

Speech Codes, Censorship and Undue Process: Politics and the Restoration of Free Speech and Liberty on Campus

I am here tonight to talk about an important and controversial issue: the status of free speech and academic freedom in institutions of higher education. My talk is based on my own research and personal experience as a leader of a unique free speech and liberty movement at the University of Wisconsin, Madison, both aspects of which constitute a core of my new book, *Restoring Free Speech and Liberty on Campus*. Our movement consists of an alliance of students and faculty centered on the Committee for Academic Freedom and Rights (CAFR). Established in 1996, CAFR is a non-partisan, private group with a retained legal counsel that has supported many faculty and students at Wisconsin and throughout the state whose academic freedom and constitutional rights have come under attack. CAFR has also acted politically to foster a pro-open discourse environment on campus. This alliance has had many surprising victories, beginning with the central role we played in the political movement that led to the abolition of the faculty speech code in the classroom by a vote in the Faculty Senate in 1999—a vote that stands as a virtually unprecedented event in higher education today. And we were able to build on this success in several other noteworthy cases that I will discuss.

Another school that has witnessed a similar turnaround is the University of Pennsylvania, where Alan Charles Kors led a small group in the 1990s that achieved reforms in the wake of a notorious case in which a student was charged with making racist remarks for calling some noisy African-American students “water buffaloes”—a term with no racial meaning.

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Many authors have portrayed the threats to the principles of academic freedom that have beset universities over the course of the last 15-18 years with the rise of speech codes and related policies. (The main “principles of academic freedom” pertain to freedom of speech, freedom of inquiry, and due process and equal treatment in the adjudication of discipline.) Though often intended to create a more hospitable climate for women and minority students and staff—objectives with which no reasonable person disagrees—such policies have too often had illiberal effects, leading to unprincipled, politicized enforcement that has compromised the intellectual diversity, freedom, and vitality of university life. Perhaps the strongest condemnation of this situation is that offered by Alan Charles Kors and Harvey Silverglate, in their book, *The Shadow University*, published in 1998:

The *best* aspects of...[the 1960s] idealistic agenda have died on our campuses—free speech, equality of rights, respect for private conscience and individuation, and a sense of undergraduate liberties and adult responsibilities. What remain of the `60s are the *worst* sides: intolerance of dissent from regnant political orthodoxy, the self-appointed power of self-designated “progressives” to set everyone else’s moral agenda, and, saddest of all, the belief that universities not only may but should suspend the rights of some in order to transform students, the culture, and the nation according to their ideological vision and desire.

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A key problem Kors and Silverglate highlight is the ubiquitous “double standard” that prevails: administrators have consistently applied speech codes and similar policies predominantly against conservatives and those who are sometimes at odds with campus orthodoxies. Intellectual diversity thereby suffers, to say nothing of basic free speech and First Amendment principles, which are premised on the doctrine of viewpoint neutrality.

Most works in the vein of *The Shadow University* discuss the legions of cases of censorship and suppression of politically incorrect thought, as well as the legal and normative implications of speech codes and related policies. I, too, deal with these matters in my book. But my primary focus lies elsewhere: in examining the ways in which political mobilization and resistance can protect or restore liberal principles of academic freedom. One such movement at the local and state level is the Committee for Academic Freedom and Rights at the University of Wisconsin. A more prominent example at the national level is the Foundation for Individual Rights in Education (FIRE), founded in 2000 by Kors and Silverglate to actualize the principles of *The Shadow University*. FIRE—which was modeled on CAFR—has taken on many cases nation-wide, and has won many noteworthy victories in the name of free speech, academic freedom, due process, and intellectual diversity. (The ACLU has also done good work in this area, as in their recent strong defense of an economist at the University of Nevada for making comments illegitimately deemed anti-gay.)

Background Issues or Points

Before I get more into my talk, let me address some points that will clarify some conceptual issues. First, many of the cases that I will be talking about are what I call “no brainers.” That is, they represent clear threats to academic freedom and academic due process; consequently, taking a strong stand is justified in these cases. Unfortunately, many of the cases that have taken place in the era of speech codes are of this nature. But some cases are indeed gray, or complex enough to merit a less adversarial approach.

One recent example of a “no brainer” case is what happened at California Polytechnic Institute in the spring of 2003. A student was found guilty of “disruption” for putting up a poster across from the multi-cultural center that advertised an up-coming speech by Mason Weaver, author of *It’s OK to Leave the Plantation*. Weaver argues in this book that undue reliance upon the government perpetuates a slave mentality in African-Americans. During a lengthy hearing, the vice president for student affairs told the student, “You are a young white male member of CPCRC [Cal Poly College Republicans]. To students of color, this may be a collision of experience...The chemistry has racial implications, and you are naïve not to acknowledge this fact.” The case dragged on for several months before the university was compelled to drop it, but only after FIRE, the ACLU, and other groups exerted nation-wide pressure.

On the other side of the coin, consider the recent controversy at Columbia university, where students have charged that members of the Middle Eastern Studies department brow-beat and intimidate students who disagree with their hard-line anti-Israel teachings (or rantings, as the case may be). This case pits student academic

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freedom against professorial freedom, and even such hard-line defenders of faculty academic freedom as civil liberty columnist Nat Hentoff and FIRE have sided with the students. I think that Hentoff and FIRE are mistaken in this case for reasons I am happy to discuss later. But I do not view their support of the students as obviously wrong-headed. This is indeed a difficult case. And it does represent the lack of intellectual diversity that reigns in higher education today.

Also, I acknowledge the argument of Robert Post and other constitutional scholars that freedom of speech and inquiry at the university are not absolutely coincident with First Amendment rights in other contexts. For example, students can be flunked for writing bad exams, and professors can be limited in terms of the amount of commentary they make in class that is not germane to the subject matter of the course. And speech that is appropriate in the public forum or student newspaper may not be acceptable in departmental offices. All this is true.

But these points do not begin to justify the treatment many individuals have received in cases I discuss in my book and in my talk this afternoon. We must not let our acknowledgement of complexity in some cases blind us to the need for taking a strong stand when the “no brainer” cases arise. In my experience, the failure to distinguish properly between the gray cases and the black and white cases is a major reason for the precarious state of academic freedom in America. One reason for this failure is that too many individuals in positions of responsibility no longer give priority to the intellectual freedoms that are the *sine qua non* of the university’s mission. A lot of people pay lip service to the intellectual freedoms, yet fail to show up when these freedoms come under

attack. Through my own experience and research, I have discovered four major reasons why this is so: 1) some individuals consider other goals more important, such as sensitivity in the name of diversity; 2) others are simply unaware of the ways in which certain policies and actions pose grave threats to the principles of academic freedom. This is a failure of insight or education; 3) some have pragmatic philosophies that make it hard for them to see the wolf in the forest (if I may slightly mix metaphors); 4) some lack the courage or time to stand up and be counted in defense of intellectual freedom. This is a failure of commitment. *Restoring Free Speech and Liberty on Campus* deals with each of these reasons in some depth.

Finally, I assume that the best universities have a distinctive fiduciary duty in our democratic society to promote knowledge, respect for the pursuit of truth, exposure to a wide diversity of viewpoints and ideologies, and respect for basic constitutional rights. I acknowledge the incredible diversity and complexity of functions that characterize what Clark Kerr called the “multiversity.” (*The Uses of the University*.) But if a university wants to be taken seriously, its most important mission is the inculcation of what Jaroslav Pelikan calls the “intellectual virtues” in his book, *The Idea of the University: A Reexamination*. “It shall perhaps go without saying, but unfortunately the history of the university past and present makes it all too obvious that it does not, that the two fundamental intellectual virtues in the ‘law of studies’ are free inquiry and intellectual honesty.” Intellectual *honesty* is something that we talked about a lot in the debates over the speech code at Wisconsin. Students especially wanted to encourage it among the faculty. It is an indispensable ingredient of a vibrant, challenging education. Psychological

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(see Freud) and social pressures conspire to thwart intellectual honesty—but this is all the more reason to value it.

Priorities, Intellectual Diversity, and the Public Square

Intellectual diversity is a litmus paper test of the state of intellectual freedom. Allan Bloom's penetrating observation in *The Closing of the American Mind* captures the importance of free thought and intellectual diversity in the most poignant language that I have read: "[f]reedom of mind requires not only, or not even especially, the absence of legal constraints but the presence of alternative thoughts. The most successful tyranny is not the one that uses force to assure uniformity, but the one that removes the awareness of other possibilities."

It is interesting to note that Bloom published his book in 1987. In this instance, the owl of Minerva did not fly at dusk, but rather at dawn; for 1987 was the year that witnessed the beginning of the speech code era. It was a pivotal year in what I depict as the transition from the "liberal" to the "post-liberal" conception of the university. Among other things, this transition entails the return in a new form of what the American Association of University Professors has called the "proprietary university," that is, a university dedicated to a particular set of causes extrinsic to free inquiry. The new version of the proprietary university seeks to socialize students in sensitivity (sort of a new version of *in loco parentis*) rather than in the principles of free inquiry, which are the hallmark of the research universities that historically replaced the traditional proprietary universities. Proprietary institutions were established to promote such exogenous ends as

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religion or capitalist values. (“General Report of the Committee on Academic Freedom and Academic Tenure,” AAUP, 1915)

The post-liberal university often values intellectual freedom, but not necessarily more than other values, such as diversity, sensitivity, and campus “climate” (which never seems to include the climate for open discourse). I believe in these other values, too. But what distinguishes the liberal from the post-liberal university is the respective weight one assigns to these values when they conflict.

Getting priorities right is crucial when one has to decide what to do in the face of intense pressure. *Restoring Free Speech and Liberty on Campus* is in some respects an existential book in that it is concerned not only with law, policy, and principles, but also with how one acts when important principles come under attack in situations that are often emotionally and morally intense. I portray what campus leaders (be they students, faculty, or administrators) do when campus groups exert concentrated pressure that threatens the rights of speakers or writers who challenge campus orthodoxies.

If such pressure carries the day, no one is truly free. I agree with a powerful statement made by Alan Kors at a conference on academic freedom at Loyola Marymount University last year: “Liberty of opinion, speech, and expression is indispensable to a free and, in the deepest sense, progressive society. Deny it to one, and you deny it to all.” You simply cannot claim that your university is free if a double standard for academic freedom prevails. At Wisconsin, for example, conservative speakers in the public forum have often had a much harder time being able to speak than liberal speakers. In 1998, Ward Connerly was shouted off the stage in an incident that

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shamed the university nationally. That same year, armed guards had to be present when Ralph Reed spoke. I could talk about other cases. No such problems exist when liberal speakers come to campus. Given this situation in the 1990s, just how free was my university? The same conclusion applies to Professor Churchill at the University of Colorado. If he is fired for his admittedly absurd comments about World Trade Center victims being “little Eichmans,” then how free is public discourse in America?

In an environment characterized by the surge of ideologies and values that are not always friendly to open discourse, the principles of academic freedom will not prevail or even compete unless they are supported by those who take these principles seriously *and* are willing and able to do what is right in the face of pressure. In *Restoring Free Speech, and Liberty on Campus*, I devote a chapter to examining the most prominent theories and values behind many of the new threats to the principles of academic freedom. They include: strong versions of identity politics; various victimology ideologies; theories that equate discourse with power; and what Alan Wolfe has called a “new class” of administrative elite beholden to the “triumph of the therapeutic.”

One reason it is often difficult to stand up and be counted for academic freedom in the face of pressure is that pro-academic freedom principles often lack presence in public discourse. This is a political problem—especially if support for such principles is actually lurking beneath the surface. When this is the case, many erstwhile defenders of intellectual freedom and due process on campus feel inhibited to stand up. “If no one else has expressed concern, there must not be a problem.” “If I stand alone, I will be ostracized from my community.” These are human, all too human, responses. And then there are

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those who would support such principles if only they were reminded of their importance by others. The absence of advocacy on behalf of the principles of academic freedom in the public realm causes some people to either forget the importance of these principles, or to shy away from supporting them in a meaningful way.

Many of the universities that I write about in *Restoring Free Speech and Liberty* are examples of Bloom's point about the absence of alternative viewpoints: when free speech and discourse came under attack, the free speech-open discourse side of the debate was not visible or backed by organized power. At Wisconsin, the very first thing we strove to do early on in our decade-long struggle was simply to give public presence and voice to the free speech-open discourse position. Wisconsin had earned a reputation as a national and international pioneer in the establishment of academic freedom in the United States in the twentieth-century. (For example, it played a big role in the establishment of the AAUP early in the century; and in the 1950s, it resisted McCarthy's call for loyalty oaths while other major institutions were caving in.). But this point of view had retreated in terms of public presence in the later 1980s and early 1990s as other agendas took over, especially the desire to promote racial and gender sensitivity. So our movement had to revive public awareness of these principles by filling the public space with our beliefs.

Sociologist-economist Timur Kuran presents a theory of social and political change that is pertinent to the point about public presence. Often democratic change is unimaginable for the simple reason that most sympathizers are hesitant to express their true beliefs. Kuran explains in *Private Truths, Public Lies: The Social Consequences of*

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Preference Falsification that in environments hostile to dissent, large numbers of people feel compelled to keep their true beliefs to themselves, and do not speak out because of fear of ostracism or punishment, or because they doubt that their views will be supported by others. One of Kuran's examples is the politics of campus speech codes.

But change can take place—sometimes suddenly—when background opposition is intense and an event or activist group sparks an explosion of change in people's thinking. It can start a chain reaction. The key is passing the critical threshold:

In the presence of preference falsification, private opposition may spread and intensify indefinitely without any apparent change in support for the status quo. Yet at some point the right event, even an intrinsically minor one, can make a few sufficiently disgruntled individuals reach their thresholds for speaking out against the status quo. Their switches can then impel others to add their own voices to the opposition. Public opposition can grow through a bandwagon process, with each addition generating further additions until much of society stands publicly opposed to the status quo.

The magnitude of the change can seem almost miraculous. “Political leaders are often amazed to see their efforts bear fruit. When individual decisions are interdependent, small events can have great consequences....It is necessary only for additions to the opposition to trigger further defections from the government's ranks. In other words, the threshold sequence must form a bandwagon that is mobile at the prevailing public opposition.”

This theory fits rather well with what took place at Penn and Wisconsin on their way to abolishing their respective speech codes. The Wisconsin story includes an activist

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core that was able to generate a bandwagon effect under propitious circumstances. The eventual breakthrough led to the establishment of a renewed set of public priorities that helped to win the speech code battle, and which remains competitive in the public realm to this day. In reporting in the *National Journal* on the 1991 Richard Long case—the first known example of a questionable investigation at the University of Wisconsin—and the later faculty code abolition, Jonathan Rauch wrote that before 1999, “the speech code and the climate it represented looked as sturdy as the Berlin Wall—which, it turns out, is exactly how sturdy they were. In 1999, Long is rubbing his eyes. ‘I thought this would last a thousand years,’ says Long. ‘I never thought it would change in my lifetime.’”

Two “no brainer” incidents dealing with the same issue illustrate the importance of public support and discourse that I am making. In February 2001, conservative journalist-provocateur David Horowitz sent an advertisement to dozens of student newspapers across the land, arguing against the idea of government paying monetary reparations for slavery. Though hard-hitting, the ad was not racist according to any standard definition of the term, and it was debated civilly in many forums outside of universities. In an extraordinary article in *Salon.com* entitled “Who’s Afraid of the Big Bad Horowitz?” written during the brouhaha, editor Joan Walsh wrote about the debate over the ad that had taken place in *Salon.com* a few months before Horowitz sent his ad to student papers. “The debate was lively, argument on all sides got thoroughly aired, and a good time was had by all. Nobody picketed our offices. Nobody came to *Salon* with a list of grievances to be addressed. Nobody sought or was given an apology. Nobody called us racist.”

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But when Horowitz sent his ad to universities, it was as if a giant defense mechanism against unwanted ideas had been activated. At Berkeley, for example, the *Daily Californian* immediately apologized when faced with angry students, and promised never to run such an offending piece again. When Horowitz came to Berkeley to give a public lecture a short time later, the atmosphere was very intense, and he was unable to complete the question and answer period following his address due to the unruliness of the audience. Unfortunately, this type of reaction in the public forum is no stranger to the Berkeley campus, as many other controversial speakers have had their addresses either obstructed or compromised by hostile audiences over the last 25 years. The incidents are really quite stunning, involving bullying and threats of violence, some actual violence, burglaries of student publication offices, and destructions of entire runs of student newspapers. At times the public forum has resembled a Hobbesian state of nature rather than a civilized place to be exposed to a diversity of views. I devote a chapter to these cases in my book. Suffice it to say that Berkeley's claim to being the home of the continuing Free Speech Movement lacks some credibility.

Throughout all of these incidents at Berkeley, a salient fact has stood out: no organized group of faculty and/or students had arisen to resist or criticize what was happening to free speech in the public forum. Sadly, the administration has not done nearly enough to support principles of open discourse in the public forum.

Meanwhile, the *Badger Herald* at Wisconsin stood strong in the face of equally intense pressure to apologize for publishing Horowitz's advertisement a couple of days after the *Daily Cal* episode. Instead of apologizing, the *Herald* wrote an editorial entitled

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“The First Amendment First,” which won many awards, including second place for editorial of the year from the Associated Collegiate Press, and first place for editorial of the year from the Wisconsin Newspaper Association (the world outside universities does value unbridled free speech):

At The *Badger Herald*, we only regret that the editors of the *Daily Californian* allowed themselves to give into pressure in a manner that unfortunately violated their professional integrity and journalistic duty to protect speech with which they may disagree.

The knee-jerk response by the *Californian* is frighteningly indicative of the growing tendency of college newspapers to allow the opinions they publish to be stomped out for fear of being called names....

We understand and lament the fact that because of our commitment to free speech, we run the risk of occasionally offending readers. It is not our goal. But while we do not want to offend for the sake of offense, we refuse to censor unpopular ideas simply because someone may be offended.

The leaders of the *Herald* consulted with me and CAFR before writing this editorial. We promised our full support and worked with the *Herald* on the wording of the editorial. The *Herald's* leaders were very impressive. They felt a fiduciary duty to defend free discourse rights on campus in the face of the incredible pressure we all knew would be unleashed the next day. The *Herald* was willing to take this stand on its own;

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but it also had a politically active group of faculty standing behind it. In his column in the *National Journal*, Jonathan Rauch pointed to the different political contexts at Berkeley and Madison:

The [*Badger*] *Herald's* community is not the same as the *Daily Cal's* community. At Wisconsin, an energetic free-speech faction has emerged in the past few years. In 1999, the Wisconsin faculty rose up to abolish its speech code, an apparently unprecedented event in American academe. When the *Badger Herald* came under fire this month, an aggressive free speech group, called the...Committee for Academic Freedom and Rights, immediately offered the paper its full support.

I should point out, however, that the *Daily Cal* did a superb job the following semester of resisting pressure to apologize for a cartoon it published a few days after the terrorist attacks of September 11. The cartoon was clearly within the realm of acceptable discourse, but one hundred students improperly considered it anti-Muslim, and pressured the paper for several hours by chanting, yelling, and crying outside their offices. Chastened by the national media's criticisms of its apology the previous spring, the paper stood strong this time. In my book, I depict the *Daily Cal's* turnaround as a significant step in free speech education and commitment at Berkeley. But the turnaround was not due to any organized commitment on the part of faculty or student mobilization. Consequently, the victory did not lay a groundwork for long-term commitment. And the rhetoric that accompanied a student government hearing over the *Daily Cal's* actions displayed deep distrust and lack of knowledge of basic free speech principles. (One

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student was cheered when she called the cartoon and Horowitz's advertisement the previous semester "terrorist acts." But a free speech advocate was also cheered in reply.)

Let me now briefly discuss about some of the other case studies in my book that provide support for the thesis of mobilization that I have discussed. My book deals with many examples, but I focus on four case studies that illustrate my political points: Berkeley, Penn, Wisconsin, and Columbia. As I have already talked about Berkeley, I will deal only with the other three.

Case Studies

A. Columbia's Sexual Misconduct Policy

In 2000, Columbia's University Senate enacted questionable new procedures for the adjudication of sexual misconduct cases. Though reform was needed, the new policy discarded virtually all aspects of due process. After FIRE and its allies exposed the policy to the outside world, public opinion was overwhelmingly negative. The *Wall Street Journal* editorialized about "silenced faculty" and opined that "The short shrift given due process at one of the nation's most distinguished universities gave rise to no objections from the Columbia faculty, with but one or two exceptions....It is a policy that mirrors an ominously increasing tendency to devalue due process in the interest of a select category of victims."

I found in my research that the movement toward the policy was remarkably one-sided. Virtually no dissenting voices were heard on any university committee established to deal with the policy, nor did any such voice speak out in the broader political arena.

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Two professors and one student courageously opposed the policy in the Columbia University Senate before the vote, but they presented no organized attack. A broad coalition of student groups led by a group called SAFER (Students Active for Ending Rape) marshaled a massive campaign in support of the policy that included marches, rallies, and the wearing of red tape by up to 25% of the student body, symbolizing the “bureaucratic red tape” that had bedeviled the previous system. Columbia alumnus Lawrence Kaplan of *The New Republic* underscored the failure of resistance and courage on behalf of administrators and faculty in the debate over the due process reforms: “After Columbia’s President George Rupp endorsed the new rules, one of the campaign’s teenage coordinators boasted, ‘There was obviously some fear in the eyes of the administrators.’”

The Columbia story epitomizes the points I have raised above about commitment, education, and public presence. Though SAFER and its close allies construed due process as a form of oppression, the students who worked with the administration to actually formulate the policy were reasonable, responsible individuals who were not at all opposed to due process principles. They just were not aware of the importance of these principles because the due process position lacked any presence in the politics and public sphere that led to the policy’s adoption. Numerous interviewees told me that the process of enactment was decidedly one-sided—which the extensive press coverage confirmed. Not a single person disagreed with this assessment. Sophia Berger, an undergraduate student who played the most important role in formulating the policy on the policy committee told me:

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One thing that made me so mad all this time was that I was getting all this information, all those phone calls and e-mails that I got, the open forum—no civil liberty group ever said anything. There was barely anyone ever who said anything against it, anything along the lines of what FIRE ended up fighting for...I feel like we paid attention to everyone's concerns. I wish there had been someone fighting against SAFER. That would have made it so much more raucous on campus, but then it wouldn't have been one overwhelming voice. SAFER was not representing every single student, and there's no way it could.

Michelle Bertagna, later editor in chief of the *Columbia Daily Spectator*, said that the administration failed on two counts: to educate the student body about the importance of due process, and to provide an opportunity for counter-views to be expressed:

anyone who opposed SAFER was demonized. By getting all those groups involved, SAFER made it virtually impossible to criticize them. If you criticize the policy, you are anti-SAFER and against those who oppose violence against women. The administration caved in to the activists. They appear to have made no attempt to find out what non-SAFER students felt. They took SAFER as the student opinion.

In the end, the opposition of such national groups as FIRE, the ACLU, and Feminists for Free Expression, along with such courageous members of the Columbia community as

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professors Gerard Lynch and James Applegate, and students Karl Ward, Jaime Schneider, and Nat Singer led to modifications of the policy.

B. The University of Pennsylvania

At Penn, the work of Alan Kors and his small cohort of supporters brought about institutional change in the mid-1990s that was virtually unthinkable during the previous decade, during which Penn championed speech codes and related policies designed to foster diversity and civility. But rather than ushering in a new era of harmony and mutual respect envisioned by the administration, the policies often engendered suspicion, acrimony, and compromises of the spirit of intellectual liberty, at least in some telling respects. These trends culminated in the notorious case in 1993, in which the Penn judicial system accused freshman Eden Jacobowitz of violating Penn's speech code. Jacobowitz's transgression lay in calling some African-American sorority sisters "water buffaloes" for partying loudly outside his dormitory late one night. (Several other students also said disparaging things, but only Jacobowitz admitted shouting something at the women.) Though the term "water buffalo" was widely understood to have a non-racial meaning, Penn proceeded to prosecute the case. Kors became Jacobowitz's advisor, and, after much struggle, managed to turn the case into a national *cause celebre*. Kors then leveraged the impact of the case to effectuate stunning institutional change at Penn that included the abolition of the speech code and ideological changes in student orientation programs.

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The water buffalo case gave speech codes a bad name at Penn, allowing pro-free speech supporters to gain influence in the spheres of public and political opinion. Kors described the effect to me in words that echo the words of Timur Kuran: “They took such a hit that students were mobilized across a pretty broad spectrum. People who had lost their courage and voice suddenly found it. And administrators had more to lose supporting this [code] stuff than backing away from it.” The student government opposed the administration in the case, and a group of students, some of whom Kors called “extraordinary,” formed the First Amendment Task Force, which played an important role over the next few years. After President Sheldon Hackney left at the end of the term, interim president Claire Fagin opened up a debate regarding the code, which featured hardy arguments on all sides of the issue. It was clear proof that at least some voices for free speech had indeed “found their courage.”

C. The University of Wisconsin

In 1987, Wisconsin passed two speech codes: a student code and a code restricting faculty speech in the classroom and in academic settings outside of class. Both prohibited saying things that “demeaned” others on the grounds of race, gender, nationality, sexual orientation, and the like. Schools all over the country followed suit. A federal court declared the student code unconstitutional in 1991, but the faculty code remained on the books. When the Faculty Senate considered the codes in 1988, only the pro-code side was organized and vociferous. As Timothy Shiell writes about the passage of codes at Wisconsin, Michigan, and Yale:

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[W]hat happened at Yale (and Michigan and Wisconsin for that matter) was hardly inevitable....things could have turned out differently, and they turned out as they did largely because of political forces. At Michigan and Wisconsin no organized opposition to hate speech regulation with political clout emerged, although it could have. For example, instead of backing down in the face of student pressure, the UW-Madison Chancellor Donna Shalala could have remained resolute in her conviction that the Madison speech incidents were protected by the First Amendment. But she didn't. She became an advocate of regulation, maintaining that 'We're talking about harassment here, not impinging free speech.'" (*Hate Speech on Trial*)

By the early 1990s, the faculty code started being enforced in less visible ways. The first known case took place in 1990, when art professor Richard Long was investigated for saying "seig heil, comrades" (he told me that he was careful to cover both sides of the political spectrum!) to two graduate students who had been verbally harassing him in public for several weeks in the aftermath of an unbelievably intense departmental dispute over standards in which Long had not participated. Unbeknownst to Long, one student's wife was Jewish, and the other had Gypsy ancestors. Unable to deal in an intellectual fashion with being accused of acting like fascists, the students filed a complaint against Long for violating the faculty speech code. Thus was a moral dispute turned into a quasi-inquisition. During the several weeks of damaging innuendo leading up to the official

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questioning of Long, “it was all over the hill that Long was being investigated for racism, sexism, homophobia, and other things.” (Richard Long, “All that Is Solid Melts into Air: Political Correctness, Speech Codes, and Academic Commissars in the Land of Sifting and Winnowing.” This essay is to appear in an edited volume on the status of academic freedom at the University of Wisconsin. Lee Hansen, ed., *Academic Freedom in the Balance*.)

A hearing was finally held in March 1991, during which Long was questioned by two faculty members. After the questioners acknowledged that the accusation of anti-Semitism bore no credibility, they asked Long to respond to allegations that he had “a lot of problems in the areas of racism, sexism, and homophobia.” Long refused to answer this and several other questions, but the interrogators persisted. “Now, Professor Long, have you ever used the word ‘feminazi?’” another asked. At this point, Law professor Gordon Baldwin (who defended Long pro bono) put his hand over Long’s mouth, clapping it shut. “He apprised the committee of the fact that he was directing his client not to answer that question. He went on to inform them that the Constitution of the United States was in effect in the entire United States *including* the University of Wisconsin and the room in which we were sitting.” The interrogators then adjourned the meeting, conceding that they possessed no evidence that Long was guilty of any of these sins. The university dropped the case, but refused to grant Long’s request that it publicly vindicate him or even provide him with the documents on the case. In Long’s eyes, he was never really cleared. Long’s case was the first revelation of an improper investigation, and it brought several of us together to start discussing what to do about the

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code. But at this point in time, we remained voices in the wilderness. We simply lacked the organizational know how and skills to forge a meaningful counter-movement.

As the nineties wore on, other questionable investigations took place that had catalytic effects on our movement. One case involved my ally and friend, philosophy professor Lester Hunt, who was charged with violating the code for saying the word “injun” to a student (which he denied using) and for using the Lone Ranger and Tonto as an example in class of the tensions of different notions of community. The administrator in charge of the investigation told Hunt that he could lose his job for his transgressions. Perhaps more than anyone, Hunt fathomed how the presence of the code thwarted conscientious teaching. As a former student of mine, Anat Hakim, wrote in an unpublished article, teaching had become “a game of strategic thinking—an academic cat-and-mouse exercise. The vitality of the cauldron of ideas that is the university is extinguished when giving offense is forbidden.” Hunt was vindicated, and joined the fledgling movement.

Other cases arose. In one, officials took a 74-year old professor out of class and questioned him behind closed doors accompanied by an armed guard. A thirty-eight year old graduate student had accused him of making inappropriate comments, such as telling her to “straighten up,” “start working harder,” and “to stop messing around with her boyfriend.” He also asked her to marry him. Though his behavior was inappropriate, the university acted as if the professor had committed a crime. There were also incidents involving the student newspapers, especially the *Herald*. Never did the administration take the side of free speech in these cases.

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By the mid-90s, our small group of five or so individuals had little influence politically, but we spoke out against the code and other infringements on freedom every chance we had in public forums and in the media. And along with the Wisconsin Association of Scholars (the state chapter of the National Association of Scholars) we brought such champions of free speech to campus as Jonathan Rauch (who had just written a mini-classic book defending free thought) and Nat Hentoff (who had also written an important book). In addition, I began teaching a lecture course of several hundred students on the First Amendment, and activists like Hunt wrote articles and spoke repeatedly to the media about free speech issues. Professors and students developed a synergy that would energize the final drive a few years down the road.

In 1996, the most important catalytic case took place. It involved an illegitimate secret investigation of a professor in the history department who was unfairly targeted as a scapegoat for another issue. Though the investigation began in the department, it was ultimately sanctioned, even encouraged, by high levels of the administration. Though the faculty code was not invoked in the case, the logic that drove the investigation was similar to that behind the code, and the target of the investigation linked the code to what happened to him. In the target's estimation, in sanctioning the investigation, the university became a Leviathan that did not care if it crushed him under its feet, his decades of outstanding service notwithstanding.

The case sent shivers through the divided and politicized history department, and shocked many liberals who had been too nonchalant about the illiberal forces that had gained headway on campus. When conscientious colleagues finally informed the target of

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what was going on, he sued the University and won a settlement that represented vindication.

As a result of this case, a group of about 30 of us formed a group that I believe is without precedent in American higher education: the Committee for Academic Freedom and Rights. CAFR represented the joining of the free speech activists like myself who were unconnected to larger groups on campus with individuals who had some experience in organizing in the history department and such outside groups as WAS. We are a non-partisan group consisting of liberals, conservatives, moderates, and even some people who don't know the difference between these terms. We received outside funding from the Bradley Foundation (which has given us 100% autonomy), and have retained a local Madison attorney for legal actions. We have an executive committee (of which I am presently the president) and have engaged in many political actions in addition to taking on several cases.

With the formation of CAFR, the Madison free speech and academic liberty movement was born. *Restoring Free Speech and Liberty on Campus* chronicles the long and tortuous path that led to the abolition of the faculty code in the faculty senate in spring 1999. I don't have time to get into the details here. I must stress that it was not just CAFR, but also student allies (including the student newspapers and the local—and sometimes national—press) who helped bring this reversal about in the land that had once pioneered codes. It was a laborious as well as an exhilarating process that required tireless campaigning and acts of persuasion. We succeeded for several reasons, including:

- 1) we got organized and committed, creating a critical mass of resistance and an

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infrastructure that could be relied upon in future cases; 2) we were able to use the questionable cases as publicly recognized reasons to abolish the code; 3) we drew on latent support for the traditional liberal principles that had laid dormant during the era of codes.

When the first evidence arose in late 1998 that campus opinion was actually on our side, we felt precisely the kind of “amazement” that Timur Kuran describes in his book. I will never forget the exact time we first realized this fact: during and right after the first of three Faculty Senate meetings devoted to dealing with reform or abolition of the code. Senators stood up for the first time in memory and denounced the reign of codes in memorable speeches. I wrote in the *Daily Cardinal* that that the Senate “spoke with the language of free men and women,” and that Wisconsin “could become the very first university in the country to take back a code by a faculty vote rather than a court order.”

The speech code vote in the Faculty Senate received widespread national attention, including coverage in *Wall Street Journal*, the *New York Times*, the *Boston Globe*, the *National Journal*, the Associated Press, National Public Radio, the *Village Voice*, *Reason*, *Liberty*, National Public Radio, and the *Chronicle of Higher Education* (the latter published a cover story and several follow up articles). My favorite commentary was in the *Wall Street Journal*, which published an editorial written by Kors’ and Silvergate’s ally, editorial board member Dorothy Rabinowitz:

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[T]he story of this successful battle, [was] one in which one faculty member after another found his voice. A story in which, by an alchemy known only in a free society, accommodation and silence dropped away, and formerly quiet citizens spoke their minds. They used to make movies with scenes like these, speeches like some of those heard here, way back when filmmakers were given to celebrating American values and character.

It may be, of course, that at the University of Wisconsin, adherents of the speech code will look for ways to bring it back in some other form. That can't matter now that Wisconsin's faculty has shown what can happen under the leadership of a few intrepid rebels against the forces of dimness. (July 16, 1999)

Rabinowitz's predictions were on the mark. New crises did arise, but our freedom movement was now ready to tackle them as soon as they appeared. With an infrastructure now in place, we were able to respond with efficacy, and have enjoyed other important successes in ensuing years. Let me just mention the most important in chronological order.

First, we were the major force preventing the adoption of due process revisions to the university rule in 1999 that would have watered down due process protections for faculty charged with misconduct.

Second, in 2000, CAFR was the major player in a resistance movement that led to the dismantling of a new program called MARC, for "Make A Respectful Campus." The program included setting up 35 boxes at strategic locations around the campus,

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accompanied by brochures that encouraged informers to make anonymous complaints about people for transgressions ranging from actual crimes to harassment to merely offensive speech. The Orwellian implications of the MARC program were immediately evident to many faculty and students, and CAFR set to work to forge opposition.

Working with the *Badger Herald*, a local newspaper (*Isthmus*, Madison's version of the *Village Voice*), and a the local ABC television affiliate, we sparked critical press commentary. We also put together a campus-wide resistance movement of faculty. Four CAFR leaders then met with the new chancellor, John Wiley—who had opposed the boxes the previous year as provost—and made our case. A month later, Wiley—who has had a good record as chancellor on the civil liberty front—ordered the boxes dismantled. Our friends Nat Hentoff and Alan Kors of FIRE called to offer their assistance, but we said we would rather deal with this matter internally for a while. This method proved effective.

Third, CAFR has taken the case of a student who was charged with violating the new “professional conduct code” of his professional school. Such codes represent the next wave of “back door” speech codes. The code was shockingly broad, and attempted to circumvent the normal university and state rules of procedure, making it potentially more problematic than the old speech codes, which could be enforced only by following the procedural requirements governing the disciplining of faculty or students. CAFR gave the student legal aid and advice. And after meeting with university officials, CAFR managed to convince the school to revise its code to conform to university rules governing due process. When the student who was charged under the old code graduated

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last spring, he called me to say that he would never forget what CAFR did in coming to his defense. “I was alone, and don’t know what I would have done without your group,” he said. Several other individuals have told us similar things over the years.

Finally, CAFR has been a lead player in a case that concerns the entire University of Wisconsin system. The Board of Regents terminated a tenured professor at the University of Wisconsin at Superior in a manner that raised serious questions of due process and faculty governance. The matter is still pending, and has brought CAFR together with the Faculty Senate and state labor unions to oppose the Regents’ actions in court and in political mobilization. This case represents a new type of threat than that posed by the era of speech codes and related policies.

Conclusions

In concluding, let me stress what I consider the most poignant points arising from my work.

First, speech codes and related policies are often tools to “criminalize” intellectual and moral differences. In the Long case at Wisconsin and the “water buffalo” case at Penn, for example, disputes over language and rudeness (if they even amounted to the latter) were reconceptualized as acts of discrimination that called for coercive measures. This type of resort turns the academic community into a soft police state. Just how and why this happened is important and interesting, and worth a book in its own right. Acts of discrimination certainly do occur; but we have to learn to distinguish the real wolf from

the crying of wolf. Paternalistic coercion of the “state” should not replace the need to educate and persuade.

Second, politics matters. In the absence of administrative commitment to principles of free inquiry (a problem nation-wide), there is no substitute for faculty-student mobilization. Such mobilization can present a bandwagon-type support and cover for those who believe in these principles but are reluctant for whatever reason to speak out and act. The free speech and liberty movements at Penn and Wisconsin brought these commitments back to public life. This is a hopeful message, as it suggests that the principles of the liberal university are still kicking.

Political action can be superior to legal action in court. Court decisions do not require persuading one’s fellow citizens to change their minds. Research by Jon Gould (“The Precedent That Wasn’t: College Hate Speech Codes and the Two Faces of Legal Compliance,”) and others has shown that the court rulings against speech codes in the 1990s had no effect on universities’ actual practices. To borrow the terms of H.L. A. Hart, universities did not feel “obligated” to obey the rulings, for they were not morally persuaded by them. They were only “obliged” to obey, like a person is “obliged” to hand over money when a gunman says “give me your money.” (*The Concept of Law*) At Wisconsin, we were at first angered by the refusal of the Wisconsin Civil Liberties Union to take the faculty speech code to court. But in the end, we were grateful because that refusal meant that we had to abolish the code through political persuasion. By having to make our case to the entire university, we ended up making the code issue the most important issue of the year on campus, thereby influencing public consciousness. We also

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had to create a political infrastructure that has proved invaluable in the years after this successful vote. In Bloom's terms, we showed that there are alternative positions on speech codes.

The right kind of political organization can provide the type of checks and balances that are absent in most university administrations. The administrative structure of most universities is organized like a corporation: it is hierarchical, and countenances little dissent from central missions. The post-liberal university consists of administrations dedicated to a particular concept of diversity and sensitivity that can compromise the intellectual mission of the university. Seldom is a contrary word heard from within the governing elite. But, as the Framers' knew, checks and balances are important to protecting minority voices and dissent. The framers institutionalized checks and balances not because they feared the clash of different interests, but because they feared majority tyranny. (Paul Eidelberg, *The Philosophy of the American Constitution*) The danger to public justice lies not in factional conflict, but in the undue homogeneity of opinion.

One of the problems with the contemporary university is its unquestioning allegiance to a particular vision of diversity and sensitivity. Though these goals are certainly worthy, they are not immune to a fundamental Socratic law: any moral agenda becomes a recipe for injustice when it becomes unquestioned. (See Dana Villa, *Socratic Citizenship*, and the works of Rienhold Niebuhr) Checks and balances are institutional devices to protect against such injustice predicated on homogeneity.

Back in the aftermath of the Berkeley Free Speech Movement in late 1964, Berkeley political science professor Albert Lepawski presciently pinpointed the dilemma

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that universities in the future would have to confront now that political agendas had become part of the fabric of university life. Like me, he accepted the fact that political agendas were here to stay. But he maintained that liberal principles of freedom would have to be asserted and protected in order to preserve universities' distinctive contribution to democratic society:

The main task we face is preserving the university not merely as a free political community but primarily as an institution which is privileged to be an intellectual sanctuary within a greater society that is now in political flux.

After all, the university's prime mission resides not in political activity but in the cultivation of the intellectual freedoms...it is imperative that no one facet of the university's activities, certainly, not the political, should dominate its overall responsibilities for the cultivation of the intellect...any conflict between the intellectual and political way of life must be resolved in favor of the primacy of the intellectual over the political.

Ironically, the defense of these principles often requires its own kind of politics. Whether this is good or bad is something that we can discuss.

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