

## Whose Ox Is Gored? Free Speech, the War on Terror, and the Indivisibility of Rights

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Rights have two lives. There are the rights that exist on paper, and those that exist in actuality, or in practice. In a similar vein, it is one thing to have a right declared by a court, and another to have this right respected by those who have power over others. One branch of political science is replete with literature on the gap between what constitutional courts hold, and what authorities and citizens actually do.<sup>1</sup> A number of reasons help to explain such gaps. For example, classic civil liberty attitudinal research teaches us that there is generally more support for rights in the abstract than in individual cases.<sup>2</sup> Everyone loves free speech, but not always the free speech of those who fall too far outside of the mainstream. In Nat Hentoff's words, it is a matter of "free speech for me, but not for thee."<sup>3</sup> And as Alexis de Tocqueville portrayed so hauntingly in

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<sup>1</sup> See, e.g., Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact* (CQ Press, 1999), 2d edition.

<sup>2</sup> See, e.g., Samuel A. Stouffer, *Communism, Conformity, and Civil Liberties: A Cross-Section of the Nation Speaks Its Mind* (Double Day, 1955).

<sup>3</sup> Nat Hentoff, *Free Speech for Me, But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (Harper Collins, 1992).

*Democracy in America*, American's love liberty at the same time that they are prone to the the "tyranny of the majority."<sup>4</sup>

Tocqueville delineated several "remedies" to the soft despotism posed by tyranny of the majority, one of the most important of which is the nurturing of such "free institutions" as local government, private associations, rule of law, and a free press.<sup>5</sup> Institutions of higher learning perform a similar political and normative function. Universities have a fiduciary obligation to promote respect for dissenting thought and freedom of inquiry, and to instill the intellectual skills that foster critical, independent thinking.<sup>6</sup> Furthermore, universities' "moral charter is first and foremost to advance human knowledge," an obligation that depends on freedom of inquiry as a necessary condition.<sup>7</sup> Yet history has shown that universities and other institutions of higher education have not always lived up to this responsibility.

In this essay, I want to address how institutions of higher learning have dealt with free speech in the aftermath of September 11. Some intriguing reactions have taken place on at least two fronts, telling us something about the politics and practice of rights.

#### Pre-existing Censorship: The Rise of Progressive Censorship

The question of the post-September 11 status of intellectual freedom is interesting because a different kind of threat to free speech, academic freedom, and civil liberty had already gained a foothold in higher education during the later 1980s and the

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<sup>4</sup> Alexis de Tocqueville, *Democracy in America*, Volume I, esp. Ch. XV (Schocken Books, 1961), H. Reeve, trans.

<sup>5</sup> Tocqueville, *Democracy in America*, Volume 2, Book 2, Ch. IV.

<sup>6</sup> See e.g., Jaroslav Pelikan, *The Idea of the University: A Reexamination* (Yale University Press, 1992), esp. p. 48

<sup>7</sup> Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993), p. 86. See also Jaroslav Pelikan, *The Idea of the University: A Reexamination* (Yale University Press, 1992), esp. p. 48.

1990s. This challenge came about when censorship became of tool for promoting progressive and egalitarian goals on campus. (What, in the spirit of the philosopher Herbert Marcuse, is now known as “progressive censorship,” or censorship designed to promote social justice.)<sup>8</sup> The most important reforms included speech codes, very broad anti-harassment codes, orientation programs dedicated to promoting an ideology of sensitivity, and new procedures and pressures in the adjudication of student and faculty misconduct. Though these measures were laudably intended 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. Several books have chronicled the extent of this problem, most notably *The Shadow University: The Betrayal of Liberty on America’s Campuses*, by Alan Charles Kors and Harvey A. Silverglate.<sup>9</sup> I also have a forthcoming book, *Restoring Civil Liberty on Campus*, which deals with these issues from the perspective of political mobilization and resistance.<sup>10</sup>

Several infringements of basic rights took place on my own campus during the 1990s, events that led me to join in organizing the Committee for Academic Freedom and Rights, an independent, non-partisan academic freedom and civil liberty group at the University of Wisconsin. What happened at Wisconsin was typical of many other schools. For example, an anonymous e-mail sent by a senior-level judicial administrator at a “top ten institution” in July 2001 to Thor Halvorssen, chief executive director of the

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<sup>8</sup> Herbert Marcuse, “Repressive Tolerance,” in *A Critique of Pure Tolerance* (Beacon Press, 1969).

<sup>9</sup> The most important book chronicling these events is Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America’s Campuses* (Free Press, 1998). Cite others?

<sup>10</sup> Donald Alexander Downs, *Restoring Civil Liberty on Campus* (forthcoming, Cambridge University Press).

Foundation for Individual Rights—a leading academic freedom organization in America today that was established to promote the principles espoused in *The Shadow University*—suggests the considerable extent of the problem in the realm of due process and adjudication:

Mr. Halvorssen,

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 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?<sup>11</sup>

One indicative example of universities' commitment to progressive censorship and related policies is their reaction in the 1990s to actual court decisions that attempted to circumscribe speech codes. Federal courts struck down the student speech codes at Michigan and Wisconsin, and a state court invalidated Stanford's code.<sup>12</sup> And in 1992, the United States Supreme Court issued a decision that many thought would sound the death knell of speech codes, *R.A.V. v. St. Paul*, which declared St. Paul's hate speech

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<sup>11</sup> E-mail to Thor Halvorssen of FIRE, July 2001. Interview with Thor Halvorssen, July 2001.

<sup>12</sup> *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *UWM Post, Inc., et al. v Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (1991); *Corry, et al. v. Stanford University*, Santa Clara County Court, case no. 740309 (February 27, 1995).

ordinance unconstitutional for being viewpoint based.<sup>13</sup> Most new college codes resembled the ordinance in *R.A.V.*

Perhaps surprisingly, *R.A.V.* had little impact on universities' treatments of speech codes. As Jon B. Gould shows in an innovative and thorough empirical study, the number of speech codes actually *increased* after *R.A.V.* Gould attributes this reaction to several factors, including ideological commitment and institutional political pressures.<sup>14</sup> In fact, Gould probably understates the extent of the resistance to anti-censorship court rulings, as he does not deal with institutions' increasing use of harassment codes to limit or investigate free speech. Originally, such measures were not intended to be used as expansive speech codes, but rather to prohibit such clearly unacceptable conduct as quid pro sexual harassment, repeated unwanted sexual advances, and environments laden with sexual expression and prurient appeal. Over time, however, many administrative authorities began to apply harassment codes much more broadly, making such codes the most important source of censorship on campus.<sup>15</sup> In one recent case, an ill-fated "civility" policy at Edinboro University in Erie, Pennsylvania, maintained that criticizing someone's political views could constitute prohibited harassment. Similarly, the University of Massachusetts' code prohibited, among a long list of offenses, demeaning someone's "political belief or affiliation."<sup>16</sup> By the end of the 1990s, the spirit of progressive censorship was alive and well, regardless of what the law said.

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<sup>13</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>14</sup> Jon B. Gould, "The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance," 35 *Law and Society Review* 345 (2001).

<sup>15</sup> See Timothy Shiell, *Campus Hate Speech on Trial* (University of Kansas Press, 1998); Martin Golding, *Free Speech on Campus* (Rowman and Littlefield, 2000).

<sup>16</sup> On Massachusetts, see Kors and Silverglate, *The Shadow University*, p. 321. A colleague at Edinboro recently told me about the new code there, which was ultimately abandoned.

## The Return of Classic Censorship: An Occasion for Free Speech Universalism?

With the advent of September 11, a more familiar, traditional challenge to academic freedom returned. After all, the era of speech codes and progressive censorship represented something relatively new under the sun. With a few exceptions, censorship in America has historically emanated from the Right.<sup>17</sup> Virtually all of the major historical conflicts over academic freedom in higher education before the 1960s concerned attacks from the Right. The major periods in which attacks on academic freedom were unleashed include the suppression of religious dissidents before the later 19<sup>th</sup> century; charges against progressive professors during the Gilded Age; crackdowns against leftists and anti-war activists during and after World War I; and the multitudinous suppressions of the McCarthy era.<sup>18</sup> Two factors stood out in these previous disputes that distinguish them from the recent era of progressive censorship: 1) the attacks came from the Right; and, 2) they came largely from *outside* institutions of higher education. The threats posed by speech codes reversed this state of affairs; they stemmed largely from the Left, and, as often as not, from *inside* the university itself, where the Left is disproportionately represented, according to studies.<sup>19</sup>

As I will discuss in a moment, post-September 11 free speech cases involve both traditional and progressive forms of censorship. One interesting question, however, is whether the return of traditional censorship pressure is fostering a greater appreciation of academic freedom and free speech on America's campuses. Though we lack adequate

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<sup>17</sup> See, e.g., Paul S. Boyer, *Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age* (University of Wisconsin Press, 2002), second edition.

<sup>18</sup> On the "six waves of zealotry" in American history that witnessed powerful attacks on academic freedom, see Neil Hamilton, *Zealotry and Academic Freedom: A Legal and Historical Perspective* (Transaction Books, 1995), Ch. 1.

<sup>19</sup> See, e.g., "The Shame of America's One-Party Campuses," *American Enterprise Institute Report*, September 2002.

empirical evidence to answer this question, there is pretty clear anecdotal evidence that institutions of higher learning have done a fairly good job of protecting freedom of inquiry and speech in the face of attacks from governmental and social forces against anti-war and anti-American discourse. For example, in mid-February 2004, Drake University successfully resisted an order by the Department of Justice to produce extensive evidence of background checks of members of the university. The government backed off in the face of institutional and press criticism.<sup>20</sup> There is also anecdotal evidence that progressive censorship is starting to retreat in the face of mobilizations by a new generation of free speech and civil liberty activists who have brought internal and external pressure upon administrations. A crucial question is whether these two domains of activism on behalf of free speech are distinct, or whether they are somehow linked in concept or practice. The threat to freedom posed by the war on terrorism could be an occasion for reviving a belief in free speech universalism, as the oxen of both sides of the political spectrum are now being gored.

A recent example of this type of agreement is the fate of the independent counsel law at the end of the 1990s. Democrats supported the law in the 1980s because it was applied mainly against Republicans, while Republicans opposed the law as the criminalization of political differences. It was only after the Democratic administration's ox was gored by the law (now inflicted by Republican adversaries) in the later 1990s that both sides agreed to a kind of truce and agreed to let the law die a merciful death.<sup>21</sup>

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<sup>20</sup> This event was discussed by Robert M. O'Neil at a conference on academic freedom at Loyola Marymount University, Los Angeles, on February 16, 2004. Robert M. O'Neil, "Academic Freedom in the Post-September 11 Era: An Old Game with New Rules."

<sup>21</sup> See, e.g., Stephen L. Carter, "The Independent Counsel Mess," 102 *Harvard Law Review* 105 (1988).

Practical conceptions of rights and civil liberty are often forged out of the cauldron of politics and adversity. In *The American Language of Rights*, Richard Primus links the discourse and law of rights in American history to political rhetoric and practice. The discourse of rights is, among other things, a discursive device employed to help political actors frame and justify underlying political and normative objectives. The articulation of rights is often a product of confronting resistance or adversity. Primus writes, “the major pattern of development in American rights discourse has been one of concrete negation: innovations in conceptions of rights have chiefly occurred in opposition to new adversities, as people articulate new rights that would, if accepted, negate the crisis at hand.”<sup>22</sup>

An essential attribute of free speech and academic freedom is universalism: these principles mean nothing if they do not apply to what Justice Holmes called “freedom for the thought we hate.”<sup>23</sup> Have the events since September 11 compelled higher education to reaffirm the fundamental freedom of speech and inquiry?

There are two routes that can take one toward the universality of rights and equal protection. First, one can grasp this end deductively as a matter of *a priori* normative principle. Second, one can arrive at this destination inductively through experience that opens one’s eyes to the larger principle at stake, or, less augustly, that makes one aware of how one’s self-interest is linked to the rights of others. Civil liberties attorney James Weinstein claims that there is no substitute for experience when it comes to fully fathoming the First Amendment implications of policies and actions. Courts have fashioned the modern doctrine of speech (as epitomized by the reigning content and

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<sup>22</sup> Richard A. Primus, *The American Language of Rights* (Cambridge University Press, 1999), p. 7.

<sup>23</sup> *United States v. Schwimmer*, 279 U.S. 644 (1929), Justice Holmes, dissenting.



viewpoint neutrality doctrines) in reaction to historical conflicts and claims. “Free speech doctrine is more a product of experience than theory,” Weinstein maintains.<sup>24</sup> A personal example is John Dewey and his allies, who did not fully appreciate the importance of free speech to democratic self-governance until they were exposed to the widespread unprincipled suppression of dissent during World War I.<sup>25</sup>

The experience of having to defend one’s rights against pressure can prompt one to consider the broader implications and applications of rights claims. Tocqueville envisioned a somewhat similar process in *Democracy in America* in his discussion of “self-interest rightly understood.” This attitude entails a balance between self-interest and empathy for the rights of others based on a reflection of the links between one’s self-interest and the plights of others.<sup>26</sup> American constitutionalism is, in part, premised on this principle of mutually reinforcing self-interest. For example, checks and balances and other restraints on power are designed to further the protection of minority rights, and to weaken the power of moral or political consensus, which is inherently predisposed to repress the rights of those who dissent from whatever orthodoxy happens to reign.<sup>27</sup> In his recent book on Socratic citizenship, Dana Villa illuminates the ways in which all moral orthodoxies harbor the potential to suppress disagreement if they are not checked

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<sup>24</sup> James Weinstein, *Pornography, Hate Speech, and the Radical Assault on Free Speech Doctrine* (Westview Press, 1999), p. 181. See also Harry Kalven, Jr., *The Negro and the First Amendment* (University of Chicago Press, 1965).

<sup>25</sup> See David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge University Press), Chs. 5-7.

<sup>26</sup> Alexis de Tocqueville, *Democracy in America*, Volume 2, Book 2, Chs. VIII & IX (Schocken Books, 1961), H. Reeve, trans. See also Rawls’s portrayal of “reflective equilibrium” in *A Theory of Justice* (Harvard University Press, 1971), pp. 48-50. Roberto Unger presents a more purely self-interested model for respecting the rights of others in *Law in Modern Society* (Free Press, 1977), Ch. 3. Liberalism’s practice of equal rights is like an insurance policy.

<sup>27</sup> See Paul Eidelberg, *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* (Free Press, 1968), p. 153.

by others or by self-doubt, regardless of how virtuous their causes happen to be.<sup>28</sup> Villa's work links restraints on moral orthodoxy to the attainment of such ends as the pursuit of truth and enhancing the quality of citizenship.

### The Post-September 11 Era: Has the Pendulum Swung?

Legal scholar Kermit Hall has recently proclaimed that the era of political correctness is "pretty much dead."<sup>29</sup> This claim is no doubt overstated, as several conflicts dealing with progressive censorship are still being waged. I can cite only a couple of examples for reasons of space. The best source of information about recent cases of both progressive and traditional forms of censorship on campus is the website of the Foundation for Individual Rights in Education (FIRE).<sup>30</sup>

One indicative example is the case of a student at Cal Polytechnic Institute, who was charged in 2003 with "disruption" for simply placing a poster advertising a conservative black speaker on a bulletin board next to the multicultural center. The talk was based on the speaker's book, which criticized welfare policy for perpetrating a "plantation" mentality in both whites and blacks. Students opposed to the speech complained to the administration that the posting constituted harassment, and the administration then subjected the student to a Kafkaesque hearing despite the protests of

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<sup>28</sup> Dana Villa, *Socratic Citizenship* (Princeton University Press, 2001), pp. 23, xii. One of Reinhold Niebuhr's great insights concerned how the moral impulse is simultaneously the source of humanity's nobility and savagery. See, e.g., *The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defense* (Charles Scribner's Sons, 1944).

<sup>29</sup> Hall quoted in Gary Young, "Free Speech Dilemmas: Free Speech 'Zones' and 'Codes' Go from Campus to Court," *National Law Journal*, January 12, 2004, p.1.

<sup>30</sup> [www.thefire.org](http://www.thefire.org)

FIRE, the American Civil Liberties Union, and the Center for Individual Rights.<sup>31</sup>

Another example of continued progressive censorship is the denial of official campus recognition to several conservative Christian groups on the grounds that their beliefs and membership policies are discriminatory. A recent FIRE hornbook on the freedom of religion on campus exposes a number of such cases, as does David Bernstein in a new book on the status of free speech and associational rights on campus and elsewhere.<sup>32</sup> In a recent case in point, in December 2003, the president of Gonzaga Law School banned a Christian pro-life group because it restricted its membership to those who shared its beliefs—a *sine qua non* of the right of association.<sup>33</sup>

In addition, some of the cases that arise under the umbrella of post-September 11 censorship also fit the pre-existing model of progressive censorship. Consider the case of a professor at Orange Coast College a few weeks after September 11. Several Muslim students accused the professor of calling them “terrorists” and “Nazis,” and of comparing them to the individuals who drove the planes into the World Trade Center. A thorough investigation concluded that no basis on which to sustain the charges existed, and that the accusers had misstated the facts. Nonetheless, the administration placed the professor on administrative leave, and sanctioned him with a reprimand.<sup>34</sup>

Another 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 Sand Diego State University who understood Arabic, overheard

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<sup>31</sup> See the discussion of the case on the FIRE web page.

<sup>32</sup> See David A. French, *FIRE’s Guide to Religious Liberty on Campus* (Foundation for Individual Rights in Education, 2002); and David Bernstein, *You Can’t Say That* (Cato Institute, 2003).

<sup>33</sup> See discussion of the case on FIRE’s web page. See also Joyce Howard Price, “Jesuit College Bars Pro-Life Group for ‘Bias,’” *Washington Times*, on FIRE’s web page. See, e.g., *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000).

<sup>34</sup> “Academic Freedom and National Security in a Time of Crisis,” p. 20.

some Saudi Arabian students laughing about what happened in New York and Washington. Upset, he challenged them and asked them why did not “feel shame.” A heated exchange ensued, and campus police had to order the students to disperse. In what appears to 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.<sup>35</sup>

Despite continuing skirmishes on the progressive censorship turf, there are signs that free speech is making a kind of comeback in this domain on campus. Two reasons appear most responsible for this. First, threats posed by the war on terror are forcing universities to deal with the return of censorship pressure from the outside Right. Second, some commentators believe that progressive censorship has been thrown on the defensive over the course of the last year from another source. In a recent column in *U.S. News and World Report*, the arch critic of progressive censorship, John Leo, wrote that “campus censors” are “in retreat.”<sup>36</sup> He cites some of the cases mentioned above, but points out how campus administrators are now recoiling in the face of the legal and political pressures being exerted by such advocacy groups as FIRE, the Center for Individual Rights, the Alliance Defense Fund, and the American Civil Liberties Union.

Leo’s emphasis points to the second reason for a possible pendulum turn: the intensification of political and legal mobilization by civil liberty and free speech activists who have forced some institutions of higher learning to defend their policies in the light of public scrutiny—a domain where double standards are harder to defend than behind

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<sup>35</sup> See Jason Williams, “Student: Attack Praised,” *Daily Aztec*, October 17, 2001.

<sup>36</sup> John Leo, “Campus Censors in Retreat,” *U.S. News and World Report*, February 16, 2004, p. 64.

the closed walls of academe. As already mentioned, institutions of higher learning largely ignored the signals that the U.S. Supreme Court sent in *R.A.V. v. St. Paul* in 1992.<sup>37</sup> A major reason for this state of affairs was the lack of organized mobilization on campuses to compel these institutions to respond in a proactive way to this decision. The political science literature dealing with the effects of major court decisions on attitudes and behavior stresses that meaningful legal change often requires sufficient political mobilization to compel change in actual social practice.<sup>38</sup> As Timothy Shiell stresses in his thorough book on speech codes, the absence of organized opposition was partly responsible for the rise of speech codes in the first place at the schools that pioneered the speech code movement, such as Yale, Michigan, Stanford, and Wisconsin.<sup>39</sup>

Two types of mobilization have been most effective. First, FIRE, CIR, the ACLU, and other groups have created pressure at the national level by deploying publicity, political pressure, and legal challenges brought by attorneys associated with these groups. FIRE, in particular, has waged powerful attacks in a large number of cases.<sup>40</sup> As Leo points out, this pressure is having some impact. For example, the guidelines accompanying the new “civility” code at Edinboro University declared that simply offending someone for almost any reason constituted “harassment.” A faculty member

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<sup>37</sup> Gould, “The Precedent That Wasn’t.”

<sup>38</sup> See, e.g., Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 1991); Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994). McCann and Rosenberg are often seen as antagonists, but in many ways they represent two sides of the same coin. Both agree that political mobilization is an important part of meaningful legal change.

<sup>39</sup> 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. On the contrary, the speech code movement at Duke was stopped by the intervention of noted constitutional law professor William van Alstyne. See David P. 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.

<sup>40</sup> See FIRE’s extensive “Archive” of cases on its web page: [www.thefire.org](http://www.thefire.org)

trained in First Amendment principles informed his department chair that the code was seriously overbroad, and the sympathetic chair then conveyed the colleague's points to the university's office dealing with harassment and discrimination. With the help of these insights, the officer recognized the problem, and changed the policy to make it consistent with free speech. In thanking the individuals who enlightened her, the officer also said that she was grateful because "we would have been sued, especially after what FIRE has done over at Shippensburg."<sup>41</sup> (In September 2003, a federal court ordered Shippensburg university to stop enforcing its speech code, which was drastically overbroad. The case was among the first in FIRE's "Declaration of War on Speech Codes."<sup>42</sup>) The victories for free speech being won by these groups support the conclusions of law and society scholars who have maintained that the sustenance of an infrastructure of legal mobilization is an important ingredient in the actualization of rights.<sup>43</sup>

The second domain of action is less well known, but also effective: local campus mobilization. This type of mobilization took place at the University of Pennsylvania in the 1990s, sparked by the notorious case in which a student was subjected to Kafkaesque formal proceedings for calling some African American students "water buffaloes," a term that had no racial meaning. Alan Kors leveraged this case to create a resistance movement that led to the president's abolition of the code and far reaching libertarian reform of Penn.<sup>44</sup>

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<sup>41</sup> The faculty member who brought this issue up is a friend of mine. I am not presently authorized to divulge his name.

<sup>42</sup> See "FIRE Declares War on Speech Codes," FIRE web page: [www.thefire.org/index.php](http://www.thefire.org/index.php)

<sup>43</sup> See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

<sup>44</sup> Kors and Silverglate, *The Shadow University*, Chs. 1, 13; Downs, *Restoring Civil Liberty*, Ch. 6.

Another example is the University of Wisconsin, at one time a pioneer in the pro-speech code movement. There, a privately funded, nonpartisan group called the Committee for Academic Freedom and Rights has spearheaded a free speech and civil liberty movement that has won several important battles. In fact, CAFR served as the model for FIRE after FIRE's co-founder, Harvey Silverglate, witnessed CAFR's key role in the process that led to Wisconsin's abolition of its faculty speech code in March 1999. CAFR has provided legal assistance to several faculty, staff, and students who have come under questionable investigations and sanctions. In addition, it has led the way on many political fronts, including: leading the drive to abolish the faculty speech code in the classroom in 1999 (Wisconsin remains the only case of a code being abolished at the hands of a political movement on campus); organizing the opposition that led to the dismantling of a comprehensive system of anonymous complaint boxes in 2000, a system that had unavoidably Orwellian implications; initiating due process reform in the university rules governing the disciplining of faculty; providing support for groups whose free speech has come under attack, often the student newspapers; and pressuring departments into modifying their own internal speech codes based on the concept of "professional conduct standards."<sup>45</sup>

The Wisconsin initiative had to be accomplished politically because the Wisconsin branch of the ACLU would not take the code to court. While this decision upset opponents of the faculty code at first, it proved to be a blessing in disguise because it necessitated building a political mobilization and organization that has proved to be an

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<sup>45</sup> See Downs, *Restoring Civil Liberty*, Chs. 1, 7 & 8. Articles and editorials appeared in the *Wall Street Journal*, the *New York Times*, the *Boston Globe*, the *National Journal*, the Associated Press, National Public Radio, the *Village Voice*, *Reason*, *Liberty*, National Public Radio, and the *Chronicle of Higher Education* (the latter published a cover story and several follow up articles), to name a few.

invaluable resource in recent years. Most commentators believe that a corner has been turned at Wisconsin in terms of free speech and civil liberty, as the norms of free speech now enjoy widespread public presence on the campus (backed by mobilization power.)<sup>46</sup>

### Universities and the War on Terror

In discussing the reaction to the war on terror, I rely on an extensive study of the American Association of University Professors, entitled A “Academic Freedom and National Security in a Time of Crisis,” and reports in the press and FIRE’s web page.”<sup>47</sup> I do not have the space to discuss the full range of reported cases or the broader aspects of the new powers that the government has amassed in the war on terror, particularly those pertaining to the USA PATRIOT Act. But I should stress that the new laws involve significantly expanding surveillance and searches of libraries and other campus programs; extensive record keeping and background checks on students and university workers in sensitive areas; and gag orders against disclosing government inquiries and surveillance to third parties, including the targets. Whatever one’s position on the balance between liberty and security in the post-September world, there is reason to be guarded and vigilant about the potential abuse of government power.<sup>48</sup>

Though the AAUP report provides grounds for guarded optimism, it does cite several examples of chilling effect on academic freedom related to the war on terror. According to the report, several universities have expanded background criminal checks

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<sup>46</sup> See Jonathan Rauch’s depiction of the political importance of the Wisconsin free speech/civil liberty movement in “A College Newspaper Messes Up, and So Might You,” *National Journal*, March 24, 2001.

<sup>47</sup> “Academic Freedom and National Security in a Time of Crisis,” Report of an AAUP Special Committee, p. 20. Available at: <http://www.aup.org/statements/REPORTS/911report.htm>

<sup>48</sup> See, e.g., David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (The New Press, 2002).



on new faculty.<sup>49</sup> (As mentioned above, however, Drake University successfully resisted the government in this domain in February 2004.) In addition, some schools have issued broad warnings to faculty about talking about the war in Iraq unless “directly relevant” to the class. Though it is not improper to require faculty to stick to relevant material in class, at least one such warning (at Irvine Valley College in California) amounted to a prior restraint on such expression across the board.<sup>50</sup> In another notorious case, a writing instructor at Forsyth Technical Community College lost her job for criticizing the war in Iraq in March 2003, even though the war was the subject of the writing assignment that day.<sup>51</sup>

Conflicts over curricula and speakers have also been reported on a number of campuses. In the summer of 2002, a University of North Carolina professor in charge of the summer reading program for incoming students required them to read Michael A. Sells’ *Approaching the Qur’an: The Early Revelations*. A private group brought a lawsuit against the program, which a federal court dismissed; and the state legislature later dropped an “equal time” provision after a pitted battle. As the AAUP reported, “Chapel Hill and University of North Carolina officials stood their ground.”<sup>52</sup> Later, the administration at North Carolina stood firm in the face of protests against “Islamic Awareness Week.” Similarly, the University of Michigan administration resisted vehement calls to cancel a conference on the Middle East that included some very controversial speakers. But the State University of New York at New Paltz succumbed to

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<sup>49</sup> “Academic Freedom and National Security in a Time of Crisis,” p.22. See also Sharon Jayson, “UT System Revises Employee Policy,” *Austin-American Statesman*, November 27, 2002, P. B6.

<sup>50</sup> “Academic Freedom and National Security in a Time of Crisis,” p. 22.

<sup>51</sup> See “Writing Instructor Loses Job for Discussing Iraq War in Class.” [www.thefire.org/pr/php?doc=forsyth\\_ito\\_2004-01-27html](http://www.thefire.org/pr/php?doc=forsyth_ito_2004-01-27html)

<sup>52</sup> “Academic Freedom and National Security in a Time of Crisis,” p. 22.

pressure and canceled a panel discussion that outside groups considered “unbalanced in its criticism of Israel.” A similar result took place at Rutgers University, when the administration yielded to claims by pro-Israeli groups and state politicians and refused to host the “Third National Student Conference on the Palestinian Solidarity Movement.”<sup>53</sup>

Visiting speakers and scholars have also encountered some major problems in the post-September context. In late 2002, the University of Colorado and Colorado College stood up to pressure and allowed a pro-Palestinian speaker to come to campus; around the same time, Harvard University ultimately resisted pressure to disinvite Irish poet Tom Paulin, who had written that “Brooklyn-born Jews” who resettled on the West Bank should be “shot dead.” The College of Holy Cross, however, disinvited a prominent British clergyman when faculty members opposed his visit on the grounds that he was an anti-Semite.<sup>54</sup> Many visiting scholars have also had a hard time getting into the United States. (This, of course, is not the decision of universities, so it is not directly relevant to the concerns of this paper.)

An important set of cases involves faculty free expression. Such private groups as Campus Watch and the American Council for Trustees and Alumni have begun monitoring classes and denouncing faculty whose views they consider unpatriotic. This is their right. But such action can contribute to making the climate hostile to free speech, so it needs to be critically evaluated. And some institutions of higher learning have jeopardized academic freedom by the way they have responded to public pressure exerted against faculty members who have made intemperate statements after the September 11 attacks. The AAUP report cites several such cases, which have typically entailed

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<sup>53</sup> On all these cases, see “Academic Freedom and National Security in a Time of Crisis,” p. 22.

<sup>54</sup> “Academic Freedom and National Security in a Time of Crisis,” pp. 22-3.

statements by faculty blaming America for the attacks, or denouncing America as the real villain in the world. Despite strong pressure from trustees and the public, I know of no case, other than the Forsyth case just discussed, in which a faculty member has lost his or her job for simply expressing an unpopular viewpoint; but some have received reprimands, which do represent formal sanctions. And one case involving alleged association with terrorists led to dismissal.

Two clear 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 Magadishus” during the war in Iraq in 2003, leading alumni and over a hundred members of the United States House of Representatives to call for his dismissal. (Magdishu refers to the shooting down of U.S. troops 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 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.”<sup>55</sup> In the end, the board dropped the matter. 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

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<sup>55</sup> “Academic Freedom and National Security in a Time of Crisis,” p. 20. The other cases discussed here are from this report.

policies. His stance in the City College case shows that he is not selective in applying his principles.<sup>56</sup>

A case the 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 because of 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 FIRE have opposed the university’s actions in this case.<sup>57</sup>

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.<sup>58</sup> 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.

### An Occasion to Affirm Universalism

Though the record is less than sterling, the AAUP report on the status of academic freedom in relation to the war on terrorism concludes that universities today appear to be

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<sup>56</sup> 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).

<sup>57</sup> “Academic Freedom and National Security in a Time of Crisis,” pp. 20-21.

<sup>58</sup> See Jonathan Rauch, *Kindly Inquisitors*.

doing a better job of protecting controversial faculty and speakers than they did during previous eras in which national 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.”<sup>59</sup>

Whether institutions of higher education have turned a corner regarding respect for equal protection and the universality of free speech and civil liberty remains to be seen. Rigorous empirical work is needed to provide sufficient support for this proposition. What the present evidence does suggest is that institutions of higher learning are protecting anti-war free speech and liberty more than in previous eras in which concerns about national security were high. One reason could be that the liberal values and interests of university leadership and universities as institutions are challenged by the war on terrorism, causing these institutions to circle the wagons. In the cases mentioned above, few involved faculty coming under attack from inside their institutions. The threat lay outside, not within.

Another possible reason for this posture is more historical: the norms of free speech have been institutionalized to historically unprecedented extents. Free speech norms are now widely supported by various forms of organized and mobilized power, such as universities; library associations; First Amendment law firms; broadcasters and

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<sup>59</sup> “Academic Freedom in a Time of Crisis,” p. 19. The “grave” case is the University of South Florida case discussed above. 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* 257. For a more specific focus on academic freedom, see Neil Hamilton, *Zealotry and Academic Freedom*.

publishers; constitutional law doctrine; and free speech interest groups and advocates, to name just a few. Richard S. Randall has written about the rise of the “free speech society” in which norms supporting free speech permeate society.<sup>60</sup> If so, institutions of higher education have support in resisting calls for censorship and the punishment of anti-American discourse.

Though the war on terror might be reminding educational leaders of the importance of free speech once again, it is too early to tell if the relatively positive reaction to pressures emanating from the war on terror have spilled over to the realm of progressive censorship. In my view, such a state of affairs would be an occasion, in Alexander Meiklejohn’s words, for dancing in the streets.<sup>61</sup> The politicization of speech policy launched by progressive censorship has not served institutions of higher learning well. But my breath remains on hold. In the meantime, what the evidence is beginning to suggest is that the legal and political mobilization of such groups as FIRE, CIR, and CAFR is starting to make progressive censors think twice. Whatever the state of the evidence at this point in time, the material for laying a foundation for free speech universalism on campus is now present. What is needed is the political and moral will to take the next step in the process.

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<sup>60</sup> Richard S. Randall, *Freedom and Taboo: Pornography and the Politics of the Divided Self* (Berkeley: University of California Press, 1989), pp. 5-6.

<sup>61</sup> These were Meiklejohn’s words when Harry Kalven, Jr. informed him of the Supreme Court’s famous decision on the libel of public figures, *New York Times v. Sullivan*, 376 U.S. 254 (1964). This decision was premised on Meiklejohn’s theory of self-governance. See Meiklejohn, “Free Speech and Its Relation to Self-Government,” in *Political Freedom* (Oxford University Press, 1965).