

Restoring Free Speech and Liberty on Campus

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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 CPCRC [Cal Poly College Republicans]. To students of color, this may be a collision of experience. . . . The chemistry has racial implications, and you are naïve not to acknowledge 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 procensorship 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.