SUE A UNIVERSITY

When I began teaching at the University of Wisconsin-River Falls in the fall of 1991, I was unaware of the

[15]Portions of this paper are adapted from the author's 2015 book, *The Lonely Activist: An American Odyssey* (Spokane: Marquette Books, 2015).

[16]The whistleblower role might not seem radical, but the U.S. Supreme Court has ruled that public employees are not allowed to play that role. See *Garcetti v. Ceballos,* 547 U.S. 410 (2006) — a case that will be addressed in some depth later in this article.

[17]*Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Gerson flag-burning incident.[18] I learned about it several months later, from another UW-RF professor, who speculated that no faculty on campus criticized the chancellor because they feared retribution. (Gerson, by the way, went on to obtain tenure at the University of Massachusetts in Lowell. As of this writing, he still teaches there.[19])

Meanwhile, as the weeks passed, I quickly forgot about the Gerson flag-burning incident. Like other professors, I came to see it — or perhaps wanted to see it — as an outlier, not indicative of a systemic leadership or organizational problem. I should have known better. After all, I was a social structural theorist.

Before becoming an academic, I had worked as a newspaper reporter and market research analyst. As a reporter, I was drawn to stories of injustice, partly because of ideals I learned during my Lutheran elementary school years and during my undergraduate college years. I earned a bachelor's in journalism from Central Michigan University and worked as a newspaper reporter for four years, earning two first-place statewide awards for investigative reporting (one for an environmental disaster and the other for an alleged abuse at a foster care home).

I eventually earned a Ph.D. in mass communication (sociology was my theoretical area) from the University of Minnesota.[20] While there, my students and I conducted two precision-journalism (social scientific research) projects, one which found that Minneapolis Police were twice as likely to sustain complaints filed against police by whites than by minorities. Police initially refused to release the records. I sued the city with the help of an attorney, and the case eventually wound its way into the Minnesota Supreme Court, which ruled that information about the complainants was public data but not info on police officers. The second precision-journalism project involved an analysis of statewide property sales records. Our study found that as the sales price of the property increased, the assessed valuation of the property decreased in relative terms, which meant owners of expensive properties were paying less than their fair share of property taxes.

Bureaucrats in both instances took no action after our research appeared in a Twin Cities weekly newspaper. I learned through the years that government and private industry more often than not resist changes that would democratize their organizations or equalize economic, social and political discrepancies. This essentially is the same conclusion reached by Law Professor Erwin Chemerinsky, whose found that the U.S. Supreme Court is more likely to uphold government abuses of power than to stop them.[21]

My first three years at UW-RF were very pleasant. I taught courses in reporting, editing, media law, public opinion and media history. I received better than average teaching evaluations. I was also very successful in terms of publishing. I had published more than ten refereed articles and one book. My department chair put me up for early promotion to associate professor; tenure would come later.

Student Evaluations of Faculty

My free-speech controversy began in the fall of 1993, when I asked the dozen or so students attending the first meeting of the UW-RF chapter of the Society of Professional Journalists what they wanted to do for a project. For the past two years, I had been adviser to the group, which represents the interests of student and professional journalists and promotes First Amendment rights and open government and records.

"I'd like to see us go after student evaluations of faculty," one female student said. "There are a lot of terrible professors on campus. Why doesn't the university do something about that?"

Others nodded in agreement. I told the SPJ students that "university officials will argue those records are confidential, because they are part of a faculty member's personnel file. They will fight attempts to release the records." But the students wanted to press on. Although I was an ardent advocate of government accountability, I hadn't formed an opinion on whether the teaching evaluations should be opened to the public. But that didn't matter. My role as adviser was to help students achieve their goals, not dictate their projects. Although I was certain the university would reject the students' request, what a great learning experience this could be for the students, I reasoned.

To start the process, the students contacted a spokesperson in the Wisconsin Attorney General's office, who surprisingly told the students that the AG believes the student evaluation records should be available to the public. But he said the AG does not have the power to release them.

On November 17, 1993, the students wrote a letter to Chancellor Thibodeau, requesting the records. The letter cited Wisconsin's Open Records Law as justification for releasing the records.[22]

Meanwhile, I informally talked with about two dozen

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[18]The *St. Paul Pioneer Press Dispatch* had covered the controversy, but I subscribed to the *Minneapolis Star Tribune*, which ignored the story. I conducted an archival search of the *Star Tribune* website on July 29, 2012, but could find no references to the flag-burning incident at the University of Wisconsin–River Falls.

[19]I spoke with him on several occasions about his experience at UW-RF. He told me he never burned another flag in class.

[20]My Ph.D. adviser was Phillip J. Tichenor, a social structural theorist who helped coin the Knowledge-Gap Hypothesis and develop structural theories about the news media.

[21]Erwin Chemerinsky, *The Case Against the Supreme Court* (New York: Viking, 2014).

[22]Wisconsin Public Records Law, Wis. Stat. §§ 19.31 through 19.39. The law was enacted in 1981.

faculty and administrators about the issue. Everyone was against opening the records except one. "Our department allows students to see those evaluations if they ask," said Bill Turnabout,[23] chair of the English department, at a college-level committee meeting I was attending. Turnabout pointed out that there was no formal university policy prohibiting release of student evaluations, so the department wasn't violating any rules. But most departments, like journalism, did treat them as confidential personnel records.

On Dec. 2, Chancellor Thibodeau responded to the SPJ students' request: "There is a need to protect the integrity of the evaluation process, both to ensure that evaluations are candid and thorough and to permit the university, as an employer, to use them as a basis for improving performance. Further, disclosure of this information could expose the reputations of individuals to possible damage."

Several days after Chancellor Thibodeau's response, Damon Smith, my department chair, appointed me adviser to *The Student Voice*. The job could be controversial. For example, several months before I took the position, the newspaper published a display advertisement stating that the holocaust never occurred. The ad came from a man who for many years would send it to college newspapers across the country, hoping some would publish it. Almost none did. But the *Voice* advertising student staffers didn't read the content of the ad. Neither did the faculty adviser at the time. The students pasted it onto the page and accepted the payment check from the man. Of course, controversy erupted after it was published. Many administrators, faculty, and Jewish and Christian leaders around the area condemned the ad, its creator and the student journalists. Chancellor Thibodeau also criticized the *Voice* editors, saying they showed poor judgment. Everyone was demanding an apology.

"So what do you intend to do," I asked one of the editors.

"We are going to apologize."

"For what?" I said. "For not censoring someone? You know, a U.S. Supreme Court justice once said that prior restraint or censorship isn't the solution for evil or bad speech. More speech is. And this is exactly what happened. The local community has responded with what many would call 'good speech' and the 'hateful speech' has been drowned out. The system worked. You don't need to apologize. You actually helped remind the community that this is a society that respects free-speech rights, even for those who hold controversial, false ideas."

A day later the student editors apologized. So much for my big speech. But I wasn't surprised. The students were scared. I probably would have done the same thing as an undergraduate.

Once again, it appeared to me that Chancellor Thibodeau had failed in his role as administrator to support free-speech rights on campus. He had the right to personally disagree with publication of the advertisement, but he should have defended the students' right to publish the ad. University rules protected such speech. I was a lone wolf on this issue. None of the other journalism professors stood up for the students' free-speech rights.

Faculty Salary Series

In January 1994, I began teaching an advanced reporting course in which I asked students to develop an investigative project. Several students were interested in looking at faculty salaries, so I helped them conduct a computer analysis of faculty salaries. I had co-authored a book on the use of quantitative social science research methods in journalism, otherwise known as "precision journalism."[24] University officials gave us a file containing information on salaries. I ran multivariate computer analyses and showed the students how to interpret them.

The findings revealed disparity in faculty salaries between various departments on campus. For example, business professors who taught research methods were paid about 50 percent more than social science professors who taught similar courses. English professors and library scholars made less than journalism and social science professors. University officials attributed these differences to "market factors." Business professors are paid more because comparable jobs in the real world pay more. English professors are paid less because demand for those jobs is far greater than the number of positions available. The principle of equal pay for equal work does not apply to universities.

The study also found that female faculty earned slightly less than male faculty, about $1,700 a year less. This difference persisted even after statistically removing the effects for years of service, tenure, age, department, and other factors.[25] In percentage terms, women were making about 4 percent less per year than men — a differential that I thought was quite small given the national differential for women at that time was 21 percent after removing the effects of demographics.[26]

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[23]Except for top-level administrators, all of the names for academics at UW-RF are pseudonyms.

[24]David Pearce Demers and Suzanne Nichols, *Precision Journalism: A Practical Guide* (Newbury Park, CA: Sage Publications, 1987).

[25]The study employed multiple regression and other multivariate statistical techniques and controlled for a number of factors, including age, years of service, tenure status, department, rank and gender.

[26]Joseph G. Altonji and Rebecca M. Blank, "Race and Gender in the Labor Market," pp. 3143-3259 in Orley Ashenfelter and David Card (eds.)," *Handbook of Labor Economics*, Vol. 3 (Netherlands: Elsevier Science B.V., 1999).

In March, I helped the students write a three-part series for *The Student Voice*, the last of which published the salaries of all university faculty and administrators. I wrote up the results from the statistical analysis. The students conducted the interviews and wrote the rest of the series.

Chancellor Thibodeau was upset over the finding that female faculty were paid slightly less than male faculty, presumably because it made his administration look biased. He told a reporter for the Student Press Law Center that the study was not "complex enough," but his administration never even asked to look at the data or methodology.[27]

Some faculty and administrators also were angry about their salaries being published in the newspaper. This surprised me, because we were all public employees, and salaries for public officials are public data. My democratically driven, open-government journalistic philosophy was appreciated by most students, but not by many faculty and administrators, I was learning.

In mid-January 1994, the SPJ students and I contacted the SPJ regional director, who was delighted to help the students' obtain access to the student evaluations. The regional chapter committed several hundred dollars to hire an attorney.

The Freedom of Information Lawsuit

The "freedom of information" lawsuit was filed March 23, 1994. "We're the reason professors are here," Tiffany Thibideau, one of the SPJ students, told the *Milwaukee Sentinel*, which published a story about the lawsuit.[28] "We do the evaluating, and we should be able to see them. A student should be able to know what other students thought of a professor."[29]

One day after the story appeared, the attorney representing the SPJ students called me and asked whether I might have any evidence that might help the case. I told him about the English professor who said his department allows students to see the records.

"Great. That shows capriciousness in the handling of the evaluations."

He called the English professor and then called me back a day later. "Turnabout denies ever telling you that the English Department gave the evaluations to the students."

"That's false," I said. "We talked openly about it at a meeting, and several other faculty were there."

The next day, my journalism chair, Damon Smith, came into my office. "Dave, Bill Turnabout wants a written apology from you. He said Peter (the SPJ attorney) called him and asked him about the English Department's policy of giving students the evaluations of faculty. He denies telling you that. He wants an apology."

I told Damon that "Bill is lying and that I won't apologize." Of course, I expected my boss to back me up, not only because I worked for him but also because journalism faculty are supposed to be devoted to openness in government. He didn't. He was getting angry.

"Bill is my friend, Dave," he shouted. "You will apologize or he can destroy your career."

I couldn't believe what I was hearing. I had failed to take into account the politics of a small university — me, a sociologist. Loyalty often trumps principles.

About two weeks after the SPJ lawsuit was filed, the UW-RF Faculty Senate suspended the student evaluation process. The resolution also contained language supporting Chancellor Thibodeau's earlier decision not to release the records. In contrast, UW-RF students, in a campus-wide referendum conducted just before the resolution, voted 7-to-1 in favor of the SPJ students' attempts to get access to the records. But Student Senate on campus ignored the referendum results and passed a resolution supporting the Faculty Senate and Thibodeau. Student senators identified with the university power structure, not with their own rank-and-file.

On April 13, 1994, I received a call from one of the SPJ students. "Dave, the attorney general's office has ruled that the student evaluations of faculty are public data. We won. Isn't that incredible?" I could hear students rejoicing and laughing in the background. All I could think of at that moment was *what a great lesson this had been for the students. They took action and made government more accountable to the people. They helped changed the world.*[30]

In May 1994, the Midwest Region 7 Society of Professional Journalists Board of Directors named the UW-RF chapter the Top Regional Student Chapter. I was proud of the students. At the awards banquet, I was surprised when the regional chapter gave me a Director's Award for Outstanding Service as faculty adviser. Later, the national SPJ Board of Directors presented the UW-RF student chapter with a national First Amendment Award, one of the most prestigious national awards that could be granted to a student chapter.

It was a glorious time for the students.

But not so much for me.

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[27]"Professor Fights School for Job," *Student Press Law Center Report XVI*, (3):36-37 (Washington, D.C.,Fall 1995), p. 37. Available online at <http://issuu.com/splc/docs/v16n3-fall95>.

[28]Joe Williams, "Access: Students Sue School to See Evaluations," *Milwaukee Sentinel* (April 8, 1994), p. 1A.

[29]Two other students were named as plaintiffs.

[30]To this day, student evaluations of faculty in the entire University of Wisconsin System are public data. See <https://www.wisconsin.edu/regents/policies/student-evaluation-of-instruction>.

I'm in Trouble

In late May, several faculty and staff told me that my role in helping students sue the university and publish the faculty salary stories may have an adverse impact on my chances of being promoted and retained. I initially dismissed the comments, because academic freedom clearly protected my involvement in those matters. But I had trouble sleeping. I had to know for sure. So a short time later I wrote to College of Liberal Arts and Sciences Dean Cal Stricter, Damon Smith's superior and friend, asking whether my involvement in the SPJ lawsuit and faculty salary project could "be used to deny me tenure, or are tenure decisions based solely on one's performance in teaching, research and community service?"

"Yes," Stricter responded.[31]

Meanwhile, tensions were high in the journalism office. Smith and another journalism faculty member avoided personal contact with me. The fourth faculty member sympathized to some degree, but he reported to Smith and would not publicly defend me. He did tell me, however, that faculty from various departments across the campus complained frequently about me at lunch. I used to be invited to those lunches.

A number of university professors also complained to Smith, who told me that one professor even asked: "What is Demers' hidden agenda?" Another faculty member told a student: "Demers is a sociopath." The whole thing was surreal. It reminded me of Gary Cooper in "High Noon" — in that classic scene where the camera pans back to show Cooper standing alone in the street as the bad guys arrive in town. "Colleagues, let's get the rope," I could hear the faculty saying at lunch.

Fortunately, the semester ended without a hanging. But I was an emotional wreck. My career was on the line. What university would hire a professor who has been fired from his job?

Through it all I kept telling myself that the university couldn't fire me. After all, SPJ, the nation's leading journalism organization, had just given the students and me awards for our work. I had better-than-average student evaluations and an outstanding publication record. I had more publications than most of the full professors on campus. Damon had even supported my decision to go up early for promotion to associate professor. Surely the principle of academic freedom also protected me. But I decided to contact an attorney, just in case.

In July 1994, I spoke with an out-of-town employment attorney, one whom I hoped would not be tainted by local university politics. I gave him a summary of the situation and he didn't pull any punches. "If they decide to fire you, you'll lose," he said.

"You're kidding?" I responded. "What about academic freedom?"

"Listen, no one wins those cases. The only cases that win are those arising from the so-called protected categories. If you're a woman, a minority, over age 50, or have a unique set of religious beliefs, you might have a chance. But none of those apply to you, and even if they did the university will create a host of other reasons to fire you. Right now, university officials are probably developing a long list of things to hang you on, and your boss and other faculty and administrators are actively helping to develop that list. Academic freedom and the First Amendment are noble ideals, but it is virtually impossible to win a lawsuit using them as a defense. ... I wish I could be more positive, but the legal system doesn't really provide much protection for faculty who speak their minds."

I consoled myself with the thought that this attorney was not a First Amendment expert, so maybe he was wrong. I continued my search. I had hoped summer break of 1994 would cool things down a bit. It didn't. When school started up again in fall, Smith continued to shun me. I was excluded from some of the decisions affecting the department. I became, in the lexicon of the scholar, *persona non grata*, an "unwelcomed person." In ancient Greece, the worst punishment that could befall someone was not death — it was banishment from the community.

I knew I would be denied early promotion and probably renewal of my contract. What I didn't know, however, was how the university would justify the decision. My performance on all three criteria for tenure and promotion — teaching, research and service — was good for three straight years. So how could they justify a firing?

Collegiality

"Collegiality," my business professor colleague told me sometime in September 1994. "They can fire you if they think you're not nice enough or if you don't play well with others on the playground."

"What?"

"I'm not kidding. Go look at university rules."

Sure enough, there it was, in Chapter 4 of the UW-RF Faculty Handbook, under "Promotional Criteria," under subsection "Contribution to the University," paragraph (b): "Ability and willingness to maintain such working relations with colleagues as are essential to effective accomplishment of the mission of the academic unit, the college and the university."

My career is over, I thought.

But then I remembered from one of my sociology courses that autocrats often used collegiality as a tool to prevent experts and professionals from challenging their arbitrary

[31] I wrote to the dean on June 27, 1994.

authority.[32] Was it possible that UW-RF's collegiality clause violates constitutional law or state policies? I called the UW System office in Madison, and, to my delight, a spokesperson there told me that several years earlier the UW System central office instructed all of its satellite campuses to strike collegiality clauses from their faculty handbooks and administrative rules. In other words, when it comes to evaluating an employee, the key criterion is job performance or behavior, not attitude or whether others like you.[33] The clause was still on the books at UW-RF because someone at the university had failed to carry out the order to strike it.[34]

But this turn of events didn't end the dispute.

The Ranks Are Closing

On December 16, 1994, Smith and three other faculty from other departments met in closed session to consider my request for promotion to associate professor as well as to issue an advisory vote on progress toward tenure. As expected, the Journalism Department Retention Committee rejected my request and issued an adverse vote on progress toward tenure. "Professor Demers' inability to maintain productive communication channels within his department has inhibited his ability to contribute to department goals," the committee said.

The next three months were difficult. I had now achieved pariah status on campus. Administrators and professors avoided interactions with me. Only the students and the sweet receptionist in our office would talk to me.

On March 6, 1995, the retention committee issued its final decision regarding my request for promotion and contract renewal. I lost again. "Tenure is based on some assurance that a good, productive working relationship over the long term is likely. Without evidence of that, an institution is playing loose with the best interests of students in the long run."

On March 15, I got a bit of good news. The College of Arts and Science Promotion Committee had voted in favor of my request for promotion. This committee was composed of faculty from other departments — faculty who were not personally involved in or affected by the dispute. The committee concluded that my teaching, service and research met or exceeded university standards for promotion. But support from this committee didn't matter. Administrators hold final power when it comes to tenure and promotion decisions.

I met with Dean Cal Stricter, who said he was going to vote against retention because a "faculty member must have good working relations with colleagues." To ensure collegiality was the basis of his decision, I baited him with the "outlawed" wording taken directly from of the UW-RF Faculty Manual. "Do you think 'ability and willingness to maintain good working relations with colleagues is essential to accomplishing the mission of the department and university' and should this policy be used to assess whether I should be granted tenure and promotion here?"

"Of course," he said.

I got it all on the record. The dean even allowed me to openly tape record our meeting.

The vice chancellor at the university, who was the next up the chain of command in terms of ruling on my request for retention, also allowed me to tape record our meeting. He, too, confirmed that collegiality was the reason he would vote against me. The chancellor of the university, Gary Thibodeau, refused to allow me to tape record our conversation, so I left his office without an interview. But that meeting would not have affected the outcome. Thibodeau had already made up his mind.

My subsequent appeals were ignored as the school year came to a close. The university gave me one year to pack my bags.[35] The extra year didn't give me much solace. My thoughts were filled with anxiety that my academic career was coming to an end. I also began to question my own theory of bureaucracies.

Bureaucracies and Meritocracy, Objectivity

My Ph.D. dissertation,[36] completed three years earlier, had found that corporate (or large, bureaucratic) newspapers, when compared with entrepreneurial newspapers, produce content that is more critical of dominant institutions and elites; emphasize quality product more than profits; hire more competent employees; conduct more investigative reporting projects; and place more emphasis on codes of ethics.

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[32]Weber writes: "Collegiality as employed in agencies acting under the direction of higher authorities has been primarily intended to promote objectivity and integrity and to this end to limit the power of individuals."

[33]Despite the decision by UW System attorneys to strike the collegiality clause, courts across the country often have ruled that universities may take collegiality into account when assessing the performance of faculty. See Mary Ann Connell and Frederick G. Savage, "Does Collegiality Count? While Academics Debate the Importance of Collegiality in Faculty Personnel Decisions, the Courts Have Spoken. They Won't Protect Truculent Professors," Academe, 87(6) (November/December 2001). Retrieved January 31, 2009, from <http://www.aaup.org/AAUP/pubsres/academe/2001/ND/Feat/Conn.htm>.

[34]The collegiality clause was eliminated sometime after my lawsuit. The 2011 UW-RF Faculty Handbook contains no mention of the word "collegiality" in its criterion for promotion and tenure. Retrieved September 1, 2012, from <http://www.uwrf.edu/FacultySenate/Handbook/Chapter4/Handbook4s3.cfm>.

[35]At most universities, when contracts are not renewed, faculty are allowed to teach for one more year. This gives them some time to find another job.

[36]David Demers, *The Menace of the Corporate Newspaper: Fact or Fiction?* (Ames: Iowa State University Press, 1996).

Corporate newspapers were, according to my theory, social institutions that helped other institutions adapt and change, partly because they were more meritocratic and objective than other forms of organization.

But my personal experience with the bureaucracies in the Minnesota Court System, the Minneapolis Police Department, the Minnesota Department of Revenue, and at the University of Wisconsin–River Falls suggested the opposite. Political interests and personal loyalties seemed to trump good judgment. There especially was nothing objective about the tenure process. In one moment, UW-RF administrators were going to promote me to associate professor two years early, and a short time later I was fighting for my job.

But I wasn't ready to give up.

A New Attorney and Lawsuit

I hired a new attorney, Marshall Tanick of Minneapolis, who was an expert in First Amendment law and employment law. "If we file a lawsuit in Wisconsin," he told me in spring 1995, "we'll lose. The state courts will identify strongly with the UW administrative system. Instead, we'll file in federal court. We'll have a chance there." His observation that state bureaucracies could not render an objective decision contradicted classic bureaucratic theory, of course. He was probably right.

Tanick told me that filing a free-speech case in federal court means that I, as a plaintiff, would not be able to seek punitive damages. The financial remedies would be limited.

"We can fight to keep your job. Is that what you want?"

"Yes," I said. "This is not about money. All I want is an apology, and I can continue to work at River Falls, if I have to. This dispute is about protecting the First Amendment rights for faculty."

If Tanick thought I was naive, he never told me.

On May 12, 1995, he filed a notice of claim with the state of Wisconsin. The notice is required before one can file a lawsuit. Basically, the notice gives the state a chance to fix things before going into litigation. The university took no action on the claim.

The lawsuit was filed September 11, 1995, in Federal District Court in Madison. The complaint claimed my contract was not renewed because I helped students publish articles about student evaluations of faculty and faculty salaries. "Because of his involvement in those articles," the complaint stated, "he encountered hostility from ... his colleagues and superiors within the Department of Journalism and other administrators at the university."

I put together a news release about the lawsuit. The Student Press Law Center, *Quill* magazine, which is published by the Society of Professional Journalists, and local newspapers covered the story. The media coverage upset many university officials. I talked freely and openly about the case. But privacy laws limited their ability to comment to the press. It was one of the few advantages I had over the powerful billion-dollar UW bureaucracy.

In late spring 1995, after UW-RF administrators notified me that my contract would not be renewed, the director of the journalism and mass communication program at the University of Minnesota, Dan Wackman, asked me if I wanted to teach in the program during the following school year. I accepted.

The $64,000 Settlement

In late March 1996, I received a call from Tanick. "Dave, the attorney for the UW system and I have reached a possible settlement in your case."

I was surprised, because I didn't even know a settlement was in the works. "Is the university going to apologize?" I asked.

"No. Bureaucracies don't apologize. The legal system doesn't operate like that. The courts are a place where money is exchanged for a wrong that is committed. The UW system is offering you a $62,000 cash settlement. In exchange, you'll have to drop the lawsuit and leave your job."

I was disappointed. What I really wanted was an apology.

"Dave, take the money and declare victory," Tanick said. "The payment will be interpreted by others as a sign that the university wronged you. You can use that to your advantage." He pointed out that the alternative was a long and drawn out lawsuit with an ending that couldn't be guaranteed. The settlement, on the other hand, would cover my costs and I could give some to a scholarship fund. Tanick suggested that I ask the university to increase the settlement to $64,000, to draw attention to the crooked game show from the 1950s.

I laughed and consented. The university agreed.

After the settlement, Tanick and I issued press releases to news media. The story was widely covered in local newspapers and professional media in journalism, including *Quill*. He was right. The payment was seen as an admission of guilt.

All told, I piled up about $31,000 in attorneys fees, court costs and other costs. I gave my wife an extra $5,000 for her "pain and suffering." I gave $9,000 in scholarships to River Falls journalism students. I gave $2,000 in bonuses to Tanick and his assistant attorney. The rest, which amounted to $17,000, I used to pay off my car. Tanick's law firm gave several $500 scholarships to UW-RF students.

Fortunately, I also was offered a job at Washington State University. Some faculty there were concerned about my activist ways, but others were impressed.

Faculty Role in the Dispute

During the controversy at UW-RF, several students offered words of encouragement to me and several testified on my behalf at a couple of hearings. I also had some support

from colleagues at other universities. But on campus I had no support from faculty.

One UW-RF colleague of mine in another department initially offered support, but he quickly reversed his position after a committee he served on heard one aspect of my case. Not one UW-RF faculty member or administrator at the university, including those from journalism, supported my First Amendment lawsuit. As noted above, the chair of the journalism program might have been supportive had he not been friends with one of the administrators who lied about access to the student evaluations. The other two journalism faculty also refused to support my free-speech lawsuit, partly because, I speculate, they had a good working relationship with the journalism chair and neither wanted to jeopardize their careers. Professional envy also might have played a role.

The American Association of University Professors, by the way, refused to become involved in the dispute after learning that I had hired an attorney (that's their policy). The Foundation for Individual Rights in Education did not exist at the time of the dispute. It was founded in 1999, three years after the settlement in my case.

At the time, I kept telling myself that things would be different at my new job at Washington State University, because it was a larger university, and larger bureaucracies should place greater value on meritocracy and objectivity in decision making.

I was wrong again.

A Controversial Plan to Improve a Journalism Program

As the controversy at UW-RF was winding down, I was fortunate to land a tenure-track position in the Edward R. Murrow School (now a College) of Communication at Washington State University. I began teaching there in fall 1996. I was tenured three years later.

My first decade at WSU was calm and peaceful. I published nine more refereed papers (20 to date) and four more scholarly books, including one university press (six books total). My conference papers earned two more national awards (five total), and I had very good student evaluations. I provide these statistics not to brag, but to point out that objective job performance does not ensure job security, even in a bureaucracy allegedly committed to meritocratic ideals.

In 2002, I created Marquette Books, a book publishing company, to publish collections of papers presented at two international conferences sponsored by the Center for Global Media Studies, a nonprofit educational organization I had created to promote awareness of global mass communication issues.[37] To my surprise, a number of scholars, including the late John Merrill and Melvin DeFleur, began asking me to publish some of their scholarly books. Fifteen years later, my company had published more than 70 scholarly books and scores of other nonfiction and fiction books.

I diligently followed university rules in establishing Marquette Books and when using some of the scholarly books in my classes. But some administrators and scholars apparently were envious of the success, and university officials eventually conducted two extensive investigations of my company, neither of which found any ethical, administrative or legal violations. Although some university officials would continue to make veiled threats, the book-publishing issue never became a major issue of concern in later legal proceedings. Instead, the key issue became a 7-Step Plan I created to improve the quality of what I perceived to be mediocre programs in mass communication, including print journalism, my home department. I had tried for years to get administrators and faculty to seek national accreditation for the programs. They repeatedly refused.[38]

Background

The origins of the controversy can be traced to 2006, when the current director of the Murrow School, who I supported, was denied reappointment. The new interim director, Erica Austin, was a full professor in the Murrow School who I liked very much.[39] But the feeling apparently was not mutual. By that time, I had amassed a publishing record that put me squarely into a leadership role in the School.[40] The Center for Global Media Studies had sponsored two international conferences under my leadership, and Marquette Books was also doing well, adding several scholarly journals to its list of publications.

In fall of 2006, Austin and other administrators initiated an effort to restructure the School. I served on the "structure committee," where my views about improving the quality of

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[37]During the decade, Marquette Books also published three books I edited and a dictionary of mass communication I wrote. The dictionary was selected as the second most significant publication in the department in 2005.

[38]The strength of accreditation is that it ensures journalism students obtain a liberal arts education, which many scholars, including me, believe is crucial for becoming a good journalist. Some faculty dislike accreditation because it restricts the number of courses that students can take in the major.

[39]Her real name. Austin would become the first name mentioned as a defendant in my free-speech lawsuit against the university. Real names are used in this paper for all WSU administrators at or above the rank of director.

[40]"Productivity of Tenured Faculty in the Murrow College of Communication Since Obtaining Ph.D. and Between 2006 and 2008," unpublished report prepared by David Demers, Washington State University (February 2011).

the program were not well received. When some of the committee members began bashing the school's professional advisory board, I decided to develop my own plan for restructuring the Murrow School. That plan, which I distributed to then Provost Warwick Bayly in January 2007, contained seven recommendations. The most controversial were the call to seek national accreditation for the mass communication programs and a call to move the communication studies program out of the School and into the College of Liberal Arts. The latter program was consuming one-fourth of the Murrow School's resources but served fewer than 50 of the 1,000 or so majors in the School. My plan also called for improving relations with the professional community and giving non-tenured professional faculty a more active role in the development of the programs. I was so committed to the plan that I even offered to donate $50,000 of my own money if the university would implement it.

In fall 2007, I met with the new university president, President Elson Floyd, who was intrigued by the plan, especially the donation, but he never acted on it. That was OK. I figured the plan was a long shot. I proposed it because I had fewer than ten years or so before retirement. I was hoping I might be able to improve the program before I left. I failed.

Although the plan angered Austin as well as number of faculty,[41] at no point did it cross my mind that my plan was not protected speech under the First Amendment. Administrators later would even argue in court that faculty do not deserve free-speech rights when speaking in their service-related or professional roles. They asserted, in other words, that even tenured faculty could be terminated if they said something administrators didn't like during a committee meeting, such as a Faculty Senate meeting. That was preposterous, in my opinion.

But administrators were smart enough to know that firing faculty for what they say is not good public relations. So, with the assistance of upper-level administrators, the director of the program initiated a plan to challenge my competency as a scholar and teacher. The key element of that plan was a 2008 internal audit, which would falsely accuse me of canceling classes in 2007. I provided material evidence to counter the charge, but the internal auditor and administrators refused to acknowledge or accept it. I was dumbfounded — until a faculty member informed me that the internal auditor's sister worked for the director of the Murrow School.

A conflict of interest, of course.

I wanted to file a complaint against the internal auditor, Heather Lopez, but I could find no university or state agency that would hear my grievance. President Floyd said he would investigate and get back to me but never did. What I didn't know at the time was that Floyd had asked Washington State Auditor Brian Sonntag (elected by voters statewide) to investigate my conflict-of-interest allegation. Sonntag concluded that Lopez did, indeed, violate auditing codes of ethics, which of course invalidated the audit of me. But instead of making that news public, Floyd deliberately withheld Sonntag's report and tried to force me into mediation. I agreed but only if everything, including the settlement agreement, was made public. Floyd's attorneys refused, so mediation fell through.

For two years in a row Austin had given me below satisfactory annual reviews, even though during that time I had very good student evaluations and had published or written two scholarly books, one of which was theoretically based. The other was a dictionary of mass communication, which was selected in 2006 as second most important work in the program during the previous year.

But none of that mattered.

Notice Concerning Neglect of Duty

On April 16, 2008, the Murrow School interim director drafted a letter, titled "Notice Concerning Serious or Repeated Neglect of Duty." The letter falsely claimed I gave a final exam in the 14th week of the semester in one of my classes, rather than during finals week; that I conducted only two and not three class sessions per week in my classes in fall 2007, which also was false; and that I had failed to file a form about my involvement with Marquette Books. The last item was true, but I was waiting for the university to explain why its interpretation of the rules was more accurate than the interpretation of its own vice provost for research.

I followed up the Notice of Neglect letter with a detailed response, refuting each charge and repeating again that the vice provost for research told me that Marquette Books did not have to file the report. I also included an e-mail in which the vice provost confirmed that my interpretation of his conversation to me was correct. There was no response from Austin or the university. Nevertheless, the handwriting was on the wall. The university was trying to fire me. I started looking for an attorney.

On October 14, 2008, I sent an e-mail to President Floyd, pointing out that my 2006 and 2007 annual reviews contained six errors of commission and omission.[42] I asked him to direct

[41] I have encouraged WSU administrators to criticize my 2015 book from which the content you are now reading was adapted. Before publishing the book, I gave all administrators and other officials a chance to criticize the content. Two responded and their comments are included in the appendix of the book. I also have offered to debate them in public if they desired, but they thus far have refused.

[42] I didn't include some of the smaller errors identified in the first annual review.

university administrators to fix the errors. Floyd turned the matter over to interim provost Warwick Bayly, who didn't respond for several months. Not sure why it took so long.

There was no question in my mind that Austin and other administrators were violating my First Amendment rights and were harassing me with no good reason. But Austin and other administrators at WSU were smart enough to know that if the dispute were framed as a battle over free speech, they would be on soft ground. So they tried to frame the dispute as a case of professorial incompetence. Everything came to a head at a meeting with the provost on February 18 2009.

Bayly's Court of Justice?

"Hello. I'm here for a meeting with Provost Bayly," I said to the receptionist. "I'm a few minutes early."

"Yes, please take a seat," she said cordially but plainly not interested in small talk.

Five minutes later WSU Ombudsman Ken Struckmeyer arrived. University officials refused to allow me to tape record the meeting, so I asked if the ombudsman could sit in on the "appeal" of my annual reviews. I handed everyone in the room a copy of the errors in my two annual reviews and initiated the conversation.

"The reason I asked for this meeting," I said, "was to correct errors in my annual reviews and the internal audit, particularly the false allegation that I had canceled classes in 2007."

As I talked, I looked at Bayly for his reaction. For the first minute or so he refused to look me in the eye. He stared at the documents on the table I had given him. I suspected he probably had already made up his mind on the case. His body language completed the story.

"Listen," he said, interrupting me after a couple of minutes and sitting more upright in his chair. "As I understand it, your director (Erica Austin) already fixed the errors in your annual review. Isn't that correct, Ken?"

Ombudsman Struckmeyer was sitting on my left. He was fidgeting, and his face was redder than a radish. He hesitated, an action that Bayly quickly interpreted as confirmation that the errors had been corrected.

Was Struckmeyer going to betray me?

"Ken," I intervened, "at the meeting on June 30 (2008) with Dean (Erich) Lear and Austin, Lear conceded that the accusation that I had canceled classes was false and that Austin would correct the error. But Austin failed to make that correction. You were there. You were the one to ask them to correct that error. Do you remember?"

"Yes, that is correct."

"What?" Bayly interjected. "Ken, are you sure that's what happened?"

"Yes, Lear agreed to correct the error."

Bayly's brow furrowed. He apparently had not been fully informed of what happened at the meeting with Lear, Austin, Struckmeyer and me. But Bayly wasn't ready to toss the noose onto the ground. He tried, on two other occasions during the conversation, to get Struckmeyer to admit that the error was corrected or that the allegation that I had canceled classes was true. On both occasions, Struckmeyer stood behind my version of the story. That must have taken a lot of courage, because it was clear Struckmeyer was on good terms with Bayly.

Bayly switched topics.

"I don't think your performance here has been satisfactory," he said to me.

"Oh, really?" I responded. "What makes you say that?"

"I've looked at your book [*History and Future of Mass Media*] and I don't see much theory in there." Austin, by the way, had given me virtually no credit in my 2006 annual review for writing the book, which was published by Hampton Press of New Jersey in 2007.

Fortunately, I had a copy of the book with me and I pushed it to Bayly's side of the table. "My theory of corporate mass media is one of the most unique theories in the field," I said. "The last five chapters of the book focus heavily on my theoretical model."

"Well, I haven't read the whole thing, but it didn't look very significant to me."

I then told Bayly that I ranked first or second on three measures of research productivity and scholarship among tenured faculty in the Murrow School. I had written or edited 10 academic books (four edited books through Marquette Books), 20 first-author or sole-authored refereed articles and more than 100 professional publications, and that I had earned five national research awards.

"Well, I hear your teaching isn't very good," he said, looking at Vice Provost Frances McSweeney, who was also in attendance. "Isn't that true?"

Before McSweeney could respond, I said: "No, that's not true. My evaluations are at or above department and university averages. I get good evaluations and I love teaching."

McSweeney confirmed that my teaching evaluations were good.

"Let's face it," Bayly said, "You really don't care much about your job, do you?"

Where the hell did that comment come from? I wish I had this conversation on tape.

McSweeney then chimed in that the administration was concerned I was giving too many quizzes and exams online. She implied that this was inappropriate. I was caught off-guard again. Was this a new charge? No one has ever criticized me for giving too many online quizzes or exams in my classes?

"Fran, do you really want to go there?" I asked. "Hundreds of professors at the university conduct quizzes online and hold classes online. In fact, a substantial number of credit hours being offered at the university are offered exclusively online. If you indict me for conducting quizzes

online, then you'll be indicting the entire university system."[43]

She didn't respond. She looked scared. Her case was falling apart.

But "Judge" Bayly didn't see it that way. My guess is that administrators had told him I was incompetent. "I don't see any merit to your complaint, and I'm not going to change your annual reviews. I'll speak with Dr. Lear and Dr. Austin and I'll send you my response."

Court was adjourned.

I gave Struckmeyer one of those shoulder-shrugging "I-can't-believe-this-happened" looks. His face had turned another deeper shade of red. He turned his head away.

As we got up to leave the room, Struckmeyer asked McSweeney if he could meet with her after the meeting.[44] The next day Struckmeyer e-mailed me with questions about whether my quizzes or exams were conducted during class or at other times. I assumed the questions came from his meeting with McSweeney.

"Always during class," I responded, "except when we had problems with the Internet service. Then I gave the students more time. The reason I conducted the quizzes during class time is that it reduces cheating and I know all of the students have to be available to do the quiz during class time."

"And do you have records of this?" Struckmeyer asked.

"Yes. I have hard copies of all of the quizzes. They even have the time and date stamped on them."

A Moving Target

It was easy to see where administrators were going with this. If I had not conducted the quizzes or exams during class time, they could accuse me of canceling classes (or the administration's favorite new phrase, "not holding them"). But a week or so after the meeting with Provost Bayly, Dean Lear sent an e-mail saying that the administration was no longer focusing on the issue of canceling classes. Instead, the problem now was that I conducted too many online quizzes and exams. I usually gave seven to 11 quizzes or exams per semester. Students perform better when the course content is broken up into smaller sections. But Lear implied that I should have spent more time lecturing or on other activities.

This comment seemed to support what Vice Provost McSweeney was saying at the Provost meeting. Once again, I was dumbfounded. "Is this a moving target?" I wrote in an e-mail to Lear.

"No, it isn't," he responded. He said the university administration has the authority to control the number of quizzes and other decisions affecting content in courses. But if that were the case, then why did the administration wait so long to raise this issue? I felt "boxed in" until it dawned on me: Simply concede they have the authority to control the number of tests and quizzes and ask them how many I should give. No administrator wants to get into micro-managing a professor's class.

I e-mailed Austin, Lear and McSweeney and asked them how many online tests or quizzes would be appropriate. Austin replied: "As many as you would like."

BAZINGA!

But, of course, it didn't matter.

More Bad Reviews

In February 2009 I submitted my 2008 annual review. Although I had written one book and part of another, Austin gave me a 2.0 rating for the book (3.0 is meeting expectations) and an overall rating of 2.05, the lowest rating I ever received in an annual review. Her review stated that I should have published a refereed journal article, even though university rules weighted books and journal articles equally and she did not have the authority to single out one over the other.

Austin also criticized me again for "failing to hold classes." That charge puzzled me, because two of her superiors (Lear and McSweeney) were no longer accusing me of canceling classes. Instead, they continued to accuse me of giving too many quizzes or exams in my classes. My guess is that Austin was unaware of the events that took place during the meeting in Interim Provost Bayly's office. This is one of the big weaknesses of bureaucratic systems (but a good thing for people fighting them): one part doesn't know what the other part is doing.

She also criticized me for allegedly giving grades that were too high, and then later backed off when she actually looked at my grades. The sloppiness of the administrative review process was appalling. But she refused to correct the canceling classes error, and she refused to give me service credit for editing and formatting six open-access scholarly journals, even though the work I did for Marquette Books counted as service because by then I had filed the requisite form.[45]

Thus, in March 2009, the only apparent option I had left to get the errors corrected and save my job was a lawsuit. I ended up hiring attorney Judith Endejan of Graham & Dunn of

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[43]For $30,000, a student can earn a master's in Business Administration at WSU and never step on campus. The entire course is online.

[44]At the end the meeting with Bayly, I told Struckmeyer that I would probably re-file my complaint with the Faculty Status Committee, because that "appears to be the only option left." But I later changed my mind. It was unlikely that the committee would hear the case again, because the committee could subject itself to criticism for not hearing the case in the first place. There was nothing to be gained in obtaining another rejection from that committee.

[45]She made no mention in her review of my volunteer work for the open-access journals.

Seattle. She had once worked as a newspaper reporter in the Midwest. She understood my idealism.

My Colleagues React

When I started teaching again in August 2009, most of my colleagues were uncomfortable in my presence. One of the school's part-time receptionists was very friendly, but she appeared to be nervous. The sister of the internal auditor was evasive, not surprisingly. We had a polite greeting but it was clear neither of us would engage in any small talk from here on out.

Some faculty with whom I had been friends before the dispute deliberately avoided sitting next to me at the first faculty meeting. I was, of course, *persona non grata* — a role to which I was no stranger. One faculty member at one point told me that he thought I was being unfairly singled out for retribution, because he and other faculty also had failed to file forms outlining their consulting and outside business interests. I advised him to file the form as soon as possible. Six months later, after the lawsuit was filed, I asked him again if he thought I was still being unfairly targeted. He said he never recalled telling me that I was being unfairly targeted. He still hadn't filed the form but was not being investigated or punished by Austin.

Needless to say, the "banishment" was very stressful. I did seek medical assistance, but I held it together fairly well through the next five years of the eight-year-long dispute. The single most important factor sustaining me, however, wasn't the anti-depressant drugs — it was my principles. I later learned that research on workplace mobbing shows that many victims suffer mental breakdowns and some even commit suicide. But those who fight for a higher principle usually survive and even prosper. Principles give people a purpose. It also didn't hurt that at home I had a beautiful daughter (who I adopted from China eight years earlier when I was single) and a supportive spouse, Theresa.

Meanwhile, the permanent new dean, Lawrence Pintak, began his job in fall 2009. He was a former professor at a university in Egypt and a former international broadcast journalist who had done work for CBS and other news organizations. He and I initially seemed to hit it off. But it was clear he didn't know much about my case. A month later he would switch sides. I knew it would happen, even though my case now was being framed as a First Amendment dispute.

For more than two years I tried unsuccessfully to get WSU university officials to correct errors in my annual reviews and in the internal audit. In the beginning, I thought the error about canceling classes would be corrected quickly because I had the physical evidence to dispute the allegations. The facts spoke for themselves. But, as the years passed, I realized that a simple resolution would not be forthcoming. As a media sociologist, I couldn't help but run a series of questions over in my mind — questions that related this dispute to bigger issues involving the impact of institutions in society:

> How could very bright people — administrators trained in scientific methods and one of its core principles, objectivity — engage in irrational, nonobjective behavior? Why would they persist in trying to punish a faculty member who had followed university rules? Why would they repeatedly fail to explain or justify their actions and refuse to provide an explanation as to why my interpretations of the rules were wrong?

Workplace Mobbing

I found part of the answer in fall 2009, when I began doing research on workplace mobbing and came across Canadian sociologist Kenneth Westhues' book, *The Envy of Excellence: Administrative Mobbing of High-Achieving Professors*. The book focuses on the case of one Canadian professor, Herbert Richardson, who, in Westhues' opinion, was wrongly mobbed by his administrators. Westhues writes: "How does it happen that a thousand accusing fingers all get pointed in one way, toward a target who is doing little harm and much good?"[46]

The process that led to the dismissal of Richardson, who was a protestant theologian teaching in a Catholic university, was a "form of savagery," according to Westhues.[47] He blames part of the problem on the fact that universities are not bound by rigorous legal rules and principles.

> Like courts, these in-house, quasi-judicial (academic) bodies can discredit and punish an accused person, destroy the person's life, but they are governed not by criminal law but only the newer, looser rules of administrative law. Proof beyond reasonable doubt is not required, just the weighing of probabilities. Charges need not be so specific as in criminal courts, nor rules of evidence so strict. Most of the professors and staff members sitting in judgment are unschooled in law. Procedures are informal, haphazard, entangled in campus politics, and free of the presumption of innocence of the accused. At worst, domestic tribunals function as kangaroo courts — better to say wallaby courts, the latter being a smaller marsupial.[48]

Although universities "are places where the 'law of reason' appears to reign supreme ... on most issues," Westhues writes that "in these same places, on exceptional occasions,

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[46]Kenneth Westhues, *The Envy of Excellence: Administrative Mobbing of High-Achieving Professors* (Lewiston, Canada: The Edwin Mellen Press, 2005), p. 5.

[47]Ibid.

[48]Ibid., p. 3

people 'riot in complete exemption from that law.'" He adds: "Academic knives are more polished and keen than those made of steel, and they are thrown with such grace that targets sometimes barely know they have been stabbed in the back until their campus lives are lost."

So why do administrators mob?

Westhues places much of the blame on "envy." High-achieving professors are usually the victims. This theory fits well with explanations many of my friends and colleagues also gave me. Perhaps there is some validity to these psychologically oriented theories. All social systems seek to control their members, and they dislike members who rock the boat. I have never been afraid to take a position that runs contrary to the dominant view. I've always assumed that this is what makes America and its universities great.

But as a structural theorist, I believe a more complete explanation must go beyond the confines of psychology and individual motivation.

A Structural Explanation

Part of the reason the errors in my annual reviews were never corrected and why a mobbing atmosphere emerged at WSU can be attributed to rules that dole out rewards and guide the annual review process. The rules limit the ability of faculty to challenge administrative decisions. There was, for example, no appeals process for the internal audit. And although I appealed my evaluation ratings to a campus grievance committee, it refused to hear my case because it was too busy working on tenure-denial cases.

In addition, even when one can appeal an administrative decision, the "judge" usually has a conflict of interest, as Westhues points out. If faculty do not like how their supervisor rates them, they can appeal to the next highest level, which is usually a dean or provost. But the "judges" have a vested interest in the outcome. Higher-level administrators need the political support of the administrator who gave the review, so their independence is compromised. Moreover, the system presumes the higher-level administrator is knowledgeable about the performance of the faculty member. But rarely is that the case, nor do they have resources to investigate.

Although the higher-level administrator could support the lower-level administrator's decision, the safest approach is to simply provide no rating at all, which the rules allow. This insulates higher-ups from responsibility, forcing lower-level administrators to take responsibility should something go wrong. That's what Dean Lear did in my case. He didn't formally endorse Austin's first two reviews, he simply refused to change them. Because power in administrative structures is derived partly through loyalty and mutual support, obtaining an objective assessment is extremely difficult. Clearly, a more objective, independent appeal process is needed, yet administrators will resist such changes, because that could seriously dilute their power.

At WSU, administrators enjoyed a wide latitude of power over professors, because administrators know few faculty will fight a bad review. However, one dysfunctional side effect of not having a more independent review process is illustrated by my case: the dispute may end up in litigation, consuming thousands of person-hours and university resources and go on for many years. The real victim, in the end, is the taxpayer.

My First Amendment Lawsuit

My First Amendment lawsuit against four Washington State University administrators was filed electronically in U.S. District Court in Spokane, Washington, on October 28, 2009. I issued a four-page news release and distributed it via e-mail to hundreds of local and national news media, pro-speech organizations, social scientists and colleagues.

LAWSUIT ACCUSES WSU'S MURROW COLLEGE OF VIOLATING J-PROFESSOR'S FIRST AMENDMENT RIGHTS:
University Auditor Also Accused of Conflict of Interest

> SPOKANE, WA — A Washington State University journalism professor today filed a federal lawsuit against four administrators at his university who, he says, violated his First Amendment rights when they punished him for proposing a "7-Step Plan" to improve the quality of the unaccredited undergraduate mass communication programs in the Edward R. Murrow College of Communication.
>
> Tenured associate professor David K. Demers filed the lawsuit in U.S. District Court in Spokane. The defendants are Erica Austin, former interim director and dean of the Murrow program; Warwick Bayly, interim provost and vice president; Erich Lear, former dean of the College of Liberal Arts; and Frances McSweeney, vice provost for faculty affairs. ...
>
> [T]he complaint asserts that Austin falsely accused Demers of canceling classes in 2007 and 2008. One of those accusations was duplicated in a report issued by WSU Internal Auditor Heather Lopez, whose sister worked for Austin in the Murrow office. The complaint contends that the auditor had a "patent conflict of interest." ...

The defendants, through their state-appointed attorney, Kathryn M. Battuello, denied the allegations.[49] The defendants would provide more details about their case a year later, when they filed a motion to have the case thrown out of court

[49] "Defendants' Answer and Affirmative Defenses to Plaintiffs' Complaint for Violation of Civil and Constitutional Rights," *Demers v. Austin, et al.,* Case NO. CV-09-334-LRS, U.S. District Court, Eastern District of Washington, filed November 25, 2009.

(details to come). The defendants did not issue a press release, but a university spokesman told local media that WSU would "vigorously" defend them against the lawsuit.

Reaction to the Lawsuit

Short stories about the lawsuit appeared in several regional news media, including the *Seattle Times*, *Lewiston Tribune*, and *Moscow-Pullman Daily News*, and in *the Chronicle of Higher Education*. But the WSU *Daily Evergreen* and the Spokane *Spokesman-Review*, the two most important local media, ignored the story.

I wasn't too surprised by the *Spokesman-Review* snub. I had, through the years, become an unwitting critic of the newspaper's management (the Cowles family) after learning the newspaper was censoring citizen commentaries and letters to the editor. I had also been critical of the family's involvement in the River Park Square garage scandal, in which it was alleged the family was profiting at the expense of the taxpayer. Another factor that may have contributed to the snub was the organization's linkage to the university: Elizabeth Cowles, who managed the family's broadcasting stations, was a member of the WSU Board of Regents from 2000 to 2005.[50]

But the *Evergreen* rebuff was puzzling. Although student journalists most likely identified with the administrative power structure at WSU, even the most biased of editors could not have failed to see that a federal lawsuit alleging a journalism program director was violating the First Amendment rights of a faculty member was one helluva story. Were WSU students getting proper instruction in their journalism classes? The newspaper, by the way, also would refuse four years later to cover the Ninth Circuit Court of Appeals ruling, which favored me.

But there was no time to pout about lack of local media coverage. I just circumvented the media. I assembled e-mail lists of several hundred WSU faculty and administrators and sent it directly to them. Of course, administrators tried for a while to punish me for e-mailing faculty, but they eventually backed off when it was determined I had violated no university rules and that I had a free-speech right to distribute such information.

The lawsuit produced relatively little public response from WSU students and faculty. Some faculty were sympathetic. But none would support me in public. I wasn't surprised that non-journalism faculty were reticent. But I was a bit surprised at the lack of support from my journalism faculty colleagues. Murrow print and broadcast journalism faculty presumably had a greater vested interest in First Amendment issues. But not one of them publicly supported the idea that faculty should have the right to criticize the administration and offer alternative plans for restructuring a program — nor did they, later, criticize the university administration for arguing that faculty do not deserve free-speech rights in their professional or service-related roles.

In addition, some of the WSU faculty on campus who were associated with the American Association of University Professors, which is one of the strongest voices for free speech in higher education, were tepid in their support. "I have to be very careful about how I approach all this," said one AAUP member, who was worried that he would jeopardize his chances of being elected to an important position in Faculty Senate if he took a strong stand on the issue.

On another occasion I asked a WSU junior administrator whether he would defend a faculty member who was being falsely accused of violating university rules.

"Are you kidding?" the administrator said, laughing. "I have a family to support."

That administrator, by the way, eventually became the head of an academic unit at a major university. He is the kind of person who succeeds in bureaucratic systems.

The WSU Faculty Senate, which presumably had a vested interest in supporting free-speech on campus, also ignored the lawsuit, even when WSU administrators later argued in court that faculty do not deserve free-speech protection when acting in their service-related or professional roles.

I believe that most of these lapses in judgment can be explained by three factors. The first is fear — of retribution and of not getting the rewards that a faculty member thinks he or she deserves from the university. The second factor is that faculty, especially the Faculty Senate leadership, strongly identifies with the administration on most issues, whether by choice or through co-optation. A third factor is a lack of faculty leadership on issues involving academic freedom. None of Faculty Senate leaders had a background in First Amendment law and, thus, did not have the knowledge to understand what was protected speech. Two of the Senate presidents even denied me an opportunity to speak to the senate body about the legal issues at stake in my lawsuit, apparently unaware that Faculty Senate is a public body that legally cannot deny citizens or faculty the opportunity to address it.

Although WSU insiders may have been reluctant to speak out on the issues surrounding the lawsuit, this did not apply to observers outside of the university. Some even advised me to withdraw my lawsuit. "You should drop this lawsuit," one expert on disputes between faculty and universities told me shortly after I filed the free-speech lawsuit. "Your university will destroy you. They are too powerful. They will build a case against you that you can never beat. You can never win. It will cost you hundreds of thousands of dollars and you will end up bankrupt and bitter. I've seen it happen many times before.

[50]The Regents had to approve the university's decision to defend itself in the lawsuit. They also were updated on progress of the lawsuit through the years during closed sessions.

Life is too short."

"Do you really think anyone cares about your case?" said an attorney familiar with the lawsuit. "Do you really want to work at WSU? You should settle it while you can. Even if you win, you will lose. You will never get your money back. Life is too short."

The only significant support I received with respect to the lawsuit came from friends, family and colleagues outside of the Murrow College and from nationally based free-speech organizations. Most of my colleagues were former journalists-turned-professors who valued the fight for free speech. This included one retired dean. "This is an incredible situation," he said, "and one that has my deepest sympathy, and a good deal of empathy as well. I hope you win this case quickly and hands down ... . The 'mobbing' behavior is [a] new [concept] to me, but outrageous, and the faculty and other participants should be ashamed." [bracketed material added for clarification]

One unexpected positive event to occur amidst the controversy came in February 2010, when the Society for Collegiate Journalists honored me with a Louis Ingelhart Freedom of Expression Award.[51] The award is given to individuals who contribute to freedom of expression at the risk of personal or professional cost. I have received a fair number of awards through the years, but it is the only award currently on display in my office to this day.

Two major free-speech organizations — the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression — also would provide supporting legal briefs later in the case. The Foundation for Individual Rights in Education periodically published stories about the lawsuit on its website. I appreciated that. I tried to obtain some financial assistance from these organizations and others, but no funds were available. I was, in this respect, a lonely activist.

The Secret State Audit Report

The lawsuit discovery stage began in early 2010. The entire process took about a year and produced more than ten thousand pages of documents. I had already seen many of the documents when, two years earlier, I made a Freedom of Information Act request. But one document was not available at that time.

The "secret" state audit report.

I called my attorney immediately. "Judy, Washington state Auditor Brian Sonntag investigated Internal Auditor Heather Lopez and concluded that she, indeed, had a conflict of interest. But President (Elson) Floyd withheld that information from me. The internal audit is tainted. That's why his administration wanted to settle the case through mediation."

Indeed, now it all made sense.

The university's case against me had fallen apart when Sonntag concluded that Lopez had a conflict of interest, and Floyd's administration was trying desperately to Duct-Tape it back together. The events leading up to the Sonntag's report began in fall of 2009, when I asked Floyd to give me instructions on how to file a conflict-of-interest complaint against Lopez. Lopez's sister, who reported to Murrow interim Dean Erica Austin, informed Austin that her sister was the WSU Internal Auditor. Austin also had instructed Lopez's sister to monitor my classes on at least one occasion.[52]

Floyd never gave me instructions on how to file a conflict-of-interest complaint against Lopez. But he and his administration obviously were worried about it. On March 2, 2009, Floyd, without my knowledge, asked Washington state Auditor Brian Sonntag to investigate, who concluded in a March 23, 2009, letter to Floyd that Lopez had violated auditors' codes of ethics.

> Thank you for your letter asking us to review whether the independence of the University's Director of Audit was impaired during an investigation. After consulting Government Audit Standards, we concluded that a conflict of interest and impairment to independence did exist based on the facts you provided . ... Specifically, the Audit Director's investigation of her sister's co-worker was based on assertions from the sister. This relationship creates not only a personal impairment for the Director but also for all audit staff members who are under the Director's control and influence. ...

Floyd never gave me a copy of Sonntag's letter, no doubt because it undermined the administrative case against me. Floyd's administration then tried to settle the case through mediation. But that failed when I demanded that any settlement be made public.

Shortly thereafter, Floyd's administration asked the auditor at the University of Idaho to issue a new audit report. The UI auditor never contacted me, nor was I even aware another audit was being conducted. The auditor duplicated the errors contained in the original audit. The UI auditor's failure to interview me also violated auditor codes of ethics. Provost Warwick Bayly sent me a copy of that new audit report on December 4, 2009, four weeks after I filed the lawsuit.

When Floyd was asked during his deposition why he refused to give me a copy of Sonntag's report, he paused and

[51]See <http://www.scj.us/awardwinners.shtml> for a list of recipients.

[52]Lopez's sister told me that she never spoke to Lopez about her investigation of me, but my conflict of interest allegation was based on the "halo effect." In other words, Lopez put more trust in the information she obtained from Austin and trusted me even less because her sister reported to and was liked by Austin.

looked down at the table. He was nervous. Because it was "minuscule," he said. "I had more important things to do." Floyd's response was enlightening. If he was telling the truth — that he failed to give me a copy of Sonntag's report because he had more important things to do — it meant that, to him, academic freedom and due process were not very important issues. If he was lying, it meant he deliberately violated the administrative due process rights of a faculty member.

In either case, the failure to provide that document radically altered the outcome of the dispute. It meant that taxpayers now would have to fork out hundreds of thousands of dollars to defend the WSU administrators. It meant that Floyd could not be trusted to protect due process rights of faculty.

Not surprisingly, though, no WSU group or state agency ever followed up on the allegations that President Floyd had violated the administrative due process rights of a faculty member when he refused to provide me with a copy of Sonntag's letter. That's the way it usually works in large bureaucracies. To bring down a powerful figure like a university president, you have to have a powerful elite behind the effort, such as a member of the WSU Board of Regents or the Faculty Senate. But not one WSU senator openly criticized the president for his unethical behavior, or the fact that WSU had for years been terminating professors in violation of AAUP standards. WSU administrators were trying to frame my lawsuit as case of "incompetence," not "free speech," and the leadership of the WSU Faculty Senate had been sucked into that story line — like sheep.

But four months later the "incompetence frame" unraveled. WSU administrators and their attorney decided they did not want to go to trial and fight the case out on its merits. Instead, they asked the U.S. District Court judge to declare that WSU faculty do NOT deserve free-speech rights when speaking in their service-related roles. They cited *Garcetti.*

Big mistake.

This not only elevated the "free-speech frame," it cast the defendants and the university administration as free-speech bullies. And, ironically, it reinforced my original claims that university administrators did not respect free-speech rights of faculty. "This is a very bizarre legal strategy," I told a colleague. "The administration is cutting off its nose to spite its face."

Expert Witnesses

The WSU defendants and I both hired "expert witnesses" to help our cases.

I hired Kenneth Westhues, the sociologist mentioned earlier who is an expert on workplace mobbing at universities, to analyze the case. His overall analysis helped me understand why administrators did not appreciate a civil-liberties-loving professor like me. He began by comparing Austin's academic record to mine:

> To judge by her vita, [Murrow Interim Director Erica] Austin is above-average in the sense of having more than an average number of refereed articles to her credit. Demers is above-average in a different sense: not only having more than an average number of books to his credit, but having transcended, far more than most professors, a narrowly academic and professional definition of a professor's role. Demers is a culture critic in an era of academic specialists and ideologues. Excelling in this way tends to threaten colleagues and call forth animosity from them, especially when coupled, as in the Demers case, with undisguised disdain, even contempt for puffed-up ivory-tower professionals — "legends in their own minds," as he has called them.
>
> Demers is not only a bigger thinker than most professors, he is also bigger in practical engagement toward implementing the kind of scholarship he believes in. He is an activist, outspoken in support of the First Amendment of the U.S. Constitution, willing even to take his employer to court in defense of free expression. He is a reformer, appealing publicly to the Murrow alumni and the WSU administration for support of his "7-Step Plan," agitating for higher priority on "green-eyeshades" skills than on "chi-square" abstractions. He is an organizer, founding the Center for Global Media Studies ... and directing it for some years. He is an entrepreneur, founding and making a stupendous success (to judge by its website) of his publishing company, Marquette Books.
>
> In sum, Demers is a type of social-science professor who tends to get in steadily deeper trouble, the more success he enjoys in his work.

To be clear, I don't think I am a bigger thinker than other professors. But the main point in the write-up above is that I, as a scholar, was far more likely than other faculty to fight for what I believed in. I thought other journalism faculty had the same commitment. I was wrong.

In fact, the university even hired a journalism dean to discredit my academic record. Her name was Jean Folkerts, dean of the University of North Carolina's School of Media and Journalism. At the time, I considered her an amiable colleague. I was surprised to hear WSU had hired her to discredit me, because years earlier she told me she wanted me to work for her when I interviewed for a position in the School of Media and Public Affairs at George Washington University, a program she once directed. In addition, as editor of *Journalism & Mass Communication Quarterly* in the 1990s, she had accepted for publication eight of nine refereed manuscripts I had submitted to the journal. To undermine my academic record, she would have to devaluate the very journal

that she edited for more than a decade and then explain why she wanted to hire me. Moreover, Folkert's own academic publication record was much weaker than my own. She hadn't published a refereed manuscript in nearly two decades and, after 28 years as an academic, she only had published nine refereed journal articles and three books, two of which were textbooks and one an edited book. She never published the more highly valued theoretical-monograph book. I had three times as many publications.

Of course, I was shocked then and still am today that a journalism dean would actually help administrators develop an anti-free-speech case against faculty. But the financial rewards for her were big. Folkert's charged about $300 an hour for her services. I had to pay half of the cost of her deposition, which alone was more than $12,000 for two days work.

The District Court Hearing

Oral arguments were heard on May 12, 2011, before Judge Robert H. Whaley, a senior U.S. District Court judge for the Eastern District of Washington in Spokane. Two weeks later he threw my case out of court. He cited *Garcetti v. Ceballos* (2006), writing that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." These "expressions" included my speech about accreditation, whether the college should emphasize professional training or theoretical research, the restructuring of the college, and my 7-Step Plan. He also ruled that these speech expressions dealt with "internal matters at WSU" and "were not matters of public concern."

Garcetti v. Ceballos (2006)

The defendants' and judge's legal arguments were predicated in large part on the 2006 U.S. Supreme Court decision in *Garcetti v. Ceballos*, which held that public employees do not have free-speech rights when acting in their official duties. Prior to *Garcetti*, the courts had relied on what came to be known as the "Pickering Balancing Test."[53] This involved balancing the interests of a public employer with employees' right to free speech using the following three questions:

1. Did the employee's speech address a matter or matters of public interest and concern?
2. Was the employee's speech a significant or motivating factor in the employer's decision to punish or terminate the employee?
3. Did the interests of the individual commenting on matters of public concern outweigh the public employer's interest in "promoting the efficiency of public service?"

To prevail, an employee had to convince the court that the answers to all three questions were "yes." Garcetti basically mooted the first two questions and assumed that all speech from employees was contrary to the efficiency of public service. A conservative majority of five justices — led by Justice Anthony M. Kennedy — ruled that a Los Angeles assistant prosecutor (Richard Ceballos) could be punished by his superiors even after he reported that police had fabricated evidence to obtain a search warrant. Government employees, the majority opinion stated, only have free-speech rights when they speak as citizens, not employees.

In dissent, Justice David H. Souter wrote that he hoped the *Garcetti* ruling did not apply to public universities, "whose teachers necessarily speak and write 'pursuant to official duties.'" Kennedy's majority opinion seemed to agree: "We need not ... decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

But over the next four years, federal courts ignored these comments and on eight separate occasions denied free-speech rights to professors who criticized administrators for hiring too many adjunct faculty, for making comments in support of a student during a disciplinary hearing, and for criticizing the use of grant monies.[54] Not one federal court after 2006 ruled in favor of a faculty member whose workplace speech was uttered outside of the classroom or their scholarship. The situation was so grave that, by early 2011, the American Association of University Professors was urging faculty "to defend their academic freedom ... not through the courts but through clear university policies." Several universities, including the University of Michigan, followed that advice.

The Notice of Appeal and More Reactions

Endejan filed a notice of appeal with the Ninth Circuit Court of Appeals shortly after the District Court's decision. She would file the brief in the case for another seven months.

In the meantime, taking the First Amendment high ground did little to improve my image in the Murrow College and the university as a whole during the 2011 calendar year. I

[53] *Pickering v. Board of Education of Township High School District, 205, Will County*, 391 U.S. 563 (1968).

[54] Visit <http://www.acfcl.org/latestonwsulawsuit.html> and scroll down about halfway to the following headline: "Courts Rule 7-1 that Professors Have No Free-Speech Rights When Performing Their Service-Related Roles, Analysis Shows U.S. Supreme Court May Decide the Fate of Shared Governance" (November 1, 2013). Note that one additional case was added to the list after 2013.

volunteered or was a candidate for four department and university committees, including head of the journalism sequence, and was not appointed or elected to any of them. The Faculty Senate administration also refused to allow me to run for a position on the university-wide Graduate Committee, because it said my lawsuit would interfere with my ability to make decisions. That made no sense to me, but why fight that one.

I eventually was appointed to the campus library committee, where I volunteered to chair the committee. This presumably was a position that would keep me marginalized in terms of university politics. Nevertheless, I enjoyed working with and learning from the head librarian at WSU and the members of the committee. One was a vocal critic of Floyd's policies.

The American Association of University Professors contacted me and said it would be filing an *amici curiae* brief in support of my lawsuit against the four WSU administrators. The Thomas Jefferson Center for Free Expression also joined in.

Algora Publishing of New York City sent out for blind review a draft manuscript of my book, *The Ivory Tower of Babel: Why the Social Sciences Are Failing to Live Up to Their Promises.* Fortunately, the review was positive, and Algora published the book. Administrators had threatened to fire me if the book was not published. I was in the midst of an administrative gauntlet, doing my best to avoid the blows.

In August 2011, the four defendants and I tried to mediate a solution to the dispute. Mediation was required under federal rules before a case could be heard before the Ninth Circuit Court of Appeals judges. The mediation failed. But I was not disappointed. More than ever, I wanted the free-speech issue to be adjudicated, win or lose. The only problem was that I was running out of money. By this time, I had spent more than $85,000 in legal fees and court costs. I still owed Graham & Dunn $45,000. If I were unable to recover attorney fees from the lawsuit, I might have to file for bankruptcy.

In fall 2011, I asked the Faculty Senate leadership whether I could give a brief presentation to the Senators about the implications of the administration's anti-free speech position. The leadership refused my request. When I pointed out that the Faculty Senate is a public body that cannot, under law, refuse one of its own "citizens" a right to speak before it, the leadership backed down. But I never gave the talk, mainly because the Senate couldn't fit me into its agenda for several months.

The Ninth Circuit Court Appeal

Judy Endejan, my attorney, filed the appeals brief with the Ninth Circuit Court of Appeals on February 7, 2012. Although I have always argued that professors have a right to criticize administrators on any topic related to university operations, Endejan took the safe approach and, following *Garcetti* and other court rulings, argued more narrowly that my speech regarding the 7-Step Plan was protected because it came from Demers the citizen, not Demers the employee.

The *amici curiae* brief from the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression was more interested in a broader legal strategy, arguing that "affirming the district court's opinion will diminish open and honest debate in public universities."[55] The *amici* brief acknowledged that the 7-Step Plan did not fit neatly under either the teaching or scholarship exceptions carved out for protection by the federal courts. But the Plan still deserves free-speech protection, the brief argued, because "where an employee is hired to explore new and controversial topics, punishment for a researcher's ideas would defeat the purpose of his employment."[56] This argument was similar to my own, which contends that it is illogical and ethically wrong to ask faculty for input on restructuring a program if administrators then punish them for the ideas they offer.

On March 1, 2012, about a month after the appeals were filed, legal writer Peter Schmidt of the *Chronicle of Higher Education* published a story headlined "LEGAL DISPUTE PITS WASHINGTON STATE U.'S JOURNALISM SCHOOL AGAINST FREE-SPEECH GROUPS." Here are the first two paragraphs:

> Washington State University's college of journalism has found itself at odds with groups that advocate a First Amendment right to academic freedom after persuading a federal district court to adopt a limited view of the speech rights of faculty members at public colleges.
>
> The case is now pending before the U.S. Court of Appeals for the Ninth Circuit and expected to be heard in the fall. In a friend-of-the-court brief submitted to that court last month, the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression jointly warn the Ninth Circuit that a ruling upholding the district court's logic would set "a dangerous precedent" jeopardizing academic freedom and the sound governance of public higher-education institutions.[57]

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[55]The authors of the *amici curiae* brief were Robert M. O'Neil and Kathi Wescott of the AAUP and J. Joshua Wheeler and Susan Kruth of the Thomas Jefferson Center.

[56]*Amici Curiae* Brief of American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression In Support of Appellant's Request for Reversal, filed February 14, 2012, in *Demers v. Austin*, Ninth Circuit Court of Appeals, p. 13.

[57]Peter Schmidt, "Legal Dispute Pits Washington State U.'s Journalism School Against Free-Speech Groups," *The Chronicle of Higher Education* (March 1, 2012), retrieved April 22, 2015, from <http://chronicle.com/article/Legal-Dispute-Pits-Washington/1309

On April 26, 2012, the WSU defendants, through their attorney Kathryn Battuello, filed their response to our initial brief:

> Indisputable facts establish that Demers' 7-Step Plan originated as an internal academic communication made by Demers as an employee of WSU on the structure of an academic department, a matter irrelevant to the public. The plan was not original research or scholarship, nor was it an example of controversial classroom teaching. It cannot serve as the basis for a First Amendment claim. ... [58]
>
> The 7-Step Plan emanated from an internal power struggle and was motivated by Demers' self-interest ... Demers' alleged protected speech reflects personal and/or personnel related grievances from a disgruntled employee who is engaged in a workplace power struggle between "Com Studies" and "Mass Com" faculty. As such, Demers' speech is not entitled to First Amendment Protection. ... [59]
>
> In short, despite Demers' efforts to characterize the 7-Step Plan as citizen speech presented by his alter-ego, the publisher of Marquette Books, the record is clear that his proposals for restructuring Murrow School are inextricably related to his discharge of faculty responsibilities and are therefore employee speech, not citizen speech.[60]

Oral arguments before a Ninth Circuit panel of three judges was set for November 7, 2012.

More (Lack of) Reaction from Faculty Senate

By this time, most faculty on the entire WSU campus were aware of my free-speech lawsuit and the fact that the WSU defendants, through their university attorney, had argued that faculty do not deserve free-speech rights when speaking in their service-related roles. But why hadn't the WSU Faculty Senate "publicly gone on the record condemning the administration for its anti-professional free-speech position?"

On April 8, 2012, I e-mailed and posed that question to Faculty Senate President David Ray Turnbull.[61] He responded on April 19: "After consulting with a number of people, we have determined that it is not appropriate for us to take any position or become involved in a situation where there is a pending lawsuit."[62] One WSU AAUP member familiar with the inner workings of politics at WSU said Turnbull probably consulted with administrators before generating that response.

I responded to Turnbull the following day: "I didn't ask you take a position on the lawsuit. I asked you why the Faculty Senate has refused to criticize a university administration which is arguing in court that faculty do not, as employees, deserve the right to criticize the administration (in our service roles). You should know that if the appeals court rules in favor of the administration on this issue, all of you will lose the right to criticize the administration without fear of reprisal. Any protestations on the legal issues after that point will be too late."[63]

He did not respond.

In early May 2012, I wrote a letter to the editor to the WSU *Daily Evergreen* which explained the anti-free-speech arguments in the university's legal briefs and added:

> I am dumbfounded that WSU administrators and the Board of Regents could make such arguments while claiming they embrace the principle of shared governance, which presumes free-speech protection. I am even more baffled by the lack of response from the Faculty Senate leadership, which is failing to protect faculty interests. Faculty Senate leaders apparently have forgotten philosopher John Stuart Mill's advice: "Bad men need nothing more to compass their ends, than that good men should look on and do nothing."

In fall 2012, I also asked the new Faculty Senate president, Robert E. Rosenman, why the Faculty Senate had not condemned the anti-free-speech position of President Elson Floyd's administration. He responded: "It is not the practice of this Faculty Senate Chair to respond to requests for information about our activities, including votes of record, which are publicly available."

In the fall of 2012, I decided to take early retirement at the end of the semester. My best friend from high school had died and there were a lot of things I wanted to do before following him. Oral arguments before a three-judge panel of the Ninth Circuit Court of Appeals were heard on November 7, 2012.

Ninth Circuit Ruling

Judge William Fletcher penned the ruling, which was issued in September 2013. As expected, he and his colleagues held that my 7-Step Plan was not citizen or private speech, but job-related speech. Like the district court, the panel ruling also extended qualified immunity to the defendant-administrators, because the Ninth Circuit had not yet provided guidance in

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79>.

[58]Appellees Responding Brief, *Demers v. Austin* (Ninth Circuit Court of Appeals, Case No. 2:09-cv-00334-RHW), pp. 32-33.

[59]Ibid., p. 49.

[60]Ibid., p. 54.

[61]E-mail from David Demers to David Turnbull (April 8, 2012).

[62]E-mail from David Turnbull to David Demers (April 19, 2012)

[63]E-mail from David Demers to David Turnbull (April 20, 2012).

cases like mine. The immunity ruling meant that I could not recover punitive damages even if I won my lawsuit at trial. I could only recover court costs and attorney's fees.

But, to my complete delight, the panel declared that my 7-Step Plan was protected speech because it focused on an issue of public concern and was "related to scholarship or teaching."

> [T]eaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are "a special concern of the First Amendment." ... We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. ... The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. ... We conclude that *Garcetti* does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. ...

Fletcher wrote that my Plan did not focus on a personnel issue or an internal dispute, nor did it address the role of particular individuals in the Murrow School or voice personal complaints. Rather, the Plan proposed changes to the direction and focus of the School.

> The manner in which the Plan was distributed reinforces the conclusion that it addressed matters of public concern. ... Here, Demers sent the Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other faculty members, to alumni, to friends, and to newspapers. He posted the Plan on his website, making it available to the public. ... Demers's Plan contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions.

The WSU defendants and their counsel had argued that the 7-Step Plan was not protected speech under *Garcetti* because it was not uttered in the classroom or in scholarship or research. They were arguing that the location of the speech — where it was uttered — was crucial.

The Ninth Circuit panel disagreed. The issue isn't where the speech is uttered. The issue is whether it is "related" to scholarship or teaching — language taken directly from dicta in *Garcetti.* In fact, Fletcher's opinion cited a host of court decisions to back up the idea that professors qualify for First Amendment protection when they speak on issues related to scholarship or teaching. In concluding that *Garcetti* did not apply to *Demers v. Austin*, the panel said *Pickering* is the governing standard for faculty.

The WSU defendants' asked the panel to reconsider its decision and petitioned the Ninth Circuit Court of Appeals to for an *en banc* hearing. They argued that the Constitution does not protect employee grievances, implying that my 7-Step Plan was a grievance. More important, they argued that none of the other federal courts since *Garcetti* had ever extended free-speech protection to speech arising from "professional duties." On this point, they were correct.

On January 29, 2014, the appeals court issued a revised ruling, which rejected the WSU's arguments and included a new section called "'Speech Related to Scholarship or Teaching' Under Garcetti" that quoted liberally from my 7-Step Plan. "We conclude that The 7-Step Plan prepared by Demers in connection with his official duties as a faculty member of the Murrow School was "related to scholarship or teaching" within the meaning of *Garcetti*. See 547 U.S. at 425."

> In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech "related to scholarship or teaching" within the meaning of *Garcetti*. But this is not such a case. The 7-Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, *it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.* [emphasis added]

The WSU defendants decided not to appeal the case to the U.S. Supreme Court.

In sum, the Ninth Circuit ruling means that faculty in nine Western states may criticize administrators on issues of public concern related to teaching and scholarship. The rest of the country, however, is governed by *Garcetti.* I've been hoping another case would emerge to expand the issue to all Circuits, but so far I know of none.

The Aftermath

I was extremely pleased with the Ninth Circuit Court ruling. But to recover my attorney's fees, I needed another $50,000 to $100,000 to go trial.

Unfortunately, I was broke and was not able to find any

free-speech organizations that could help with the costs. I had paid out more than $100,000 and I still owed about $250,000. I was forced to file for bankruptcy in January 2014, two weeks before the Appeals Court handed down its final decision. Several lawyers had predicted this would happen. I knew it was a possibility, but I would do it all over again. Fortunately, I was able to keep my retirement funds, my Spokane house (I continued to make payments on it), and my 9-year-old Volvo.

Nine months later, on October 28, 2014, the WSU defendants and I settled the case out of court. As usual, I wrote another overly wordy news release, which was distributed on November 4, 2014. "Washington State University is paying former journalism professor David Demers $120,000 to drop his five-year-old federal free-speech lawsuit against four WSU administrators," the lead of a news release stated. Most of the money went to my attorneys; the rest to creditors. So in the end, my attorneys came out OK — they earned about $200 per hour for their work. But the taxpayers were the real losers. I don't know exactly how much the lawsuit cost the university and taxpayers. But it was probably far more than the what it cost me, because scores of different public officials, attorneys and employees were working on the case at various times. My best guess is that the university spent somewhere between $450,000 and $1 million, enough money to employ a full-time tenured faculty member for up to 10 years.

My family and I moved to Arizona in summer 2014.

The Murrow College is still not accredited.[64]

Some of the administrators involved in my case are still working in administration at WSU.

And it appears that some WSU administrators never learned a lesson from Demers v. Austin. In 2017, several high-level university administrators tried to discrediting a Wolf researcher at the university in order to curry favor with state legislators who hold the purse strings on a proposed medical school in Spokane to be named after Elson Floyd, who died in 2015 of cancer.[65] Recent news reports show administrators also are continuing to terminate faculty in violation of AAUP rules.[66]

More Aberrant Anti-Free-Speech Activity

Demers v. Austin began having an impact on policymaking at universities almost immediately. In one incident, faculty used the decision to promote a more liberal free-speech policy — but oddly, a journalism dean took sides with the anti-free-speech administration.

The incident occurred at the University of Oregon, where faculty in spring 2013 voted to unionize. The UO faculty committee supporting the expansion of free-speech rights for faculty cited *Demers v. Austin* to back up its position that faculty deserved First Amendment protection when speaking in their service-related, or shared-governance, roles.[67]

> The university is governed by the faculty and the president ... . Institutional policies and practices are informed by consultation and advice from the faculty, staff, and students. Therefore, members of the university community have freedom to address, question, or criticize any matter of institutional policy, action, or administration, whether acting as individuals or as members of an agency of institutional governance.[68]

UO President Mike Gottfredson's administration initially rejected the faculty proposal. Gottfredson then tried to limit academic freedom to only speech uttered in the classroom or in scholarship. The administrative proposal also tried to require faculty members to be civil when "discharging his or her duties."

One of Gottfredson's lieutenants in the fight against free-speech rights for faculty was Tim Gleason, a professor of mass communication law at the university and former dean of the University of Oregon's School of Journalism Mass Communication, who was now serving as UO's strategic communications consultant. Gleason and another administrator fought against OU faculty free-speech rights for 18 months before Gottfredson capitulated in May 2014 and signed into effect a policy that provides strong protection for service-related speech.[69]

That action came after O'Neil, the former University of Virginia president, told *Inside Higher Education* that administrators and faculty at Oregon "need to make sure the

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[64]The *Daily Evergreen*, WSU's student newspaper, did publish a story on the settlement.

[65]Cody Cottier, "Emails: Facing threats to med school, WSU disavows wolf researcher," WSU *Daily Evergreen* (August 11, 2017).

[66]Cody Cottier, "CAHNRS conflicts undermining academic freedom, faculty say: Administrators in agricultural college often punish professors who frustrate industry, according to multiple sources," WSU *Daily Evergreen* (September 12, 2017).

[67]Academic Freedom Work Group, "Rationale for Policy on Academic Freedom and Draft Academic Freedom Policy," unpublished memo to University of Oregon President Michael Gottfredson and University Senate (January 7, 2014), p. 2, retrieved May 26, 2015, from <http://senate.uoregon.edu/sites/senate.uoregon.edu/files/Academic%20Freedom%20rationale%20memo%20and%20proposal,%20January%202014.pdf>.

[68]Ibid., p. 5.

[69]Betsy Hammon, "University of Oregon President Michael Gottfredson Signs Academic Freedom Policy Faculty Say Is Among Strongest in Nation," *The Oregonian* (May 28, 2014), retrieved May 26, 2015, from <http://www.oregonlive.com/education/index.ssf/2014/05/university _of_oregon_president_12.html>.

adequate language currently reflects *Demers* [*v. Austin*]."[70]

Several months after Gottfredson signed the pro-speech policy, he resigned (many faculty say he was forced out) from his position as president. The UO Board of Trustees gave him a $970,000 severance package.[71] But before he left, Gottfredson appointed Gleason to the position of university Faculty Athletics Representative for the NCAA, which pays more than $100,000 a year for a half-time appointment. The rest of Gleason's pay, about $150,000, came from his job as a professor in the journalism program.[72] Needless to say, the appointment angered some OU faculty who believed that Gleason had worked against their best interests.[73]

On June 2, 2015, Greg Lukianoff, president and chief executive officer of the Foundation for Individual Rights in Education, urged the Subcommittee on the Constitution and Civil Justice for the U.S. House of Representatives to enact a law that will protect freedom of expression at public colleges and universities in the United States.[74] A law is needed, he said, because the courts have handed down mixed rulings on the issue of speech on campus. He cited *Demers v. Austin* and other cases to back this up.

"By leaving unanswered the question of whether an academic freedom exception applies to public employee speech doctrine following *Garcetti*, the Supreme Court's decision threatens academic freedom and free speech," he testified. "Congress should statutorily protect academic freedom by making clear that there is an exception to *Garcetti* for academics."

Lukianoff proposed several draft bills. One of the them borrowed directly from the language of the Ninth Circuit Court ruling in *Demers* and would amend a section of the Higher Education Act of 1964:

> No publicly operated institution of higher education ... shall take adverse personnel action, or maintain a policy that allows it to take adverse personnel action, against a faculty member in retaliation for expression related to scholarship, academic research, or teaching ... *or within the context of the faculty member's activities as an employee of the institution of higher education, related to matters of public concern, including matters related to professional duties, the functioning of the institution of higher education, and the institution's positions and policies* ... [75] [emphasis added]

The chances of enacting such a law are not very good, especially with a Republican-controlled House. But, as maverick journalist I. F. Stone advised, "The only kinds of fights worth fighting are those you are going to lose, because somebody has to fight them and lose and lose and lose until someday, somebody who believes as you do wins."

ARE BUREAUCRACIES EVIL?

This paper has put much of the blame for anti-free-speech activity onto bureaucratic structure, which is rule-driven and often restricts democratic processes and due process. Bureaucracies frequently monopolize information to the detriment of an open society. They often resist change, especially when the call for action comes from outside sources, such as social movements and activists. Bureaucratic hierarchies increase social distance and reduce understanding between those at the bottom of the hierarchy and those at the top. Each level of management above those at the bottom also reminds those at the bottom of how little power, influence and autonomy they have. Democracy suffers. Bureaucracies also can de-skill work and increase feelings of alienation. That's because they are characterized by a complex division of labor and seek to reduce complex jobs into simple discrete tasks that anyone or a machine can do.[76]

Of course, as the 1950s-era sociologists argued,[77]

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[70]Colleen Flaherty, "Requiring Civility," *Inside Higher Education* (September 12, 2013), retrieved May 26, 2015, from <https://www.insidehighered.com/news/2013/09/12/oregon-professors-object-contract-language-divorcing-academic-freedom-free-speech>.

[71]Don Kahle, "One UO President Was Fired, One Simply Quit? Yeah, Right," *The* (Eugene, OR) *Register-Guard* (August 15, 2014), p. A9, retrieved May 26, 2015, from <http://projects.registerguard.com/rg/opinion/32011301-78/one-uo-president-was-fired-one-simply-quit-yeah-right.html.csp>.

[72]Office of Institutional Research, "Unclassified Employees with a Record of Employment During the 10/1/2014 to 12/31/2014 Period," retrieved April 10, 2015, from <http://ir.uoregon.edu/sites/ir.uoregon.edu/files/Unclassified100114to123114.pdf>.

[73]Some of the critical comments are posted at the UOMatters.com website. See, e.g., <http://uomatters.com/2015/05/mike-gottfredsons-last-act-was-appoint-tim-gleason-as-far-so-hows-he-doing-on-representing-the-faculty.html#more-14862> and <http://uomatters.com/2014/05/gottfredson-pads-resume-with-credit-for-academic-freedom-after-getting-tim-gleason-and-randy-geller-to-fight-it-for-18-month.html>.

[74]Written Testimony of Greg Lukianoff, President and Chief Executive Officer, Foundation for Individual Rights in Education, Before the United States House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, June 2, 2015 Hearing on First Amendment Protections on Public College and University Campuses, retrieved June 6, 2015, from http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10- Wstate-LukianoffG-20150602.pdf>.

[75]Ibid., p. 29.

[76]David Demers, *History and Future of Mass Media: An Integrated Perspective* (Cresskill, NJ: Hampton Press, 2007).

[77]David Riesman, *The Lonely Crowd: A Study of the Changing American Character,* in collaboration with Reuel Denney and Nathan Glazer (New Haven, CT: Yale University Press, 1950), and William H. Whyte, Jr., *The Organization Man* (Garden City, NY: Doubleday Anchor Books, 1957; originally published in 1956 by Simon &

bureaucracies need compliant workers to achieve their goals. Compliancy is not unique to bureaucracies. All organizations, even dyads, such as a married couple, need individuals who can cooperate to achieve goals. But bureaucracies differ from other types of organization in terms of how that cooperation is achieved. In traditional or small entrepreneurial organizations, social control is achieved mainly through simple rules, often unwritten, that usually prohibit certain kinds of behavior. A married couple, for example, might agree to follow the Ten Commandments. Those rules prohibit, or *proscribe*, certain kinds of behaviors, such as lust or infidelity. But bureaucracies are characterized by formal, written rules that not only proscribe, but also increasingly *prescribe*. In other words, they not only tell subordinates what they can't do, they also tell them what they must do!

Folks over age 40 remember a time when wearing a seat belt in an automobile was optional. Now every state except New Hampshire requires drivers and passengers to wear seat belts, and all states require them for juveniles. By the way, seat belt laws were created not only to save lives, but also to reduce insurance pay-outs to accident victims. Insurance companies heavily lobbied state legislatures and the federal government to pass such laws, because it saved them and their investors money.[78] Yes, the profit motive can lead to positive outcomes for individuals (if you assume, for the moment, that the loss in freedom stemming from mandatory seat belt laws is less important than the reduction in injuries and deaths from accidents).

In short, the main reason bureaucracies represent such a threat to civil liberties and freedom is that they create more rules that prescribe. Bureaucracies are rule-driven — rule crazy, say some sociologists. They constantly attempt to reduce uncertainty and improve efficiency of the organization through the creation of more and more rules. But, as every sociologist knows, rules often get in the way of the goals of the organization and in the way of civil libertarian ideals, especially democracy and due process.

But bureaucracies are not inherently evil. They are only as good or bad as the leadership that runs them. If the leaders refuse to acknowledge the problems with bureaucratic structure, or create a culture that de-emphasizes democracy and due process, then the organization will reflect those deficiencies. Leaders of organizations, including universities, must actively create a culture that fully embraces civil liberties to counter the structural tendencies of bureaucracies to subvert those ideals.

But what is one to do, then, when such a culture is lacking? What if the federal and state courts continue to rule in favor of university administrators on free-speech or shared governance cases?

The only viable option I can see is unionization. The benefits of faculty unionization at most universities far outweigh the disadvantages, according to AAUP officials and numerous reports from universities with unions. At most universities where a faculty union exists, faculty pay is higher and faculty have better due-process protection, enjoy higher levels of shared governance and are happier.[79]

However, only about one-fifth of all colleges and universities have faculty unions and only about a third of all public universities have them. Opposition from administrators and conservative politicians is one factor for the low numbers. It also is harder to organize unions at privately owned colleges. But even at public universities, tenured faculty are often reluctant to organize because they often feel they will lose something.[80] Most receive a comfortable income and unions are usually associated with blue-collar workers, which have a lower social status than white-collar workers.

The strongest growth in faculty unions currently comes from adjunct faculty, who are organizing in large part because they typically are poorly paid — about 50 percent to 74 percent less than tenured faculty for teaching a course.[81] Part-time adjunct faculty also generally receive few or no benefits, such as health insurance. The pay for some full-time adjuncts is so low that they are on public assistance.[82]After unionizing, adjunct faculty are typically paid about 25 percent more than their nonunion counterparts.[83] The number of adjunct faculty teaching at U.S. universities has skyrocketed since the 1970s, when 70 percent of the professors were tenured or on tenure-

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Schuster).

[78]See, for example, Press Release, "Senators Warner and Clinton Introduce Legislation to Enact National Primary Enforcement Seat Belt Law: Coalitions of Highway Safety and Medical Groups Lend Support," Advocates for Highway and Auto Safety (December 9, 2003), retrieved June 18, 2015, from <http://www.saferoads.org/national-primary-enforcement-seat-belt-law>.

[79]A question-and-answer session with Lisa Klein of AAUP at Rutgers University and Bill Lyne of Western Washington University at Washington State University (May 12, 2011), retrieved May 1, 2015, from <http://public.wsu.edu/~wsu-aaup/Faculty_Unionization.pdf>.

[80]About one-third of public universities have unions. See "What Does the History of Faculty Unions Teach Us About Their Future?" an interview with Timothy Reese Cain, assistant professor, College of Education, University of Illinois at Urbana-Champaign <https://www.higheredjobs.com/higheredcareers/interviews.cfm?ID=315>.

[81]Sam Hananel, "Adjunct Faculty Increasingly Joining Unions To Push For Better Pay," Associated Press (November 1, 2013), published online in the *Huffington Post*, retrieved May 1, 2015, from <http://www.huffingtonpost.com/2013/11/01/adjunct-faculty-unions_n_4194652.html>.

[82]Arizona State University paid me $3,700 to teach mass media law in fall 2013. I spent three hours of teaching per week in the classroom and about 10 hours in preparation time and grading. So, over a 15-week semester, I earned about $18.50 per hour, slightly more than a McDonald's hourly worker in Seattle or Los Angeles.

[83]Ibid.

track. Today, only half are tenure track. Universities are hiring more adjunct faculty two major reasons: (1) They can pay adjuncts less, and (2) They are easier to control. Most adjunct faculty cannot obtain tenure status and, hence, have far less free-speech and due process protections.

In sum, I believe that unionization and organized social action are the only sure ways to enhance shared governance and academic freedom at American universities. □