

Restoring Free Speech and Liberty on Campus

This book addresses a major problem in contemporary American higher education: deprivations of free speech, due process, and other basic civil liberties in the name of favored political causes. Downs begins by analyzing the nature and evolution of the problem and discusses how these betrayals of liberty have harmed the truth-seeking mission of universities. Rather than promoting equal respect and tolerance of diversity, policies restricting academic freedom and civil liberty have proved divisive and have compromised the robust exchange of ideas that is a necessary condition of a meaningful education. Drawing on personal experience as well as research, Downs presents four case studies that illustrate the difference that conscientious political resistance and mobilization of faculty and students can make. Such movements have brought about unexpected success in renewing the principles of free speech, academic freedom, and civil liberty at universities where they have been active, while their absence at some universities has caused a steady decline in the importance of these principles.

Donald Alexander Downs is Professor of Political Science, Law and Journalism at the University of Wisconsin, Madison, and Research Fellow at The Independent Institute, Oakland, California. He has written four previous books, including *Nazis in Skokie: Freedom, Community, and the First Amendment*, winner of the Annisfield-Wolf Book Award; and *The New Politics of Pornography*, winner of the Gladys M. Kammerer Award of the American Political Science Association. Professor Downs has also published extensively in leading journals, encyclopedias, and professional books; lectured throughout the United States and in England and Scotland; and made numerous media appearances on radio and television to discuss issues of American politics and law.

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Praise for the hardcover edition

“At the very core of all our rights and liberties – as Justice William Brennan once told me – is the First Amendment. One of the places it has been most endangered is the American college and university campus. The story of how Donald Downs restored it so vibrantly against considerable odds, including the administration at the University of Wisconsin, is downright inspiring and, I hope, infectious.”

Nat Hentoff, *Village Voice*, *Washington Times*, *The Progressives*,
and *United Media Newspaper Syndicate*, *Free Inquiry*

“Nuanced but stark, rigorous but passionate, *Restoring Free Speech and Liberty on Campus* puts coercive political correctness under the microscope as no previous book has done and discovers not only why it is virulent but how to make antibodies. Real intellectual diversity and thus the American university itself has no better friend, anywhere, than Donald Downs.”

Jonathan Rauch, The Brookings Institution and Journalist

“*Restoring Free Speech and Liberty on Campus* is both an impressive work of scholarship and an important contribution to the never-ending real-world struggles to maintain free speech on campus. Drawing on research as well as personal experience in the cauldron of campus politics, Downs addresses an issue that has been neglected in the literature thus far: how political mobilization and checks and balances on campus can restore liberties that have been lost at the hands of speech codes and similar policies designed to further a questionable notion of sensitivity rather than the pursuit of truth. Through his illuminating case studies and broader inquiry, Downs shows the difference that politics can make and how the fate of basic constitutional principles is ultimately determined by the decisions relevant individuals make in the face of pressure. *Restoring Free Speech and Liberty on Campus* should be read by anyone interested in the status of higher education, the fate of constitutional citizenship, the politics of civil liberty, and larger questions dealing with the relationship between law and politics.”

Nadine Strossen, President, American Civil Liberties Union,
and Professor of Law, New York Law School

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The Independent Institute, Oakland*

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*To my friends and colleagues in the Committee for Academic
Freedom and Rights, and to the many students who have
participated in the free speech and civil liberty movement at
the University of Wisconsin, Madison*

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Life is hard to bear, but do not affect to be so delicate.
Nietzsche

Talk is cheap. Free Speech isn't.
Bumper sticker sold on Telegraph Avenue,
Berkeley, November 2001

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Numerous individuals in the field contributed to this book by granting me interviews or providing me with relevant data and information. There are too many such contributors to name, and some have reason to remain anonymous. So it must suffice here simply to express my gratitude to these individuals, each of whom knows who he or she is. Of course, many were also participants in the events that I describe, so their names will appear in that capacity in the narratives that follow.

Several individuals at Wisconsin worked as research assistants in this project. Morgan Felchner and Sara Beachy did excellent work as tape transcribers and engaged in very helpful discussions with me about the project. It was always a pleasure to work with them. Mitch Pickerill collected material from newspapers, engaged in many probing conversations with me about the issues discussed in this book, and acted on behalf of free speech and civil liberty at Wisconsin. Mitch's combination of intelligence, scholarship, and commitment to liberty on campus and elsewhere has never failed to inspire me. Anat Hakim conducted penetrating research on cases concerning the University of Wisconsin faculty speech code and, along with her husband Martin Sweet, gave me stellar strategic advice in the pivotal years of the Madison free speech movement. Anat, Martin, and I go way back, and I have long benefited from witnessing the strength of their minds and character. Ben Thompson had many illuminating discussions with me about the

subject matter of this book and enriched my thinking about the relevant issues, always with his distinctive acuity. Ben also wrote a senior thesis on the recent history of free speech controversies at the *Badger Herald*, a work that presented important and fascinating information. Ben was also a formidable leader of that paper along with other students whom I depict in the book. Katie Harbath was an invaluable assistant in a way that highlighted her all-purpose abilities. She conducted interviews, filed state freedom-of-information requests on her own initiative, coordinated a number of aspects of the research, and generally kept me on track. Katie's assumption of many weighty responsibilities on campus – including her work at the *Badger Herald* – stands as a model of campus citizenship.

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The Department of Political Science at Wisconsin deserves mention for two reasons. First, the department named me to a Hawkins Professorship, which has provided me with research funds to gather data and to travel to New York City, Philadelphia, Berkeley, and elsewhere. This project would not have been possible without these ample funds. Second, the department has remained hospitable to a diversity of viewpoints and has consistently fostered an environment conducive to those who challenge various campus orthodoxies. I know too many faculty members in other departments at Wisconsin or elsewhere who envy me for belonging to such a department.

My colleagues in the Committee for Academic Freedom and Rights (CAFR) merit special recognition. We have experienced many challenges together, and I shall always treasure my association with them and the opportunity I had to join them in political action. These colleagues were indispensable to the pro-liberty changes that have taken place at Madison in recent years. My CAFR allies have taught me many things, the most important of which are to stand up in a responsible and effective way for what you believe and to seek out souls who share a belief in academic freedom. Nor shall I ever forget the friendship and association that these individuals have afforded.

Equally important are the dozens of students who have participated in the Madison free speech and civil liberty movement over the course of the past decade or more. A few of these students have been named here, while the others appear in the narratives of Chapters 6–8. Most of these students have taken classes with me, and it has been an honor and a delight to teach them and also to work with them in the movement. Indeed, the opportunity to get to know such students, along with my CAFR friends, constitutes what I consider the highlight of my career at Wisconsin. Without these students, none of the free speech and civil liberty victories at Wisconsin would have

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come to pass. I also extend thanks to those students who have performed similar service for these causes at the other universities that I portray in my case studies – Columbia, Berkeley, and Penn.

Hasdai Westbrook stood out by performing many noteworthy tasks as a student, research assistant, and ally. First, Hasdai engaged in important free speech and civil liberty conflicts at Wisconsin as a member of the student government, as an editorial page editor of the *Badger Herald*, and in his individual capacity. He and I worked together on some key issues, some of which are portrayed in this book. Second, Hasdai conducted and transcribed many interviews and discussed their implications with me at length. Third, he interacted with me and challenged me more than anyone in terms of the sifting and winnowing of the issues with which this book deals. Hasdai had remarkably acute and discriminating instincts for the normative, political, legal, and psychological nuances of civil liberty conflicts, and he possessed a congenital disdain for moralistic bullying. He left a special mark on this book through his intellectual contributions and his example.

Finally, I want to thank my wife, Susan, and my children, Jacqueline and Alexander. They have consistently supported the principles that went into this book and have prodded me when I have wavered. More important, they are classic examples of the virtues that attend independent, self-reliant minds. I thank them for this and so much more.

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).

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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.

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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.

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Preface

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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.