1972

The Manifest Unwisdom of the AAUP as a Collective Bargaining Agency: A Dissenting View

Sanford H. Kadish

William W. Van Alstyne

William & Mary Law School

Robert K. Webb

Repository Citation

https://scholarship.law.wm.edu/popular_media/67

Copyright c 1972 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/popular_media
In 1915, a small number of American scholars formed an organization concerned with academic freedom and the integrity of higher education in the United States. Among themselves, including Roscoe Pound, John Dewey, Arthur O. Lovejoy, Edwin R. A. Seligman, and Wilbur Cross, they founded the American Association of University Professors and extended invitations to fellow members of the academic profession to join with them. The idea of the Association was to use the type of skill its members were best equipped to provide—an academic skill—as an organized means of influencing conditions of academic freedom and professionalism in institutions of higher education. This perspective and this role have always characterized the distinctive identity of the AAUP. They do so even now, after the emergence of literally hundreds of other educational associations and despite the very lively interest which labor organizations have recently taken in extending their complementary services to the faculties and nonmanagerial staffs of our colleges and universities.

From its beginning in 1915, with its first Declaration of Principles, the AAUP has never affected to seek direct power in the conventional sense. Its principal resource is the academic excellence of its membership and staff. Its principal means is that of careful inquiry and deliberative process. Its principal influence is that of publication and opinion. Since 1915, the Association has grown in membership to 90,000, its standing committees have multiplied from A through Z, its development of policy statements is virtually comprehensive, and its mediation of disputes relating to faculty members has grown to more than 800 cases a year, while in addition an estimated 200 cases each year have not arisen because administrators sought the advice of the Association in advance of taking a proposed course of action. The Association now faces the decision whether to maintain and expand the distinctive role AAUP has cultivated in American higher education for more than a half-century, or to jeopardize that role in an

2 Professor Sanford H. Kadish (Law), University of California, Berkeley; Professor William W. Van Alstyne (Law), Duke University; Professor Robert K. Webb (History), Columbia University.
attempt through its chapters to become one among a number of collective bargaining agencies for college professionals.

It is important to recognize the major difference between what the Council is proposing and an alternative which we hope will be presented if the Annual Meeting should reject the Council's recommendation. The alternative, which was endorsed by Committee A with just one dissent and stated as a first preference by thirteen members of the Council, would preclude the AAUP and its chapters from involvement as a rival, competitive labor organization seeking representational status, and would instead acknowledge an Association commitment to provide advice and assistance to chapters who wish to engage in collective bargaining through other entities. The Council's proposal, on the other hand, would commit the AAUP to "pursue collective bargaining" with such allocation of "resources and staff as are necessary for a vigorous selective development of this activity." It is this proposal which we believe threatens to jeopardize the historic role of the AAUP in higher education.

In this statement of dissent we will try briefly to show why: (1) our historic functions will be seriously threatened by adoption of the Council's proposal, (2) the chances are small that our influence will be enhanced if we choose the collective bargaining route; and (3) adherence to our historic role will, even assuming a spread of collective bargaining, facilitate the maximum contribution by the Association to the profession and to higher education.

I. Jeopardy to Our Historic Functions

It is important to see as clearly as possible what we stand to lose by a full-scale commitment to competitive collective bargaining.

A. Once the AAUP becomes substantially and unambiguously involved in competitive collective bargaining, the risk is great that we may see an end to our capacity to make inquiry or investigation into academic freedom and tenure complaints on any campus with a collective bargaining representative other than our own. Our identification as a "rival" union in competition with the recognized bargaining representative works to stop us at the very threshold of inquiry. This follows from the principle, widely accepted under federal and state labor relations law, that a collective bargaining agent is the exclusive representative of the employees and that it is unlawful for an employer to impair the authority of that exclusive representative by dealing with another union over matters involving the covered employees. And during a collective bargaining campaign, the block to our efforts derives from legal restraints upon employers not to interere with employee free choice by giving de facto recognition to one of several contenders. The consequence of locking out AAUP inquiry, investigation, and effective means of report to the profession may obtain under these circumstances even though the situation prima facie involves a violation of academic freedom, academic due process, tenure, or other standard of this Association and even though the situation may involve violations of those standards by the union itself either directly, in action it insisted upon in the terms of the contract it negotiated, or indirectly, by refusing to process a grievance of a faculty member.

A recent example of what may increasingly occur occurred at a large Midwestern public university in January of this year. At a time when several organizations, including the AAUP chapter, were competing for collective bargaining rights, the administration sent a letter to over 250 nontenured faculty members putting them on notice that because of financial exigency their contracts would not be renewed unless the financial situation improved. The Association's staff promptly registered its concern, found the administration initially quite willing to discuss the matter, and requested a meeting for that purpose. There was then an exchange of letters, at the end of which the chief administrator stated that he did not see how the AAUP could maintain its traditional impartial role while seeking certification as a representative and that it would be improper for the administration to discuss the issue with AAUP or the other competing organizations, since to do so would expose the university to an unfair labor practice charge.

If the AAUP is not in the competitive business of collective bargaining, problems of this kind might still arise. But our position would become much less vulnerable. That position would be that the labor relations law offers no excuse for an administration to refuse to deal with us for two reasons. First, the Association's involvement in a faculty grievance involves no threat to the authority of the union as the exclusive bargaining agent since the Association neither aspires to nor is authorized to become a competitor. Secondly, the principles of freedom of speech bar application of labor laws to interfere with the Association's freedom to make inquiries and to report its conclusions in a given case.

B. Should the AAUP go the way of collective bargaining and operate as one among several professional unions, it must expect an overall loss of cooperation even with the larger number of institutions not bound with exclusive collective bargaining agreements. Currently that cooperation has been forthcoming because of the identity of the AAUP. As recently described by the editors of Harvard Law Review, the Association is widely understood "to safeguard the integrity of higher education." It is an academic association in the best sense committed pre-eminentiy to furthering the interests of the enterprise of higher education rather than strictly those of a particular segment of that enterprise. Our record of extended influence in shaping the norms of higher education for several generations has derived from our credibility as committed professionals and from our reason appeal to common commitment and moral legitimacy rather than to the play of power in adversary relationships. The changes necessary to make the AAUP a realistic competitor as a professional union, however, must inevitably erode the very special advantage that the Association's identity confers. Conversion into such a union, retooling to campaign and electioneer against other organizations, arm's-length
bargaining with university administrations, the need to back a negotiation position with the specific credibility of sanctions—these and other perfectly customary manifestations of competitive collective bargaining cannot possibly come free of cost to the Association. In all likelihood, the principal cost would become evident in the loss of our identity and the consequent impairment of our influence in higher education generally, in exchange for limited success as one among several labor agencies.

C. To the extent that the AAUP becomes a competitive labor organization, its membership will be controlled, for all practical purposes, by decisions of federal and state labor boards under their authority to define each appropriate bargaining unit—that is to say, the constituency of employees whom the union is given exclusive authority to represent. The pattern of decisions by these boards thus far has been to identify nonmanagerial “professionals” as members of one unit without regard to the extent, if any, of the instructional or research responsibilities. For example, directors of placement, student counsellors, health officers, and, most recently, athletic coaches have been held by governmental boards to be appropriate members of a faculty bargaining unit which AAUP chapters were seeking to represent. While the law does not require that a labor organization offering to represent all members of an appropriate bargaining unit must also admit them as members of the organization itself, experience in contested elections as well as the logic of the situation makes it perfectly clear that an organization must offer membership to compete successfully for votes; an individual may be expected to be far more sympathetic to choosing a union which admits him to full franchised membership than one which does not. When it is borne in mind that nonacademic professionals, who would probably be included in most appropriate bargaining units, amount to one fourth to one third of the total staff of some institutions, the impact on our membership and identity becomes quite clear.

The character of our membership will probably also be affected by the voluntary actions of our members should we approve a program of active competitive collective bargaining. We may well lose significantly in members who are unwilling to subsidize collective bargaining at other campuses with their own dues payments or who no longer wish to belong to an association that has altered its character as an association of professionals with a nonpartisan commitment to the welfare of higher education. Collectively, it seems likely that these groups will be heavily in the senior and, frankly, “academic” ranks; the anticipated membership gain as a consequence of collective bargaining will be comparatively in the junior, more “tough-minded,” competitive, union-oriented ranks. But such a membership trade-off ought not be seen merely as a speculative loss of “X” and a speculative gain of “X,” plus or minus. Rather, the net turnover is likely to produce a membership of decidedly different characteristics.

As a consequence of these factors, the chances of our being able to remain faithful to what we have been are further reduced. For not only are those commitments threatened by the dynamics of the competitive collective bargaining process; they run the risk of being deliberately subordinated by a new membership coloration reflecting a quite different view of the virtues of professionalism as traditionally exemplified by the Association.

In brief, the consequence of adopting the Council’s proposal may well be to convert the AAUP into the AUUP, the American Union of University Professionals, with a substantial change in the character of its membership, its identity, and its image, sharp impairment of its ability to carry out its historic role and an indeterminately severe curtailment of the effectiveness of the Association’s staff and of Committee A and other committees in resolving complaints and furthering basic Association principles and standards.

II. The Limited Chances of Success through Collective Bargaining

Two national labor organizations (the American Federation of Teachers [an affiliate of the AFL-CIO] and the National Educational Association [NEA]) are already well established in collective bargaining in higher education and have recourse to funds not within the capacity of the AAUP to match in the foreseeable future in competing as a rival for exclusive agency representation. Even the proposal submitted to the Annual Meeting contemplates no more than “selective” development of the AAUP as a rival in collective bargaining, in frank anticipation that AAUP would be unable to compete successfully as a rival labor union in many places.

It is also clear that the AAUP lacks a reputation for the kind of toughness and belligerency to mount an appeal some will want to consider in electing a bargaining agent as distinct from affiliating with an academic association which historically relies upon inquiry, deliberative processes, mediation, publication, and opinion for its principal influence. To those who find these means insufficient as their sole support in securing the best economic deal possible and who therefore will want the additional leverage of trade unionism, the AAUP is unlikely to be seen as a sensible choice in a contested recognition election. In trade union terms, the AAUP has never been an organization with that kind of power, i.e., it cannot stop deliveries, it has not conditioned shutting down institutions or engaging in slowdowns as a device of wage leverage. Financially and temperamentally, the AAUP chapter is a most unlikely first preference to succeed in a long series of contested recognition elections. AAUP’s greatest virtues are its greatest handicaps in this kind of enterprise. Indeed, it is probably the case that AAUP members will frequently be most numerous among those voting against union representation.

The Association’s record so far strongly supports these judgments. We have run a very poor third to the NEA and the AFT in organizational efforts—we represent a small minority of those campuses which have chosen collective bargaining. And we have lost every election, save one, in which we contested against the NEA or the AFT. It may be that we will do better in the future if the Council’s proposed policy is adopted. But if so, it will be, we
think, because the AAUP will have succeeded in transforming itself from what it has been to a more credible union competitor, with costs we earlier tried to describe. And, in any event, even greater success is still relative. Even the most sanguine estimates of such "success" would still leave probably the majority of campuses unrepresented and the AAUP only sharing the unionized remainder in some proportion with other organizations. "Success" at collective bargaining, therefore, would see the Association's influence substantially diminished. From a unique national academic association with membership and influence in virtually all institutions of higher education, it would become one of several unions with influence largely confined to those campuses it represents.

III. The Role of AAUP in a Partially Unionized Profession

The capacity of the AAUP to be influential in adapting collective bargaining processes to higher education may in fact be far more greatly impaired by AAUP competition as a rival union than by other activities more consistent with its present organization and emphasis. The question to come before the Annual Meeting is the specific issue of the role of the AAUP itself in collective bargaining, i.e., whether the Association should itself, through its chapters, compete as a national labor organization for exclusive agency rights. This question must be sharply separated from the wholly different issue of whether the AAUP regards the advent of collective bargaining in higher education as a favorable, rather than as an unfavorable, development. Indeed, one's personal answer to that question may very well depend in part upon what one expects to happen under collective bargaining and whether its development can be influenced by the AAUP in a manner which may enhance the security of the profession without compromising the quality of higher education or the personal freedoms of teachers and scholars.

While recognizing that some members of the AAUP do not personally favor collective bargaining for themselves, and that others are understandably apprehensive that collective bargaining processes are capable of developing highly undesirable adversary relations between faculties and administrations, the Association has nonetheless already recognized the right of faculty members to seek that representation when they desire it. As previously noted, while recommending against AAUP rivalry for collective bargaining status, the proposal by the Association's Committee A nevertheless acknowledges the need for AAUP advice and assistance to chapters that may wish to pursue collective bargaining through other entities, consistent with Association standards. In several respects, it appears likely that the Association can become a far better influence toward the effective adaptation of collective bargaining processes to higher education if it follows the Committee A proposal than it can through conversion into a labor organization.

The Association has already established a standing committee, Committee N, to deal with issues of collective bargaining. The committee can provide model contracts consistent with AAUP standards; it can also provide critical information to local chapters and to the state and regional conferences on the practical and legal implications of various features of collective bargaining, e.g., agency shop provisions, the substitution of third-party arbitration for faculty hearing committees, etc. (Committee N has already developed a great deal of material on these and related subjects.) Faculty members belonging to chapters at institutions where collective bargaining appears to offer an attractive (or inevitable) form of faculty representation can be advised and assisted in shaping the nature of that association and influencing the position of organizations competing for recognition—without the AAUP's entering the lists as a rival at the costs we have tried to describe.

Direct rivalry in contested recognition elections for exclusive agency representation between the AAUP and other agencies currently offering their services, such as NEA, must necessarily result in the exacerbation of relationships between AAUP and these other national organizations. The inevitable tendency in any competition of this sort (and there has already been significant evidence of this in the small number of contested elections) is for each agency to campaign for the allegiance of those eligible to vote in the election by exaggerating the worst features of the other organizations, while overstating their own capacity to be "effective." It may be doubted in any case whether the AAUP would stand to gain nearly as much in the occasional election success of such campaigns as the AAUP would surely lose from probable impairment of its standing and influence. Indeed, it may be doubted whether the AAUP can honestly convert itself to the extent necessary to operate truly effective, highly organized and professionally promoted campaigns of this sort in contested situations. However that may be, repeated competitive encounters of this kind, in direct rivalry with other unions, is irreconcilable with any reasonable expectation of a close working relation with and influence upon these other organizations at the local or national level. Self-interest would oblige the NEA, AFT, state, county, and municipal employees, and other unions to disparage AAUP and to belittle any claim of compatible membership once AAUP designates itself as a militant rival for exclusive agency representation.

Consistent with our present structure and with the further useful development of Committee N, the Association is in a much better position to influence the adaptation of collective bargaining to higher education consistent with our own standards through direct cooperation with associations willing to utilize our standards in representing the faculty. This unique third-party influence is critically tied to the Association's current identity, however, and must inevitably diminish exactly to the extent that the Association "succeeds" in becoming a direct rival.

Summing up

We cannot hope to have it both ways: to the extent that the AAUP succeeds as an academic association in maintaining its historic purpose to safeguard the overall integrity of higher education, it must fall in contested elections against competition by unions promising—and by being prepared to deliver—more. To the extent that the
AAUP would “succeed” in converting itself into a tough-minded, hard-bargaining national labor union, however, it must inevitably fail in what it already does far better than anyone else is prepared or seemingly concerned to do. The situation is not unlike that which Arthur Schlesinger observed in his review of President Johnson: “The irony of his presidency is that he righteously sacrificed the things he knew best on the altar of the things he knew worst.”

It will not do to temporize about this issue or to suppose that we can approve the proposal vigorously to pursue collective bargaining with the easy choice of giving it up should the effort not succeed. There will be no such choice, for the process of altering our membership standards, the different profile of membership which will emerge, the diversion of resources to subsidize vigorously contested recognition election, and the loss of unique identity generated over a half century of effort are likely to be irreversible phenomena. The Association has indeed come to the crossroad and simply must now decide whether to take the turn implicit in the position taken by the majority of the Council and being submitted to the 1972 Annual Meeting.

It is said repeatedly that the future of American higher education lies in collective bargaining, and if the AAUP does not climb on that particular bandwagon it will lose members, wither away, and die. Let us grant that considerable portions of the academic community will be involved in collective bargaining; let us equally admit that not all of higher education will go that route. The AAUP might very properly recognize the usefulness of collective bargaining in certain situations and support organizations actively and responsibly engaged in it when their activities are in accord with our principles. But it must also hold itself free to criticize those organizations when they fall short and to criticize the process itself when it fails to work well or is inappropriately applied. If there is anything that can be called a lesson of history, it is surely that a single institutional reform does not solve all existing problems and that it creates a range of new problems. Some institution must be left to analyze the results of collective bargaining, while standing outside it, to stir opinion to keep it in line, and to pick up the pieces where it fails. This the AAUP, with its tradition and structure, is peculiarly qualified to do—no other institution on the scene at present can do so well. Indeed, we would predict that, if the AAUP engages directly in collective bargaining, and if in so doing it suffers the distortion of its basic purposes (as we believe it inevitably will), some new organization can be expected to appear to defend central academic values with an objectivity the AAUP will have denied itself. By eschewing engagement in collective bargaining the AAUP suffers a risk of attrition in membership. We do not believe the risk is great, although it may have for a time to regroup or even retrench. But when the industrial model begins seriously to thrust out the academic model, when traditional organs of faculty government begin to disappear, when freedoms are eroded, when principles become bargaining counters, even one-time enthusiasts for collective bargaining may find it helpful to have someone to turn to to support them in an effort to save the only values that make the material sacrifices of an academic profession worthwhile.