

Restoring Free Speech and Liberty on Campus

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Preface

This book focuses on the threats to free speech and civil liberty that have sprung up on America's campuses following the wave of so-called progressive reforms instituted in the late 1980s and the 1990s. The most important reforms included speech codes, broad antiharassment codes, orientation programs dedicated to promoting an ideology of sensitivity, and new procedures and pressures in the adjudication of student and faculty misconduct. Although these measures were laudably designed to foster civility, tolerance, and respect for racial and cultural diversity, they too often had illiberal consequences. Rather than improving the campus climate, the new policies often provided tools for moral bullies to enforce an ideological orthodoxy that undermines the intellectual freedom and intellectual diversity that are the hallmarks of great universities.

Following in the wake of several other books, this book tells the story of how and why this turn of events took place.¹ But it goes one step further than previous literature: this book explores how faculty, students, and even administrators can retrieve liberal principles of freedom on campus through conscientious political commitment and mobilization. I present two case studies of how such mobilization can make a difference, and two case studies of how the absence of such commitment leaves liberal principles in the lurch. My hope in writing this book is to show how liberal principles of freedom and individualism can be restored in a way that adds integrity to the pursuit of diversity in the contemporary university.

Although this book stresses the threats to academic and intellectual freedom posed by speech codes and related policies, it should be noted that freedom is also threatened by other sources, especially in the post-September 11

¹ There is an extensive literature on the uses and abuses of speech codes and similar policies, most of which is cited in this book. Perhaps the magnum opus of this literature is Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press, 1998).

world. To begin, the modern university has long been engaged in industrial and governmental research that coexists uneasily with the university's erstwhile mission of open discourse. Such research benefits society and brings needed money into the university. But the benefits sometimes come at a price that includes limitations on speech and discourse. This trend has accelerated in recent years as state support has declined while the costs of higher education have escalated. Today, many universities engage in research with government agencies and corporations that require recipients to maintain silence about the nature of the research. Though understandable in certain contexts, the extension of such gag orders poses a challenge to the idea of an open university.²

Terrorism and the reaction to it also have brought about new threats to academic and intellectual freedom. Terrorism in itself is a threat, of course, as such groups as al Qaeda are bent on destroying the very fabric of liberal freedom in the world. On the other side of the ledger, such private groups as Campus Watch have begun monitoring classes and denouncing faculty whose views they consider unpatriotic. And some institutions of higher learning have jeopardized academic freedom by the way they have responded to public pressure exerted against faculty members who made intemperate statements after the September 11 attacks. A recent report by the American Association of University Professors cites several such cases, which have typically involved statements by faculty blaming America for the attacks or denouncing America as the real villain in the world. Such cases have generally been resolved in ways that constitute qualified victories for academic freedom. Despite strong pressure from trustees and the public, no faculty member has lost his job in these cases; but some received reprimands, which do represent formal sanctions.

Two less equivocal victories for academic freedom merit mention. In one case, Professor Nicholas De Genova of Columbia University sparked a firestorm when he called for "a million Mogadishus" during the war in Iraq, leading alumni and more than a hundred members of the United States House of Representatives to call for his dismissal. (Mogadishu refers to the shooting down of a U.S. Army helicopter and the killing and mutilation of U.S. troops in Somalia in 1993, subsequently dramatized in the movie *Black Hawk Down*.) Columbia president Lee Bollinger, who wrote an important book defending free speech in the mid-1980s, publicly criticized De Genova's comments, yet defended his right of free speech, declaring that "under the principle of academic freedom, it would be inappropriate to take disciplinary action." Though perhaps chastened, De Genova was not punished. In another case at City College of New York, Benno Schmidt, vice chair of the

² See, e.g., John W. Sommer, ed., *The Academy in Crisis: The Political Economy of Higher Education* (Transaction Books for The Independent Institute, 1995). On academic freedom, tenure, and the organization of higher education, see Ryan C. Amacher and Roger E. Meiners, *Faulty Towers: Tenure and the Structure of Higher Education* (The Independent Institute, 2004).

board of trustees, intervened on behalf of several faculty members who made similar remarks a few weeks after the September 11 events. Schmidt stated that “the freedom to challenge and to speak one’s mind [is] the matrix, the indispensable condition of any university worth the name.”³ In the end, the board dropped the matter. Schmidt’s intervention supports a major theme of this book: the importance of countervailing power and of strong institutional or political commitment to free speech and academic freedom principles. Indeed, during the 1990s Schmidt gained a national reputation as probably the nation’s leading administrative champion of free speech in the face of the challenges posed by speech codes and similar policies. His stance in the City College case shows that he is not selective in applying his principles.⁴

One case that appears to have been resolved less fairly concerned a professor at Orange Coast College a few weeks after September 11. Several Muslim students accused him of calling them “terrorists” and “Nazis” and of stating that they were similar to the individuals who drove the planes into the World Trade Center. A thorough investigation concluded that there was no basis on which to sustain the charges and that the statements had been misreported. Nonetheless, the administration placed the professor on administrative leave and sanctioned him with a reprimand.⁵ This case appears to fit the pattern of repression that was already taking place under the reign of speech codes, as the professor was accused (apparently unfairly) of offending minority students. Unfortunately, the evidence supports the conclusion that this particular type of repression has continued unabated since the September 11 attacks, as I show in Chapter 1.⁶

Finally, a case the American Association of University Professors (AAUP) calls “grave” involved Sami Al-Arian at the University of South Florida, who was arrested in February 2003 for providing material support for terrorism. Though dismissal would certainly be merited if such claims were substantiated or had a sufficient basis in evidence, the administration decided to dismiss Al-Arian well before such evidence became known in response to the public furor that had arisen surrounding the case. (The furor was triggered by a campaign conducted by Bill O’Reilly on *The O’Reilly Factor* television show.) Both the AAUP and the Foundation for Individual Rights in Education (FIRE) have opposed the university’s actions in this case.⁷

³ “Academic Freedom in a Time of Crisis,” Report of an AAUP Special Committee, p. 20, available at <http://www.aup.org/statements/REPORTS/911report.htm>. The other cases discussed here are from this report.

⁴ On Schmidt’s role as a prominent speech code critic in higher administration, see Timothy C. Shiell, *Campus Hate Speech on Trial* (University of Kansas Press, 1998), pp. 53–66. Bollinger’s book is *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986).

⁵ “Academic Freedom in a Time of Crisis,” p. 20.

⁶ See, e.g., the extensive set of cases in which the Foundation for Individual Rights in Education has been involved, at www.theFIRE.org.

⁷ “Academic Freedom in a Time of Crisis,” pp. 20–21.

Those who maintain that the faculty in these cases should be immune to criticism misunderstand the concept of the marketplace of ideas. Taking verbal heat for making controversial statements is itself an indispensable part of the very “matrix” of free speech. It is part of the give-and-take of debate.⁸ But free speech principles dictate that no one should be sanctioned for saying controversial things in appropriate forums and that institutions with which such speakers are associated should make it clear, as Schmidt and Bollinger did, that such rights will be protected.

Another area of concern is the new array of powers the federal government has amassed in the war on terror. There is little evidence at this point of the effects of these measures on academic and intellectual freedom, but there is reason for appropriate vigilance and concern. The USA Patriot Act and other new laws have significantly expanded the government’s power to search and survey political groups and individuals on campus and elsewhere in the name of national security, and it requires universities to produce enormous amounts of information about personnel and students from foreign countries or who work with a long list of materials and subjects. In addition, laws have greatly broadened the categories of “classified” and “unclassified but sensitive” material and research.⁹

New laws also substantially enhance the power of the Federal Bureau of Investigation and the Central Intelligence Agency to conduct domestic searches and surveillance in the name of national security. Some expansion is necessary, given the fact that al Qaeda and its allies probably have cells inside America’s shores. Only a fool would maintain that government power should not change at all given the present dangers confronting America. On the other hand, the FBI has demonstrated in the past that it is capable of abusing such power, as shown by the highly intrusive surveillance and infiltration of activist groups that it conducted in the 1960s and early 1970s, most of whom posed no danger to national security. (Antiwar groups, civil rights activists, campus radicals, and even environmentalists were among the targets of the FBI program known as COINTELPRO, which stands for “counter-intelligence programs.”¹⁰) Richard Nixon also ordered such searches and surveillance under the contrived guise of national security.¹¹

Unlike the threats concocted in the imaginations of Richard Nixon and COINTELPRO, however, al Qaeda and similar groups are actual threats to the security of the United States. And the federal government rightfully

⁸ See Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993).

⁹ For more extensive discussions of the various measures, see “Academic Freedom in a Time of Crisis”; and David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New Press, 2002).

¹⁰ See Cole and Dempsey, *Terrorism and the Constitution*, pp. 6–7, 73–76.

¹¹ See, e.g., my colleague Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (Norton, 1990), pp. 97, 585–86.

possesses greater power to combat actual threats to national security than it possesses to combat normal crime.¹² But this recognition should not give the national government carte blanche in the war against terrorism. While the line between national security surveillance and traditional domestic law enforcement has legitimately shifted due to our present circumstance, it must nonetheless be carefully monitored and maintained in a meaningful form.

The major problem with the Patriot Act is that it defines “terrorism” very broadly, thereby posing the danger of collapsing the distinct realms of domestic and national security law enforcement altogether. The act expands the definition of terrorism beyond previous antiterrorism laws to cover virtually any group carrying out or planning violence or destruction of property.¹³ Under previous approaches, the government limited the scope of the definition of terrorism to a short list of groups designated by the secretary of state. The new definition could be applied to domestic political advocacy groups engaged in civil disobedience that have nothing to do with the type of international terrorism that now threatens the nation. Americans should not be reassured by the Justice Department’s pledge that “these hypothetical examples are just that – hypothetical, since the authority in the bill would never be used in that way.”¹⁴ Revisions of the Federal Intelligence Surveillance Act (FISA) contribute to the watering down of the distinction between domestic law enforcement and national security enforcement by making it much easier to conduct national security surveillance on the domestic front. According to two knowledgeable commentators, in conjunction with the expanded definition of terrorism, this change “greatly expands the power of federal authorities to apply the relatively loose standards of FISA to investigations of both U.S. citizens and residents that only tangentially touch on national security.”¹⁵ Thoughtful judicial review and conscientious monitoring by the citizenry are called for to maintain an appropriate balance between security and liberty.

As mentioned, this book does not deal with these new threats to liberty; but the lessons I hope to teach are relevant to this domain. After all, the commitment to liberty should be consistent across the board. Although the record is less than sterling, the AAUP report on the status of academic freedom concludes that universities today appear to be doing a better job of protecting controversial speakers from attacks in the name of national security and patriotism than they did during previous eras in which national

¹² In general, see Donald A. Downs and Erik Kinnunen, “A Response to Anthony Lewis: Civil Liberties in a New Kind of War,” 2003 *Wisconsin Law Review*, pp. 385–412.

¹³ USA Patriot Act, 115 Stat. at 376.

¹⁴ Michael T. McCarthy, “Recent Developments, U.S.A. Patriot Act,” 39 *Harvard Journal on Legislation* (2002), pp. 435, 450.

¹⁵ John W. Whitehead and Steven H. Aden, “Forfeiting ‘Enduring Freedom’ for ‘Homeland Security’: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiative,” 51 *American Law Review* 1081 (2002), p. 1103.

security fears were prominent, such as the McCarthy era and the Red Scare following World War I. “Incidents involving outspoken faculty members have been fewer than one might have expected in the aftermath of so momentous an event as September 11. Moreover, with few exceptions – at least one of them grave – the responses by college and university administrators to the events that have occurred have been reassuringly temperate.”¹⁶

Unfortunately, institutions of higher education have continued to repress speech and ideas deemed contrary to the ideology of sensitivity that lurked behind the speech and harassment code movements of recent times. One case representing the continuing presence of progressive censorship took place at San Diego State. A few days after the September 11 attacks, Zewdalem Kebede, an Ethiopian student at San Diego State University who understood Arabic, overheard some Saudi Arabian students laughing about what happened in New York and Washington. Upset, he challenged them and asked them why they did not “feel shame.” A heated exchange ensued, and campus police had to order the students to disperse. In what appears to be a parody of the spirit of progressive censorship, the campus Center for Student Rights wrote Kebede a letter accusing *him* of engaging in “verbally abusive behavior to other students.” Eventually, the case was dropped, but only after Kebede’s actions were reviled in public and a warning letter was placed in his file.¹⁷

During most of the twentieth century, threats to campus free speech and academic freedom came mostly from the right, and from *outside* institutions of higher learning. The new attacks on free thought that arose in the later 1980s turned this pattern on its head: they have arisen from leftist sources *inside* the ivory tower. It is for this reason that the new battles over free speech have sometimes taken on the characteristics of civil wars. The new type of censorship is “progressive” in aspiration, not “reactionary.” What this and other books reveal, however, is that progressive censorship has a way of producing illiberal, repressive consequences that are just as detrimental to open universities and minds as traditional forms of censorship. With the return of the more traditional threats to free thought after September 11, it is possible that the advocates of progressive censorship will realize the errors of their ways for the simple reason that it is their ox that is now being gored once again. It remains to be seen whether this is true.

Whatever the case may be, it is time for all institutions to commit themselves to a more consistent approach that shows respect for free speech, academic freedom, and civil liberty for all members of the academic community,

¹⁶ “Academic Freedom in a Time of Crisis,” p. 19. The “grave” case is the University of South Florida case discussed previously. On past transgressions against academic freedom due to national security concerns, see Anthony Lewis, Kastenmeier Lecture, Address at University of Wisconsin Law School, September 30, 2002. In 2003 *Wisconsin Law Review*, p. 257. For a more specific focus on academic freedom, see Neil Hamilton, *Zealotry and Academic Freedom: A Legal and Historical Perspective* (Transaction, 1998), chs. 1, 2.

¹⁷ See Jason Williams, “Student: Attack Praised,” *Daily Aztec*, October 17, 2001.

regardless of their views or political pedigree. Accepting this responsibility means addressing threats to academic and intellectual freedom that emanate from causes and sources *within* the university, not just those that arise from without, as is the case with threats stemming from the war against terrorism. In this book, I attempt to show how political commitment on campus can help to bring about this retrieval of liberal principles.

The Return of the Proprietary University

The New Politics of Free Speech and Civil Liberty

The lore of history has indelibly linked three words in the public's imagination: "free speech" and "Berkeley." The free speech movement (FSM) at Berkeley witnessed the rise of a mass student mobilization and the first illegal takeover of a campus building – Sproul Hall – in United States history. FSM was the fountainhead of modern student political activism. And at its inception in the 1960s, it was all about free speech – at least in theory.

FSM was originally motivated by the desire to win for students the same rights of free speech and expression that citizens enjoyed in the world outside the realm of academe. This objective later blossomed into a broader movement in American higher education that eliminated or cut back in loco parentis policies, which curtailed student freedoms on the grounds that college students are not yet prepared to assume the full rights and responsibilities of adults.¹ The first major target of student protest at Berkeley was the wall of separation that University of California authorities had erected between politics and the university. In the 1930s University of California president Robert Sproul initiated policies banning such activities as the use of university buildings for holding partisan political exercises. By 1964 students were not permitted to solicit for political purposes or to hand out materials "distributed on University property to urge a specific vote, call for direct social or political action, or to seek to recruit individuals for such action."²

¹ See, in general, David A. Hoekema, *Campus Rules and Moral Community: In Place of In Loco Parentis* (Rowman and Littlefield, 1994).

² Katherine A. Towle, Dean of Students, University of California, Berkeley, "Use of Campus Facilities, Including Entrance at Bancroft Way and Telegraph Avenue and 'Hyde Park' Areas," September 21, 1964, FSM Records. Cited in Robert Post, "Constitutionally Interpreting the FSM Controversy," in Robert Cohen and Reginald E. Zelnik, eds., *The Free Speech Movement: Reflections on Berkeley in the 1960s* (University of California Press, 2002), pp. 401–21.

A 1944 restatement of Sproul's 1936 prohibition expressed the philosophy behind the policy succinctly:

The function of the University is to seek and to transmit knowledge and to train students in the processes whereby truth is to be made known. To convert, or to make converts, is alien and hostile to this dispassionate duty. . . . The University is founded upon faith in intelligence and knowledge and it must defend their free operation. . . . Its obligation is to see that the conditions under which questions are examined are those which give play to intellect rather than to passion.³

Sproul's policy was not dismissive of free speech and inquiry as principles. On the contrary, it was intended, however naively, to protect these goods in the university context from outside forces. Political activists pursue causes, not truth, pitting them in some fundamental sense at odds with the pursuit of truth. Truth has a way of being inconvenient to any cause. As Hannah Arendt wrote, "it may be in the nature of the political realm to be at war with truth in all its forms . . . a commitment even to factual truth is felt to be an anti-political attitude."⁴

The University of California's policy was premised on some key liberal assumptions about the nature of knowledge and the function of the university, assumptions that had held sway since the rise of major research universities in the nineteenth century. These assumptions included the belief that truth and reason are in some fundamental sense distinct – however imperfectly – from such forces as passion, power, and history; and that the university's primary mission is to ensure the academic freedom of properly trained professors and their students. In its most advanced incarnations, the liberal concept of the university embodies a commitment to "cognitive rationality" and "radical individualism," and to the idea of the university as a special, relatively autonomous space where "the cultivation of rational thought and analysis" is valued more than in the outside world.⁵

But the post-World War II era unleashed forces that would tear down the wall of separation between truth and politics at Berkeley and elsewhere. New political and moral obligations cried out for attention, beckoning students to make the university more relevant to society. The civil rights and other progressive movements brought the problems of racism, poverty, and oppression to the fore, while economic and corporate expansion made American

³ Regulation 5, 1944, on file in the FSM collection of the Bancroft Library, University of California, Berkeley. Sproul's statement remains the authoritative pronouncement of the University of California with regard to academic freedom.

⁴ Hannah Arendt, "Truth and Politics," in Peter Laslett and W. G. Runciman, eds., *Philosophy, Politics, and Society* (Basil Blackwell, 1967), p. 113.

⁵ Bridgette Berger, "Multiculturalism and the Modern University," in Edith Kurzweil and William Phillips, eds., *Our Country, Our Culture: The Politics of Political Correctness* (Partisan Review Press, 1994), pp. 15–24. On the historical rise of the special "space" of the university, see Sheldon Rothblatt, *The Modern University and Its Discontents: The Fate of Newman's Legacy in Britain and America* (Cambridge University Press, 1997), ch. 2.

life appear more impersonal and less authentic in many students' eyes. Forces swept through universities that rendered the separation of truth's pursuit and politics seem quaint, if not hypocritical. During the 1950s universities across the land succumbed to loyalty oath controversies and other disputes thrust upon them by McCarthyism. The University of California was afflicted with one of the most intense loyalty oath conflicts, threatening the very viability of Berkeley as an institution. UC president Clark Kerr managed to avert disaster by painstakingly forging a compromise that included the firing of more than one hundred faculty members who were or had been members of the Communist Party, while retaining faculty members who refused to sign the oath simply out of principle.⁶

More broadly, the very complexion of higher education was undergoing a radical transformation. Universities had evolved into what Kerr christened the "multiversity" in a famous book: a large, impersonal, bureaucratic institution without a soul or central mission, a land where faculty research and grants take precedence over the commitment to undergraduate teaching.⁷ The multiversity was awash in military research and other work servicing the corporate state. In addition to targeting free speech policy, FSM turned its wrath on what it considered the moral impoverishment of the modern university as an institution. As FSM leader Mario Savio proclaimed in a famous speech, "There is a time when the operation of the machine becomes so odious, makes you so sick at heart, that you can't take part. . . . You've got to put your bodies upon the gears and upon the wheels, the levers, upon all the apparatus, and you've got to make it stop."⁸

But it was a seemingly minor deed that broke the dike protecting the university from the politics outside. The fall of 1964 was marked by increased student activism in the name of civil rights, social justice, and peace. It also happened to be the time that the university learned that a twenty-six-foot sidewalk area in front of the entry to the campus at the intersection of Bancroft Way and Telegraph Avenue belonged not to the city of Berkeley – as the university had long assumed – but rather to the university itself. In response to this discovery, the university promptly applied its rules against political solicitation and advocacy to the area for the first time. Student political activists were not pleased, as Robert Post relates. "The yawning

⁶ Clark Kerr, *The Gold and the Blue: A Personal Memoir of the University of California, 1949–1967*, vol. 1, *Academic Triumphs* (University of California Press, 2001), chs. 1, 9. On the loyalty oath controversy at the University of California and other campuses, see Ellen W. Schrecher, *No Ivory Tower: McCarthyism and the Universities* (Oxford University Press, 1986).

⁷ Clark Kerr, *The Uses of the University* (Harvard University Press, 1963).

⁸ Savio speech, in Editors of the *California Monthly*, "Chronology of Events: Three Months of Crisis," reprinted in Seymour Martin Lipset and Sheldon S. Wolin, *The Berkeley Student Revolt: Facts and Interpretations* (Doubleday Anchor, 1965), p. 163. This book is an excellent compilation of primary and secondary sources assembled right after FSM's victory in late 1964.

disparity between freedom of speech as enjoyed by citizens and freedom of speech as defined within the institutional confines of the University was thus starkly exposed.”⁹ Student activists and a handful of faculty founded FSM in the name of classic libertarian ends: to tear the wall of differential treatment down in the name of free speech and equal civil liberties. A key FSM platform declared that “civil liberties and political freedoms which are constitutionally protected off campus must be equally protected on campus for all persons. . . . The Administration may not regulate the content of speech and political conduct.”¹⁰

But like most powerful political movements, FSM was complicated and tapped the full range of human motivation and aspiration. Its libertarian side reached out to those with a thirst for knowledge, moral commitment, and meaning. A less libertarian side appealed to communitarian impulses that were not always consistent with individual conscience. The movement was torn between the libertarian and moralistic impulses that Paul Berman analyzes in his book on political movements inspired by the student upheavals of the 1960s, *A Tale of Two Utopias*. Berman draws a line between movements bent on “moral reform” and those devoted to expanding the franchise, citizenship, and liberty. The latter comprised the “movement for political and cultural enfranchisement,” which has historically included labor, abolitionism, civil rights, the women’s movement, and the gay and lesbian movements. Moral reform movements, however, have too often degenerated into coercion and authoritarianism. Liberty movements are ultimately more successful and humane because they simply strive to expand the benefits of freedom to individuals and groups previously excluded by prejudice. Liberty movements are principally “campaigns to lead one sector of society after another upward from the gloom of bottom-place standing in the social hierarchy into the glorious mediocrity of the American middle class.”¹¹

Free speech was important to FSM but mainly as the vehicle by which to address more substantive political concerns, including the nourishment of solidarity.¹² In “We Want a University,” a manifesto dedicated to the students who took over Sproul Hall to further the cause, the authors (calling themselves the “free speech movement”) announced their commitment to a

⁹ Post, “Constitutionally Interpreting the FSM Controversy,” p. 405.

¹⁰ FSM Platform, quoted in *Daily Californian*, November 13, 1964. Cited in Post, “Constitutionally Interpreting the FSM Controversy,” p. 402.

¹¹ Paul Berman, *A Tale of Two Utopias: The Political Journey of the Generation of 1968* (Norton, 1996), pp. 186–87.

¹² FSM steering committee member Jack Weinberg noted, “Free speech has been the issue, and virtually all the FSM supporters identify with the FSM demands. The roots, however, go much deeper. The free-speech issue has been so readily accepted because it has become a vehicle enabling students to express their dissatisfaction with so much of university life, and with so many of the University’s institutions.” Weinberg, “The Free Speech Movement and Civil Rights,” in Lipset and Wolin, *The Berkeley Student Revolt*, pp. 221–22.

new kind of “loving community.” Their language echoed the romantic ideas of such antilibertarian critics of alienated bourgeoisie society as Rousseau, Marx, Weber, Durkheim, Tönnies, and Heidegger:

Although our issue has been free speech, our theme has been solidarity. When individual members of our community have acted, we joined together as a community to jointly bear the responsibility for their actions. We have been able to revitalize one of the most distorted, misused, and important words of our century: comrade. . . .

For a moment on December 8, eight hundred and twenty-four professors gave us all a glimpse – a brief, glorious vision of the university as a loving community.¹³

Many FSM activists yearned for an intense educational experience that moved the mind and the soul. But their commitment to solidarity, comradeship, and organic community also contained elements that could smother individual independence of mind. Before long, part of the FSM ideal led to an insistence on the “right politics” rather than to freedom as a means to attain knowledge and individualistic self-discovery. In an interview, one of the four original faculty advisers to FSM, renowned Berkeley philosopher John Searle, related that things began to turn “within six months”: “We won in December [1964] and in the following semester, by September, there was no question the situation had deteriorated. What happened is very simple and I’m sure it’s a permanent feature of protest movements. Namely, to the extent that they are successful, they are taken over by the extreme elements. The moderate liberal students went back to their studies and the radicals got control.”¹⁴ As the 1960s wore on, free speech itself began to suffer at the hands of political causes. Opinions deemed detrimental to preferred political causes encountered problems in the public forum. As Searle observed, “There were periods when it was really bad. If you were in favor of the war in Vietnam, life was very difficult for you. I wasn’t in favor [of the war], but I can tell you that there was no free speech [on that issue]. You could not have people come on campus to defend government policy. They’d be shouted down. . . . there was no free speech for people who weren’t [what we now call] ‘politically correct.’”¹⁵

In the aftermath of FSM’s great victory in December 1964, Berkeley political scientist Albert Lepawsky wrote an insightful essay that pinpointed the

¹³ Free Speech Movement, “We Want a University” (Dedicated to the 800), in Lipset and Wolin, *The Berkeley Student Revolt*, pp. 209–12. On the darker side of this communitarian revolt against bourgeoisie liberal democracy, see Bernard Yack, *The Longing for Total Revolution: Philosophic Sources of Social Discontent from Rousseau to Marx and Nietzsche* (Princeton University Press, 1986).

¹⁴ Interview with Berkeley philosophy professor John Searle, August 2001. Searle went on to become an administrator and adviser to the chancellor on student affairs. He wrote an anatomy of the 1960s student movements, *The Campus Wars: A Sympathetic Look at the University in Agony* (World Publishing Company, 1971). In this book, Searle wrote that the student movements of the 1960s were often best understood as “religious movements” (p. 5).

¹⁵ Interview with John Searle.

profound choices that Berkeley and other institutions now faced. Lepawsky conceded that political engagement constitutes a proper part of liberal education, especially in a time of democratic ferment. He also acknowledged the alienation generated by the multiversity. But Lepawsky fathomed a contradiction at the heart of FSM that would later come to haunt higher education in America: the status of free speech and thought as universal principles in contrast to the ends of political movements. What if free speech empowered movements deemed detrimental to FSM, the antiwar movement, or civil rights movements? Would free speech then be tolerated? With the traditional belief in the distinctive intellectual ends of the university now rendered suspect, just what were the criteria for determining the proper ordering of priorities? What if political commitments were valued more than what Lepawsky called the “cultivation of the intellectual freedoms”? Sensing an imminent sea change, Lepawsky cautioned that universities would lose their moorings if they allowed political commitment to marginalize the pursuit of truth and the freedom of speech and inquiry:

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.¹⁶

With the political genie out of the bottle at Berkeley, the big question over the next decades would be whether institutions of higher education could promote and sustain the priorities Lepawsky championed. In some telling respects that I discuss, they have failed. Even at Berkeley, one of FSM’s lasting legacies is not free speech but censorship by the students themselves.

New Threats to Free Speech and Civil Liberty

Lepawsky’s concern about politics superseding the “cultivation of the intellectual freedoms” was among the most prescient observations of the FSM crisis. The problem was not that the wall separating politics and the university had come tumbling down. The rise of equal speech rights out of the ashes of *in loco parentis* was inevitable and positive in many respects. Nor need the introduction of politics into the university send chills up educators’

¹⁶ Lepawsky, “Intellectual Responsibility and Political Conduct,” in Lipset and Wolin, *The Berkeley Student Revolt*, p. 272.

spines. Engagement with the political and historical worlds can invigorate the university, especially in the liberal arts.¹⁷ A problem arises only when the intellectual freedoms are consigned to secondary status in situations and contexts that matter.

In March 2000 Berkeley celebrated the FSM legacy in an official ceremony at which the university announced the opening of the Free Speech Movement Café in the undergraduate Moffit Library, part of a \$3.5 million gift to the university from a former librarian. The bequest features a wide assortment of books in the social sciences and humanities, an extensive FSM archive, and the café “where students could discuss ideas and revisit the FSM’s struggle to shape their university.”¹⁸ The heritage of FSM still reigns over the Berkeley campus, above and beyond the FSM Café.

In addition, Berkeley remains a hotbed of student activism. The Sproul Plaza area – the epicenter of the free speech movement – is a veritable bazaar, presenting an astonishing and intriguing array of student groups promoting their political views and wares, including, to name but a few, the Berkeley ACLU; College Democrats; College Republicans; the International Socialist Organization; the Muslim Student Association; various Asian student groups; students against the war on terrorism (Stop the War); students in favor of the war on terrorism (Pro-America); antisweatshop activists; pro-life and pro-choice groups; students advocating affirmative action based on race (highlighted by BAMN, for “By Any Means Necessary”); groups representing various philosophical, political, and religious orientations. In terms of student political activism, the FSM legacy is alive and well.

But not all is well with the deeper spirit of free speech at Berkeley, at least not in the public forum of speakers and print. The public forum has been notably hostile to ideas deemed incompatible with various causes for more than two decades, spawning several prominent incidents of suppression at the hands of counterdemonstrators. And Boalt Law School has witnessed some political campaigns that have suffocated open and honest discourse, especially in the wake of the passage of Proposition 209 in 1996, which eliminated race-based admissions in the state university system. The situation at Boalt in 1997 and 1998 motivated several students from across the political spectrum to publish a set of essays in an unusual book designed to provoke a discussion on the status of open and honest inquiry in the school – a hope

¹⁷ See Jose Ortega y Gasset, *Mission of the University* (Norton, 1966), pp. 88–89. Ortega was a great defender of the university’s distinctive intellectual mission, which included engagement with the world. “Not only does [the university] need perpetual contact with science, on pain of atrophy, it needs contact, likewise, with public life, with historical reality, with the present, which is essentially a whole to be dealt with only in its totality. . . . The university must be in the midst of real life, and saturated with it.” By “science,” Ortega means higher theoretical and philosophical thought.

¹⁸ Martin Roysher, “Recollections of FSM,” in Cohen and Zelnik, *The Free Speech Movement*, p. 140.

that was disappointed. One of the book's editors described the reason for the manifesto in his own essay:

Many Boalt students act as if their education is threatened whenever any conservative view is expressed. One conservative opinion per class is more than they can stand. . . . almost any time a lone conservative tried to raise his or her voice during my years at Boalt, things got ugly. Fists, rather than hands, were raised. Eyes rolled. Glares flashed. Intolerance radiated. Diversity of mind was declared dangerous and unwanted. . . .

What excited me most about attending law school at UC Berkeley was its legacy of being an intellectually free university. I presumed Boalt Hall would be the ideal place to expose myself to a true diversity of perspectives. . . . I was angered that, in seeking truth, I was denied an encouraging environment in which to explore my view.¹⁹

Another example is the manner in which Berkeley – along with some other schools – reacted to the now famous advertisement that conservative journalist-provocateur David Horowitz sent to student papers in late February 2001, 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 (its text is reproduced in an appendix to this book). Of the fifty-two student papers that received the ad, twenty-seven rejected it outright (which was within their editorial rights), twelve ignored it, and thirteen published it. Of these thirteen, six later apologized, often under great duress. At Berkeley, 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. It was as if the university consisted of a giant defense mechanism against unwanted ideas. 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 limited by hostile audiences. I discuss some of these cases in a later chapter.

Throughout all of these incidents, a salient fact stands out: no organized group of faculty and/or students has arisen at Berkeley to resist or criticize what has happened to free speech in the public forum.

As is well known, Berkeley is not an isolated case of the restriction of liberty on America's campuses in recent years. Although they remain complex institutions in which a variety of objectives and values compete, institutions of higher learning have been busy since the later 1980s circumscribing and restricting the freedom of speech and due process rights in the name of

¹⁹ David Wienir, "The History," in David Wienir and Marc Berley, eds., *The Diversity Hoax: Law Students Report from Berkeley* (Foundation for Academic Standards and Tradition, 1999), pp. 19, 34. Interview with David Wienir, June 2001.

promoting a variety of causes, including promoting civility and making the university a more hospitable place for minorities and other groups considered to be oppressed. Inclusiveness is a laudable goal, as is the respectful treatment of students and colleagues. As presently envisioned and practiced, however, the so-called diversity movement has too often restricted the diversity of ideas on campus and has violated individual rights. *The Shadow University: The Betrayal of Liberty on America's Campuses* by Alan Charles Kors, a University of Pennsylvania history professor, and Harvey Silverglate, a noted civil liberties attorney, is the definitive work chronicling this state of affairs. According to Kors and Silverglate, there has arisen a “shadow university,” composed of select faculty, students, and administrators, that too often forsakes the 1960s promise of openness and intellectual challenge in favor of the suppression of liberty in the service of political causes. In the name of promoting civility and diversity of race, gender, sex, and culture, too many institutions of higher learning have fostered a rigid orthodoxy of belief:

The *best* aspects of that decade's [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.²⁰

In 2000 Kors and Silverglate established the Foundation for Individual Rights in Education (FIRE) in Philadelphia to provide legal and policy assistance to individuals and groups whose rights have been threatened on campuses across the country. The major problems have concerned censorship, due process violations, unequal treatment under the law, and ideological indoctrination in various contexts. FIRE's executive director, Thor Halvorssen (a former student of Kors), said in 2001 that FIRE receives at least a dozen specific requests for assistance per day. An anonymous e-mail to Halvorssen from a high-level judicial administrator in summer 2001 suggests the considerable extent of the problem in the realm of due process and adjudication:

I spoke with you last week for a while before I got cut off (I was on a pay phone). I am a senior level administrator and director of judicial affairs at a top 10 institution, and have information that I would like to share with you. Believe me, FIRE has barely scratched the surface regarding university/college judicial affairs, and while reading the testimonials on your website is interesting, I notice that none are from

²⁰ Alan Charles Kors and Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press, 1998), p. 3.

professionals in the field. I believe that information from someone in the field would add greater legitimacy to your good work. Obviously, I don't want to lose my job, but after many years in the field, I believe the public needs to know what really goes on, from a perspective you rarely, if ever, hear from. Can you suggest a next step?²¹

In 2003 FIRE commenced a campaign to challenge speech codes and the suppression of free speech throughout the country. One indicative case dealt with what happened at California Polytechnic Institute in the spring of 2003. A student was found guilty of "disruption" for posting a flier in a public area that offended some students. The poster advertised an upcoming speech by Mason Weaver, author of the 1998 book *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 CPCR [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 those." FIRE entered the case in April. After a great deal of jockeying back and forth, the case was finally settled in May 2004, when the university agreed to expunge the conviction from the record and to pay the student \$40,000 in legal fees. The case was settled because of the pressure exerted by FIRE on the student's behalf.²²

Throughout this book we encounter reasons for why this retreat of civil liberty has taken place. The most obvious reason is that the key assumptions undergirding respect for civil liberty – respect for individualism, tolerance of political dissent, and a belief in standards of truth independent of politics and power – have come under suspicion as ostensible obstacles to social justice. But something unexpected happened on the road to a new social justice: a new form of injustice arose.

The Purpose of This Book and My Change of Mind

Much has been written about the proliferation of speech and harassment codes, compromises of due process, and political or ideological indoctrination programs that have assumed prominent roles throughout higher education in recent years. The main concern of this book is to focus on something that has not yet been directly addressed: the politics of resistance and mobilization against the illiberal practices associated with such policies. A successful free speech and civil liberty movement at the University of Wisconsin,

²¹ E-mail to Thor Halvorssen of FIRE, July 2001. Interview with Thor Halvorssen, July 2001.

²² "Cal Poly Student Punished for Posting Flier: Public University Gives Veto to Students Who Claim 'Offense,'" on FIRE's website at www.theFIRE.org; "Cal Poly Settles Suit by Student," *Los Angeles Times*, May 6, 2004.

Madison, with which I have been associated has revealed the ways in which an active nonpartisan faculty-student alliance can make a difference when rights are threatened. Such mobilization can protect and promote rights that are essential to the university's most important mission, which is the Socratic pursuit of truth and truthfulness.

The University of Wisconsin and the University of Pennsylvania are two of the few institutions that have witnessed such political mobilization and reversal of restrictions of liberty that were begat in the late 1980s and the 1990s. The situation has probably improved at other institutions as well, if only because the energy behind the suppression of liberty might have lost some of its edge. But Wisconsin and Penn are rare examples of actual reversals at the hands of political action. Under the leadership of Alan Kors, Penn's liberalization movement fits an entrepreneurial model, whereas Wisconsin's movement represents a broader political mobilization. Nonetheless, restrictions on speech and civil liberty continue at other institutions. As of this writing, Wisconsin and Penn remain essentially isolated cases of successful recapturing of liberal principles of freedom.

This book presents and analyzes the three major reasons why this state of affairs has arisen:

1. Key changes in the intellectual, pedagogical, political, and administrative culture.
2. The lack of meaningful political mobilization on the part of faculty and students to protect free speech and liberty interests. This problem represents a failure of *commitment*.
3. The lack of knowledge in the intellectual and public life of universities concerning the nature of basic constitutional rights and the reasons for taking constitutional liberty seriously. This problem is a failure of *education*.

My observations are sharpened by the fact that I was originally a supporter of speech codes and related policies. In fact, as a faculty senator I voted for broadly worded faculty and student speech codes enacted at the University of Wisconsin in 1988. Led by our new chancellor, Donna Shalala, the university assumed the mantle of national leadership in the pro-speech code movement. But events later caused me and others to change our minds about the wisdom of such policies and to question the university's course.

I was hired at Wisconsin in 1985 largely on the basis of my first book, *Nazis in Skokie*, which dealt with the famous Skokie free speech controversy of 1977-78, a case that still echoes in the lore of constitutional law and politics. I maintained that the courts erred in extending First Amendment protection to a Nazi group (the National Socialist Party of America) to hold a rally in Skokie, Illinois, the home of several hundred Holocaust survivors. I argued that "targeted racial vilification" does not merit First Amendment

protection because of the trauma and moral harm it inflicts.²³ *Nazis in Skokie* represented an attempt to balance free speech rights with a communitarian concept of justice. Because of this view, I later supported speech codes and related policies, in part because I still trusted university administrators to find a way to strike a reasonable balance.

My ideological turnaround was the culmination of a long process of observing, thinking, and interacting with colleagues and students. As my teaching and writing evolved over time, I became more suspicious of administrative restrictions on speech, especially as I learned about applications of the codes and related policies at Wisconsin and elsewhere to situations they were not supposed to cover. I also began to appreciate the importance of a principle championed by journalist Jonathan Rauch, an eventual ally of the movement at Wisconsin who wrote a small classic book published in 1993 on free speech, *Kindly Inquisitors: The New Attacks on Free Thought*. Rauch argues that a new ethic has won allegiance in many institutions that is inimical to intellectual freedom – the “humanitarian principle,” which dictates that one should strive above all not to offend others, especially the oppressed. The West’s indifferent reaction to threats by militant Muslims against Salman Rushdie for publishing the book *Satanic Verses* in the late 1980s “showed how readily westerners could be backed away from a fundamental principle of intellectual liberalism, namely that there is nothing whatever wrong with offending – hurting people’s feelings – in pursuit of truth.”²⁴ The right not to be offended was now ascendant in many domains of American society, especially its universities, where it was linked to various other causes. The problem is that the pursuit of truth and intellectual engagement wither and die if we grow afraid to offend or anger by presenting our honestly held ideas and beliefs – especially when the antioffense principle is enforced by sanctions backed by administrative power.

By the early 1990s it was becoming evident how the speech codes and the ideologies that they represented had hampered intellectual honesty. Many colleagues and students related that they felt as if they were walking on eggshells in class when talking about racially and sexually sensitive topics – even though these were among the most important social and political topics of our time. In addition, by the early 1990s a small number of faculty had become aware of some very questionable investigations that had taken place under the aegis of the faculty speech code – investigations that had been conducted in a manner suggesting an ideological agenda. These cases gave a human face to the abstract claims that the code compromised civil liberty.

²³ *Nazis in Skokie: Freedom, Community, and the First Amendment* (University of Notre Dame Press, 1985). See *Collin v. Smith*, 578 F. 2d 1197 (7th Cir. 1978); *Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (1978).

²⁴ Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993), esp. p. 22.

Another major factor that influenced my thinking was my students. Students whom I respected ultimately convinced me that broad speech codes (or any speech codes, for that matter) were a bad idea, especially for *students*. Many code advocates assumed that students needed the administrative apparatus to support their self-esteem, psychological well-being, and identities. This assumption represented a return of *in loco parentis* to campus in a new, politicized guise after its banishment in the 1960s. Many pro-free speech students – often women and members of minority groups – considered this assumption demeaning. Such students considered themselves responsible young adults who are capable of dealing constructively with the rigors of constitutional citizenship and free speech.

Faculty colleagues who valued intellectual and academic freedom were also influential. These individuals included those who fought back after suffering through some questionable investigations, and those who provided the vehicle for mobilization that ultimately gave civil liberty concerns public voice and a measure of power. Such colleagues in mobilization demonstrated the importance of organizing and being willing to accept the substantial investments of time, effort, and peace of mind that successful political action – especially political action that goes against the grain – demands.

Interactions with such noteworthy students and faculty made me appreciate the liberal republican ethic that holds a special place in First Amendment theory and practice. Liberal republicanism envisions a balance between individualism and active public citizenship, stressing such virtues as self-reliance, public-spiritedness, the willingness to face uncomfortable truths, and intellectual and moral courage. Justice Louis Brandeis championed this concept in his famous concurring opinion in *Whitney v. California* (1927). “To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.”²⁵

Finally, the illiberal tendencies of many pro-censorship policies became troubling. In addition to campus incidents, new literature dealing with theories of free speech began moving considerably beyond the balance I had struck in *Nazis in Skokie*. Such thinking as critical race theory and the anti-pornography movement of Catharine MacKinnon identified as the enemy the principles of individualism, autonomy, and state neutrality in relation to

²⁵ *Whitney v. California*, 274 U.S. 357 (1927). See Pnina Lahav, “Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech,” 4 *Journal of Law and Politics* 451 (1987). Of course, free speech doctrine is predicated on other theories as well, some of which Brandeis also addresses – for example, truth, self-fulfillment, safety valve for society, protecting dissent, self-government, distrust of government, and antithought control.

the content of expression. Such thinking promoted suspicion of individual freedom as a remedy to inequality.²⁶

The Importance of a New Kind of Politics

The central thesis of this book is simple and seemingly obvious: the preservation or restoration of free speech and basic civil liberty on campus depends upon political mobilization and commitment that give these principles public presence on campus. Although freedom of inquiry and speech remain deeply entrenched beliefs in most major institutions, these principles will not flourish in the cauldron of modern university politics unless they are backed by the power or presence that only political commitment can bestow.²⁷ Failure to act surrenders the public realm to movements with other agendas. Academic and intellectual freedom are not manna from heaven. A brief look at recent history suggests the difference that mobilization can make.

Examples

At Penn, the work of Alan Kors, Michael Cohen, and a small cohort of supporters brought about institutional change in the mid-1990s that was virtually unthinkable in the previous decade, in 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 a 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 buffalos" 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.) Although the term "water buffalo" was widely understood to have a nonracial meaning, Penn proceeded to prosecute the case. Kors became Jacobowitz's adviser and, after much struggle, managed to turn the case into a national cause célèbre. Kors then leveraged the impact of the case to effectuate stunning institutional

²⁶ On how much of critical race and other antiliberal theory in law leads to authoritarianism and other problems, see Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford University Press, 1997). On MacKinnon's antipornography movement, see Donald Alexander Downs, *The New Politics of Pornography* (University of Chicago Press, 1989), and Wendy McElroy, ed., *Liberty for Women: Freedom and Feminism in the Twenty-first Century* (Ivan R. Dee for The Independent Institute, 2002).

²⁷ On the necessity of power to the actualization of rights, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), esp. p. 270. Donald A. Downs, "Human Rights/Civil Liberties," *International Encyclopedia of Social and Behavioral Sciences* (Pergamon/Elsevier, 2001).

change at Penn that included the abolition of the speech code and ideological changes in student orientation programs.

Wisconsin provides a different kind of example. When the faculty senate promulgated a student and a faculty speech code in 1988, no organized opposition arose to challenge or influence the procode movement that had swept the campus. The politics and debate were remarkably one-sided. Timothy Shiell writes about how the lack of opposition led to questionable codes at many schools:

[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."²⁸

But as individuals learned about several improper investigations at Wisconsin under the aegis of the codes in the 1990s, they began to scrape together a mobilization movement that culminated in the formation in 1996 of an independent faculty group, the Committee for Academic Freedom and Rights (CAFR). CAFR has served as the home base for several political and legal actions that have brought about Wisconsin's version of surprising change, including abolition of the faculty speech code by a faculty senate vote in 1999, some due process reform in 1999, the dismantling of a system of anonymous complaint boxes in 2000, the legal defense of individuals whose rights have been jeopardized, and the rise of a political environment that is considerably more conducive to civil liberty on campus. In fact, CAFR served as a model for FIRE, as Harvey Silverglate was impressed with its organization and politics when he visited Wisconsin in 1999. When John Wiley became chancellor in 2000, he proved to be noticeably friendlier to civil liberty concerns. The Wiley administration has taken some important civil liberty claims seriously and has striven to find a balance between sensitivity and free speech that takes account of the latter.

The faculty speech code abolition at Wisconsin was the most important victory in terms of setting a new tone for the campus. It also garnered considerable national recognition, receiving coverage in such media as *Wall Street Journal*, *New York Times*, *Boston Globe*, *National Journal*, *Associated Press*, *Village Voice*, *Reason*, *Liberty*, and National Public Radio, as well as the

²⁸ Timothy C. Shiell, *Campus Hate Speech on Trial* (University of Kansas Press, 1998), p. 55. See also Samuel Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press, 1994), p. 2.

Chronicle of Higher Education, which published a cover story and several follow-up articles.²⁹

The movements at Wisconsin and Penn had to undertake the difficult task of reversing already entrenched policies. The fate of speech codes at Duke University presents an instructive example of political resistance *before* the adoption of codes. Advocates of a speech code were gaining headway when Duke considered adopting a code in 1989, and adoption seemed inevitable until the vice president of student affairs, who had formed a special committee with representatives of various groups, brought a noted constitutional law professor, William Van Alstyne, into the process. The former legal counsel to the American Association of University Professors, Van Alstyne stopped the code movement dead in its tracks when he raised serious questions about its advisability. His prestige on campus gave his claims great weight. According to David P. Redlawsk, “Members of the faculty familiar with the speech code process attributed the lack of a code solely to the efforts of William Van Alstyne. . . . [At a crucial meeting] Van Alstyne ‘was astounded at the hostility’ he felt at the meeting, according to [physics professor Lawrence] Evans, so he asked that examples of incidents be supplied. When such incidents were not forthcoming, it became clear that the proposed code could not be justified.”³⁰ It is often far easier to stop a controversial measure while it is evolving than to reverse a policy already enacted. Penn and Wisconsin had to surmount the latter obstacle, whereas Van Alstyne’s intervention spared Duke that difficulty.

The literature and debate on speech codes and related policies have focused on the question of constitutional rights enforceable by courts. This approach is important, but it downplays the importance of politics. Court cases are expensive, and courts have limited enforcement powers. More important, reliance on courts can diminish the development of political skills and mobilization dedicated to persuasion and changing minds. Judicial orders might “oblige” one to obey the law, but they do not always make one feel “obligated” to obey. (In the latter case, one obeys because one feels a normative commitment to do so.)³¹ Rights won through politics and legislation are more likely to change people’s thinking because majorities have to be convinced to agree. In addition, political action and networking encourage

²⁹ See, e.g., “Rethinking Limits on Faculty Speech: U. of Wisconsin Debate Reflects Changing Views of Political Correctness and Academic Freedom,” *Chronicle of Higher Education*, October 2, 1998, p. A1.

³⁰ Redlawsk, “‘We Don’t Need No Thought Control’: The Controversy over Multiculturalism at Duke,” in Milton Heumann and Thomas W. Church, eds., *Hate Speech on Campus: Cases, Case Studies, and Commentary* (Northeastern University Press, 1997), p. 217.

³¹ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 1991); on the distinction between being obliged and being obligated, see H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961).

people to build alliances and infrastructures that can endure over time.³² This is one reason members of the Wisconsin free speech movement were ultimately glad (despite their surprise and initial chagrin) that the Wisconsin Civil Liberties Union turned down their request that it take the faculty speech code to court. Because the movement was forced to fight politically, it had to forge a coalition that changed the complexion of the campus climate for free speech and civil liberty. Members of the movement were not so forgiving about the WCLU's later refusal to even back their case politically, however. This was unfortunate, for the WCLU was the organization that litigated the student speech code at Wisconsin; and its parent, the national American Civil Liberties Union, had a well-earned reputation as a defender of free speech on campus and in other domains.³³

Counterexamples

Berkeley and Columbia provide two illuminating counterexamples to Penn and Wisconsin in the politics of mobilization. In 2000, for example, the Columbia University senate enacted questionable new procedures for the adjudication of sexual misconduct cases. Although reform was needed, the new policy discarded many essential aspects of due process. When FIRE and its allies made public what Columbia had wrought, public opinion was overwhelmingly negative. In exposing the new policy in October 2000, the *Wall Street Journal* (acting in conjunction with FIRE) 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.”³⁴

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. Two professors and one student

³² See Robert McKeever, *Raw Judicial Power? The Supreme Court and American Society* (Manchester University Press, 1993), esp. p. 279; and Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999). See also Jeremy Waldron’s “jurisprudence of legislation” in *Law and Disagreement* (Oxford University Press, 1999), chs. 1–6.

³³ The ACLU’s president, Nadine Strossen, has written extensively against speech codes and other restrictions of free speech. See, e.g., Nadine Strossen, *Defending Pornography: Free Speech, and the Fight for Women’s Rights* (New York University Press, 1995).

³⁴ “Due Process at Columbia,” *Wall Street Journal*, October 4, 2000, p. A26. The two exceptions were astronomy professor James Applegate and law professor (and now federal judge) Gerard Lynch, who spoke strongly against the policy in the penultimate senate meeting in February 2000. See Columbia Senate Notes, February 5, 2000; interviews with Applegate and Lynch, June 2001.

courageously opposed the policy in the Columbia University senate before the vote, but their opposition was too little too late. 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 percent of the student body, symbolizing the “bureaucratic red tape” that had bedeviled the previous system. It was only after the senate adopted the policy in February 2000 that the campus ACLU entered the fray. 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.’”³⁵ Similar problems have beset the status of free speech in the public forum at Berkeley, as I mentioned earlier. No free speech or civil liberty resistance or mobilization exists at either Berkeley or Columbia.

The Return of the Proprietary University

Given their moral charters to promote open discourse and the pursuit of truth, universities should be the last institutions in American society to surrender to a homogeneity of opinion. Yet that is what has happened too often in the drive for diversity, which is one of the motivating forces behind the speech and harassment policies that have come to play such prominent roles in higher education in America.

Ethnic and cultural diversity are among America’s greatest strengths, and need to be fostered and respected. A proper education must expose students to the actual diversity of our country; and encountering individuals of different races and backgrounds broadens intellectual horizons and contributes to citizenship. But diversity properly understood also includes numerous categories beyond those of race, gender, and sexual orientation, such as geography, philosophy, aesthetic interests, athletics – one could name a virtually infinite number of things. True diversity respects individual differences in addition to cultural or racial differences and embraces the diversity of ideas and ideologies.³⁶ Of course, race, ethnicity, sexual orientation, and gender are aspects of identity about which all individuals should be proud. And ascriptive differences are often the basis of discrimination and differentials in power. The problem arises when identity politics uses these categories of

³⁵ Lawrence Kaplan, “Columbia Blues,” *Washington Diarist*, *New Republic*, December 4, 2000, p. 58. On these issues, see SAFER’s website at www.columbia.edu/cu/safer, and FIRE’s website at www.theFire.org.

³⁶ My thinking in this regard is similar to that of Peter Wood in his recent book, *Diversity: The Invention of a Concept* (Encounter Books, 2003). Wood distinguishes between “actual” and “imagined” diversity.

difference to marginalize differences *within* identity groups and to thwart the process of individual self-determination and discovery. In other words, diversity works best when it is allied with liberal principles of freedom – not when it conceives of liberal freedom as an enemy.

As presently conceived, however, the diversity movement focuses too obsessively on what divides citizens and on racial and ethnic proportionality and differences. This understanding of diversity has not always been friendly to intellectual diversity and the pursuit of truth. Its practitioners often classify individuals too exclusively according to such ascriptive categories as race, gender, and sexual orientation, thereby downplaying the freedom to define oneself according to one's free self-determination. And for reasons that I elaborate in the next chapter, adherents of the movement have often proved to be surprisingly paternalistic, construing individuals as too weak to withstand the rigors of critical discourse. (Peter H. Schuck argues in a recent book that diversity efforts are more successful and consistent with liberty when they arise from the spontaneous choices of the citizenry rather than being imposed by government or authorities in a top-down manner.)³⁷ Much of the censorship we encounter in this book has been motivated by the desire to promote diversity as presently understood. In such cases, commitment to the pursuit of truth has taken a back seat to the promotion of ostensible diversity interests. The point is not to abandon diversity for freedom but rather to reconceive of diversity in a manner that is decidedly more consistent with liberal principles of freedom. Schuck is one of a growing list of authors who presents promising alternatives to the present conception. Wisconsin has begun to fashion this type of balance, as the administration and campus community have absorbed some of the principles and lessons promoted by the free speech movement on campus. Rather than opposing diversity as a goal, the movement has striven to broaden the conception of diversity to make it more consistent with traditional liberal norms.

When universities pursue diversity in an unprincipled fashion, they have too often succumbed to dishonesty about such things as their admission practices and their commitment to free speech. In some cases, officials have camouflaged admission policies that conflict with public opinion concerning the proper use of racial preferences. (Many schools have refused to make public relevant nonpersonal information about admissions, for example.)³⁸

³⁷ Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Harvard University Press, 2003).

³⁸ At Michigan, it took a lawsuit by philosopher Carl Cohen under the Freedom of Information Act to get the university to make known its criteria for admissions. This led to the Supreme Court case addressing the constitutionality of using racial preferences in admissions. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Wisconsin Association of Scholars has filed suit to get the University of Wisconsin to disclose its criteria for admissions, which is pending as I write. *J. Marshall Osborn and Center for Equal Opportunity v. Board of Regents of the University of Wisconsin System*, case no. 99-CV-2958.

In other cases, officials declare their support of free speech, while they endorse censorship of speech deemed politically incorrect. It is hard to contest the claim of sociologist Peter Wood: “Diversity as we have come to know it is seldom a friend of the pursuit of truth. The double standards in admissions tempt colleges and universities into public deception; unwanted disclosures prompt censorship, and campus discussions chill into polite avoidance of some hard and potentially embarrassing topics.”³⁹

One reason that the diversity movement as presently conceived has too often spawned policies and actions detrimental to the pursuit of truth and intellectual honesty is because the movement has failed to question its own motives, which are often construed as beyond moral reproach. The new administrative elite and campus leadership that have arisen since 1980 consist of persons with similar beliefs and visions concerning the promotion of diversity.⁴⁰ This uniformity of opinion is detrimental to universities because the right measure of self-doubt is essential to the Socratic pursuit of truth. The Socratic method consists of a dialectic of continuous questioning among critical thinkers that proceeds in the spirit of the sifting and winnowing of ideas. Dana Villa provides insight into the need for criticism in his book, *Socratic Citizenship*. “The implication of Socratic examination is that virtually every moral belief becomes false and an incitement to injustice the moment it becomes unquestioned or unquestionable.” Socrates “suggests that civic virtue and morals, unaccompanied by intellectual hygiene – by a thinking which dissolves opinions rather than solidifying them – are the invariable accomplices of injustice and immorality.”⁴¹ This point is consistent with the principle of checks and balances in the Constitution. The framers institutionalized checks and balances not because they feared the clash of different interests but because they feared majority tyranny. The danger to public justice lies not in factional conflict but in the undue homogeneity of opinion.⁴²

In its famous 1915 Declaration of Principles on academic freedom, the American Association of University Professors contrasted the mission of the new types of research universities that had grown to prominence with the mission of more traditional colleges and universities. The new research institutions were dedicated to individual freedom in the areas of inquiry and research, teaching, and extramural utterance and action. On the contrary, the older institutions existed to preserve the values – often religious in

³⁹ Wood, *Diversity*, p. 136.

⁴⁰ See, e.g., Frederick Lynch, *The Diversity Machine: The Drive to Change the “White Male Workplace”* (Transaction, 2002); Alan Wolfe, “The New Class Comes Home,” in Karzweil and Phillips, *Our Country, Our Culture*, pp. 283–91.

⁴¹ Dana Villa, *Socratic Citizenship* (Princeton University Press, 2001), pp. 23, xii.

⁴² See Paul Eidelberg, *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* (Free Press, 1968), p. 153.

nature – of their founders and trustees. Such “*proprietary institutions*” were devoted “not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar’s calling, who provide the funds for their maintenance.”⁴³ The older proprietary university was concerned with preserving a certain vision of the world, not with critical inquiry. It fell into secondary status in the twentieth century after science prevailed in its long struggle with religion to become the primary source of intellectual truth.⁴⁴ Today we could be witnessing a new chapter in the politics of higher education, as the tenets of academic freedom compete with the perceived requirements of diversity.

Although it emphasizes societal transformation rather than conservation, in many telling respects the new vision of the university represents a return to the proprietary university of yore. The new version devalues intellectual conflict in favor of an agenda extrinsic to the pursuit of truth and has ushered in new *in loco parentis* policies that now take the form of speech codes and paternalistic student orientation. Whereas old student conduct codes attempted to reinforce manners, the new codes attempt to influence students’ attitudes and thoughts through various kinds of pressure. The new concept of the proprietary university is not necessarily predominant, but it has attained enough status to pose serious challenges to the liberal notion of the university once envisioned by the AAUP.

The Mobilization of Resistance and Change

A comparison of the political contexts at Berkeley, Wisconsin, Penn, and Columbia illustrates the importance of political mobilization to empower checks and balances. It also shows how such mobilization can lead to surprising results if the right circumstances arise. Sociologist-economist Timur Kuran presents a theory of social and political change that is remarkably pertinent to what happened at Wisconsin and Penn. Often radical 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 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. They will

⁴³ General Report of the Committee on Academic Freedom and Academic Tenure (1915), American Association of University Professors. In William Van Alstyne, ed., *Freedom and Tenure in the Academy* (Duke University Press, 1993), appendix A.

⁴⁴ For an insightful overview of the historic conflict between science and religion in higher education, see George M. Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (Oxford University Press, 1994).

speaking their truth only if they believe that it is not futile to do so.⁴⁵ One of the examples that Kuran discusses is the rise and maintenance of speech codes on college campuses. At Wisconsin, codes persisted for years even though – as we later discovered – many faculty and students opposed them.

Preference falsification means “the act of misrepresenting one’s genuine wants under perceived social pressures.” Through preference falsification, people suppress their true preferences, thereby compromising their human dignity and the process by which truth and social change are forged. “The status quo, once sustained because people were afraid to challenge it, will thus come to persist because no one understands its flaws or can imagine a better alternative.”⁴⁶ Kuran’s thesis is similar to John Stuart Mill’s claim that even absolute truths need to be challenged lest they lose their vitality. It also calls to mind Allan Bloom’s penetrating observation that “[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.”⁴⁷

Kuran paints what at first seems a pessimistic picture of how fear of reprisals and the lack of diverse viewpoints in the public sphere promote living with a lie. But he also portrays how change can suddenly erupt when background opposition is intense and an event or activist group sparks an explosion of change in people’s thinking, igniting 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.⁴⁸

Public authority can be a kind of house of cards, sustained by a fragile underlying foundation of support. In such situations, sudden and radical change can happen even in the absence of directed mass mobilization. Seemingly minor events or the activities of small groups can generate a breakthrough. 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

⁴⁵ Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* (Harvard University Press, 1995).

⁴⁶ *Ibid.*, p. 19.

⁴⁷ Allan Bloom, *The Closing of the American Mind: How Higher Education Has Betrayed Democracy and Impoverished the Souls of Today’s Students* (Simon and Schuster, 1987), p. 249.

⁴⁸ Kuran, *Private Truths, Public Lies*, p. 20.

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."⁴⁹

Although neither Penn nor Wisconsin has witnessed the kind of comprehensive reversals that Kuran portrays in his book, his theory nonetheless fits well with what took place at those schools on their way to abolishing their respective speech codes. The Wisconsin story includes an activist core that was able to generate a bandwagon effect under propitious circumstances. The eventual breakthrough led to the establishment of a new set of public priorities that helped win the code battle, and which remains competitive in the public realm. That said, the Wisconsin case differed from the Kuran model in two respects. First, the administration did not topple (at Penn, the "water buffalo" case did in effect lead to the administration's demise). Second, change came about gradually, rather than all at once. But the movement became credible in circumstances that are otherwise similar to the process that Kuran describes. 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.'"⁵⁰

In the rest of this book, I discuss cases involving the success and failure of pro-civil liberty movements to develop on campus. The case studies highlight how failure to mobilize has left important free speech and civil liberty interests in the lurch.

The Outline of the Book

I address the challenge to freedom that has beset institutions over the course of the later 1980s and the 1990s, and how we could alleviate this challenge through the right kind of political action. This work has implications for the study of higher education, law and politics, and political and legal theory. I hope that it also has something to say about human nature and human action under pressure.

Before I move to the cases, I set the stage in the next chapter by examining the political, cultural, institutional, and legal forces that contributed to the

⁴⁹ Ibid., pp. 49, 252. This notion is similar to Hannah Arendt's notion of "action" as a product of politics and human effort that cannot be predicted by science or understandings based on scientific cause and effect. Arendt, *The Human Condition* (University of Chicago Press, 1958).

⁵⁰ Rauch, "An Earthquake in PC Land," *National Journal*, March 6, 1999.

rise of speech codes and related policies. The new policies were the extension of interrelated theories that addressed education, race and gender relations, the distribution of power in society, and the nature and impact of public and private speech. To understand codes and related policies fully, the reader must have an understanding of the assumptions from which they arose.

In Part II, I present four case studies that show different forms of the politics of civil liberty on campus. I discuss the politics of the Columbia University sexual misconduct policy; the status of free speech in the public forum at Berkeley and in Boalt Law School during the 1997–98 academic year; the turnaround that Kors engineered at Penn in the wake of the water buffalo case; and the politics surrounding the abolition of the faculty speech code at Wisconsin in 1999, and the institutional consequences of that victory. In a final chapter in Part III, I draw conclusions from the consideration of cases. My analysis deals with questions of politics and policy. Here I develop a model of mobilization for civil liberties on campus and advance some thoughts about what I consider the proper limits of expression in institutions of higher education.

My methods and my own role as a participant in the subject of my inquiry deserve a word of explanation. I interviewed key individuals involved in the politics of the relevant institutions, and I sifted and winnowed primary and secondary data. Concerning my own role in the drama of Wisconsin's speech codes, at appropriate points I discuss my thoughts and experiences when they serve to illuminate the thought processes and interactions of my allies and me as we fought this battle. Because I have been a leader of the University of Wisconsin free speech and civil liberty movement, my observations and perspectives are part of the story.

Along these lines, the reader will note a change of tone in the two chapters on the Wisconsin case. Although I sought to be fair and objective, I found it impossible to divorce completely my own views as a participant from the chronicling of the story. This fact has both positive and negative aspects. In my defense, my personal involvement in the case gave me a vantage point concerning the politics and motivations of key actors that I obviously did not possess in the other case studies that I present. I ultimately decided that it would be best to maintain some personal perspective in order to illustrate the way such cases call forth and impact participants' feelings, motivations, and thoughts. The drawback, however, is that such an approach can compromise fairness and objectivity. In the end, I strove to find the right balance by telling the Wisconsin story as objectively as possible (the reader will note that I am not wary of criticizing my side) while maintaining the personal angle and perspective in relevant contexts. I hope that the reader is able to separate any criticism of me in this regard from his or her evaluation of the case itself.