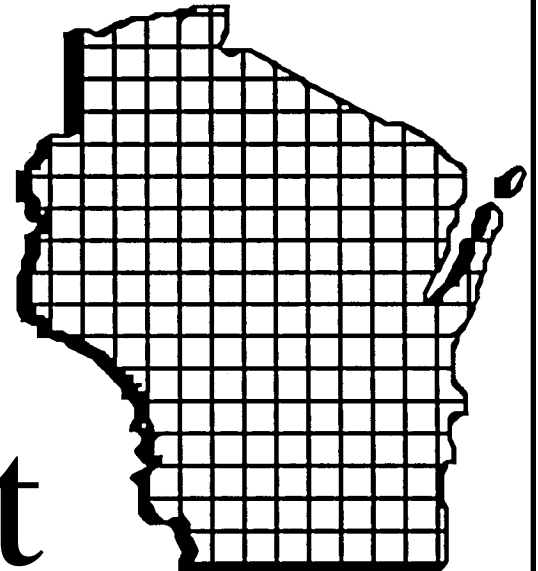


Wisconsin

Policy
Research
Institute

Report



October 2001

Volume 14 Number 7

**THE POLITICS
OF CIVIL
LIBERTY ON
CAMPUS**

REPORT FROM THE PRESIDENT:

Over the past generation, political correctness has advanced by leaps and bounds on our nation's campuses. It has certainly led to direct attack on the individual rights of students and professors. It has had a negative impact on free speech, one of the core underpinnings of any university. As political correctness grew on campuses it began to affect the very life of our country. Certain words, deeds, even thoughts were under attack. Equally disturbing was that much of this liberal ideology was directed toward supposed major defects in American society and culture. It was a growing sense that America represented all things bad, and that any criticisms or even physical attacks on America were probably warranted. Those who discounted political correctness were making a terrible judgment because of its enormous impact on American culture from universities right through the media and into our workforce.

In March 1999, something quite unexpected happened. The Faculty Senate at the University of Wisconsin-Madison rose up and abolished the speech code covering professors in the classroom. Considering that Madison was an absolute bastion of liberal political correctness, it was an extraordinary event in the culture wars of our country.

We have asked Professor Donald Downs, one of the leaders in the free speech movement, to document how this astonishing event occurred. Doctor Downs, a Professor of Law, Political Science and Journalism at the University of Wisconsin-Madison, is one of the best-known scholars in our country. What Downs presents in this study is almost a personal memoir on the forces that led to abolition of the speech code. This continues to be an important issue because some Americans still do not believe that, as Americans, we can be victims of any crimes perpetrated against us. This twisted political correctness still plays a role in how young Americans view their country.

What occurred in Wisconsin was hopefully the beginning of the end of the wackiness of political correctness on campuses, and hopefully in our society. It is really a question of free speech and the ability of every American to say what they really feel without the specter of thought police monitoring the correctness of their ideas. No one had more to do with this than Donald Downs in Wisconsin. We are delighted to be able to document his achievements in this report.



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THE POLITICS OF CIVIL LIBERTY ON CAMPUS

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	PAGE
EXECUTIVE SUMMARY	1
INTRODUCTION	1
CHECKS AND BALANCES AND THE POLITICS OF RIGHTS	4
CHECKS AND BALANCES AT THE UNIVERSITY	7
THE BASIC POLITICS OF THE UW-MADISON FREE SPEECH MOVEMENT	7
THE ROAD TO ABOLITION OF THE FACULTY CODE	10
FORGING A POLITICAL MOVEMENT	11
CONCLUSION	17
NOTES	18

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EXECUTIVE SUMMARY

In March 1999, something surprising happened at the University of Wisconsin-Madison; the Faculty Senate abolished the speech code covering instructor speech in the classroom by a vote of 71-62. Few believed such an action was possible. After all, no other major university has abolished a speech code on its own initiative during the fifteen years in which codes have reigned as policies (though several codes have been invalidated by courts). More to the point, Wisconsin has been renowned as a bastion of political correctness since the chancellorship of Donna Shalala in the late eighties and early nineties. Wisconsin was one of the last places abolition would likely arise.

Even more surprisingly, the speech code abolition movement set the stage for further civil liberty victories on the politicized campus. In the year 2000, the Senate voted for a strengthening of due process norms in discipline procedures, and the new chancellor dismantled a program that had set up boxes across the campus for individuals to drop anonymous complaints against individuals for engaging in harassing expression. During this time, other universities were busy instituting similar policies with little or no opposition.

What explains Wisconsin's counter-intuitive pro-civil liberty decisions? The University's codes and policies were not any worse than those at other institutions, and administrative leadership was similar to that of other schools. Explanation must lie elsewhere.

This report pinpoints the most important explanation: the presence of a political infrastructure of faculty and student activists who managed to provide support for free speech, academic freedom, and civil liberties on intellectual, political, and legal fronts. No such group is known to exist on any other campus. This report tells the story of this group and its politics, and addresses the relevance of the Wisconsin experience to constitutional theory, liberal political theory, and the philosophy of liberal education.

INTRODUCTION

Two years have passed since the University of Wisconsin-Madison Faculty Senate voted 71-62 to abolish its faculty speech code, thereby becoming the only major university to rescind a code without being required to by a court. Enacted in 1988 along with a student code, the faculty code prohibited expression that "is demeaning" to students on grounds of race, gender, national origin, sexual orientation, handicapped condition, and the like. In addition, the code was oriented toward finding offense — the determination of what constituted demeaning expression was based on the sensibilities of the offended group, making it a subjective standard not based on broader community norms.¹ The act of abolition was especially surprising because the University of Wisconsin-Madison, under the aegis of former Chancellor Donna Shalala, had gained national recognition for being a pioneer in the movement to adopt codes back in the late eighties. As journalist Jonathan Rauch remarked in an article on the vote in the *National Journal*, the vote amounted to an "Earthquake in PC Land."²

Given the success of abolition on such a campus, activists in the movement had reason to hope that the Madison vote would spark similar movements elsewhere. After all, codes and related policies had, by this time, encountered widespread condemnation in the media, the public, and books written by civil libertarians and individuals dedicated to traditional notions of academic freedom and liberal education. Such works as *The Shadow University*, co-authored by Alan Charles Kors and Harvey Silverglate, had chronicled the widespread abuse of codes, which was often the product of good intentions gone awry in application.³ The University of Wisconsin abolition supporters were also encouraged by the publicity their abolition effort had garnered across the country, leading to widespread national press coverage in such organizations as *The New York Times*, *The Boston Globe*, the *Associated Press*, *The Wall Street Journal*, *The Village Voice*, *Reason*, *Liberty*, *National Public Radio*, and the *National Journal*. Perhaps most importantly, *The Chronicle of Higher Education* covered the last six months of the abolition drive, starting with a cover story in Fall 1998.⁴

Codes had also encountered rough going in constitutional cases, as courts began invalidating virtually every code that appeared before them, including Wisconsin's student code. Wisconsin's student code was narrower than most codes (including the University's faculty code), prohibiting "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual or on separate occasions at different individuals . . . if such comments . . . intentionally:

1. Demean the race, religion, sex . . . of the individual or individuals; and
2. Create an intimidating, hostile, or demeaning environment for education. . . .”⁵

But it ran against constitutional shoals when a federal court declared it unconstitutional in 1991 for not being limited to “fighting words,” which are not protected by the First Amendment. Michigan’s code bit the constitutional dust in 1989 in a forceful federal court decision that emphasized its vagueness and overbreadth, and which went out of its way to criticize the chilling effect of the policy guidelines that accompanied the code.⁶ The Stanford University code (the most limited of all) fell in 1995. In another important case, a federal court ruled that George Mason University violated the First Amendment rights of Sigma Chi Fraternity in 1991 when it placed the fraternity on two years probation for staging a “Dress a SIG contest (dress members like ugly women.)” One student dressed up as an overweight black woman. Following the logic of the Wisconsin and Michigan cases, the court ruled that the university had no power under the Constitution to punish expression because of its alleged offense, even if the expression involved racial insult.⁷

Dashed Hopes

The abolition victory at the University of Wisconsin-Madison campus set the stage for subsequent victories on campus, as the infrastructure created in that drive turned its newly gained power to other issues dealing with due process and anonymous complaint boxes. (These issues will be discussed later.) However, abolition proponents were disappointed that their efforts did not spark a broader national movement. Indeed, recent events suggest that the anti-civil liberty perspective is alive and well at American universities.

Three examples support this assessment. Between 1999 and 2000, for example, student activists at Columbia University forged a campus-wide campaign that pressured a Faculty Senate task force and then the Senate to adopt major changes in the campus discipline code dealing with sexual misconduct. Though sexual misconduct hearings can result in expulsion and produce evidence that may be used in a future criminal prosecution, the new policy did away with such pre-existing, fundamental due process rights as the right to confront hostile witnesses (not just the accuser), the right even to be present at the hearing, the right to have a lawyer at the hearing, and the right to discuss the case with non-involved parties.⁸ (Pre-existing policies also provided only limited procedural protections, but the new policy went even further in this regard.)⁹

In breaking the story about the reforms in October 2000, *The Wall Street Journal* editors (acting in conjunction with the Foundation for Individual Rights in Education (FIRE) — a national organization that had been recently established under the aegis of Kors and Silverglate, the authors of *The Shadow University*) referred to “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.”¹⁰ Indeed, the author’s research at Columbia showed that the movement toward the policy was incredibly one-sided. Virtually no dissent or pro-civil liberty voices existed on any university committee established to deal with the policy, nor did any such voices exist in the broader political arena that was dominated by groups sympathetic to the erosion of due process protections. On the other hand, a broad coalition of student groups led by a new group called SAFER (Students Active for Ending Rape) marshaled a massive campaign of support that included marches, rallies, and the wearing of red tape (up to 25% of the student body did so) that symbolized the alleged “bureaucratic red tape” that characterized the previous system. It was only after the Senate adopted the policy in February 2000 that the campus ACLU entered the fray, largely because of the devoted efforts of student Karl Ward.¹¹

Lawrence Kaplan of *The New Republic* underscored the failure of courage on behalf of administrators and faculty in the debate over the due process reforms as well in the case of George Fletcher, a noted criminal law professor who was accused of sexual harassment because of the content of a final exam he wrote. (Sexual harassment policy and the new sexual misconduct policy are separate policies. The former is a function of federal law, whereas the latter is campus-specific.) According to Kaplan, “Fletcher’s colleagues have hung him out to dry. Some argued that Fletcher shouldn’t be allowed to teach a required course because, among other reasons, his very presence in the classroom might create a hostile environment for women.”¹² Kaplan denoted a similar lack of will or resistance in the politics of the misconduct policy. “After Columbia’s President George Rupp endorsed the new rules, one of the campaign’s teenage coordinators boasted, ‘There was obviously some fear in the eyes of the administrators.’”¹³ Fletcher was ultimately vindicated after he ably defended himself with the assistance of FIRE. FIRE and an array of civil lib-

erty groups (American Civil Liberties Union, Feminists for Free Expression, etc.) and journalists have rallied to attack the sexual misconduct reforms. Besieged by intense outside pressure, the University is considering amendments to the reforms as of this writing.¹⁴ In addition, some pressure has arisen from inside the campus, as a handful of student civil liberty activists have formed a subgroup within the recently formed Columbia ACLU to pressure for revision of the policy. As of this writing, however, the group has worked more closely with FIRE than with faculty within the institution.

Meanwhile, the University of California-Berkeley has also witnessed troubled times for civil liberties. For example, an environment intolerant of open discourse has prevailed at Boalt Law School for some time, especially in the wake of the passage of Proposition 209 in 1997, the statewide referendum limiting affirmative action in state institutions. The situation grew so bad that several students (conservative and liberal) published signed and anonymous letters in a book entitled *The Diversity Hoax: Law Students Report from Berkeley*. One of the book's editors described the reason for the manifesto:

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. Only radical diversity was celebrated and cherished. . . .

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 horrified by what I discovered. I was angered that, in seeking truth, I was denied an encouraging environment in which to explore my view.¹⁵

A final example is provided by the manner in which universities reacted to the now-famous advertisement that David Horowitz sent to student papers in late February 2001, arguing against the case for paying reparations for slavery. Though hard-hitting, the article was not racist according to any standard definition of the term, and its conclusions were in accord with the beliefs of a solid majority of Americans. Of the 52 papers that received the ad, 27 rejected it outright (which was their editorial right), 12 ignored it, and 13 ran it. Of these 13, six later apologized, often under great pressure.¹⁶ Confronting vociferous opposition, the Berkeley student paper, *The Daily Californian*, apologized quickly and virtually promised to never print such a piece again. One reason for this posture was the absence of any sustained faculty or student group support. In contrast, *The Badger Herald* at the University of Wisconsin refused to apologize and grew stronger in its free speech convictions in the face of intense pressure to back down. The student paper at Brown University, *The Brown Herald*, also refused to back down in the face of hostility that was greater than the pressure at Wisconsin. What distinguished the Wisconsin and Brown cases was the status of environmental support. At Brown, the interim president took a fairly strong stand in favor of the paper's right to publish the ad and connected this right to the truth-seeking mission of the university.¹⁷ At Wisconsin, the *Herald* received immediate and substantial support from a faculty group, the Committee for Academic Freedom and Rights (CAFR). Jonathan Rauch pointed to the different institutional environments in his column in the *National Journal*:

The [*Badger*] *Herald's* community is not the same as the *Daily Cal's* community. At Wisconsin, an energetic free-speech faction has emerged in the past few years. In 1999, the Wisconsin faculty rose up to abolish its speech code, an apparently unprecedented event in American academe. When the *Badger Herald* came under fire this month, an aggressive free speech group, called the Faculty Committee for Academic Freedom and Rights, immediately offered the paper its full support. [Editor Daniel] Hernandez and the *Daily Cal*, by contrast, dangled in the wind.¹⁸

Though a distinct minority of relevant institutions rose to defend free speech during the notorious Horowitz case, there is no evidence that other institutions of higher education have voluntarily rescinded speech codes and related policies. Indeed, reaction even set in at Wisconsin in May 2001 when 73 administrators signed a letter to the two student papers (the *Herald* and the *Daily Cardinal*) criticizing the *Herald* and calling on the community to restrain itself in speaking about racial issues in public. Noted civil liberties columnist Nat Hentoff — a man with more experience in these matters than probably anyone in the United States — wrote that the letter constituted “the likes of which I have never seen before in a campus newspaper.”¹⁹ In response, 45 pro-free speech faculty published their own counter-ad that appeared in the two student papers at the beginning of the following fall term.²⁰ In the end, however, it is evident that the *Herald* has emerged victorious in the battle over the Horowitz ad. Public opinion has fallen solidly on its side, and it has earned respect for its willingness to take the heat for what it believes.

Though the fight for civil liberty on campus appears to be gaining some headway elsewhere, in general such movements still have a long way to go. Accordingly, Madison's relative *sui generis* status calls for explanation. Several factors have no doubt contributed to Wisconsin's situation, such as the nature of the codes and investigations under their aegis; the relative power of interested student/faculty groups; the relative lack of significant racist incidents; etc. But one factor stands out: the strength of the civil liberty opposition, consisting of students and faculty (as Rauch emphasized in his essay on *The Daily Californian* and the Horowitz controversy).

CHECKS AND BALANCES AND THE POLITICS OF RIGHTS

Most writings on speech codes and related policies have analyzed the constitutional and policy implications of such measures. Libertarian authors have condemned codes across the board, while others have distinguished principled and less principled speech code efforts. These analyses have been very valuable. But the Wisconsin experience — especially in comparison with such campuses as Columbia and Berkeley — highlights the importance of another constitutional principle that points to politics rather than litigation in courts: checks and balances, which are part of the theory of countervailing power. In a world in which politics and power inescapably influence deliberations over policy and the meaning and application of principles, those who make policy must guard against being captured by dominant viewpoints that undermine honest consideration of competing claims.²¹ Countervailing power and checks and balances are especially important to universities for at least two reasons. First, as John Stuart Mill and Jonathan Rauch have shown, an open marketplace or forum of criticism and debate (i.e., a forum with a clash of countervailing ideas) is a necessary (if not sufficient) element of the process of determining the truth. Truth propositions must be exposed to rigorous criticism in order to claim validity. Furthermore, as Mill has famously written, unless even absolute or incontestable truths are strongly challenged, individuals will not be able to grasp them with sufficient depth and meaning. This logic is especially relevant to a university, for, as Rauch remarks, universities' "moral character is first and foremost to advance human knowledge." Consequently, "If governments stifle criticism, then they impoverish their citizenry; if universities do so, then they have no reason to exist."²²

The second aspect of countervailing power is the moral imperative of protecting civil liberties for their own sake. If one believes that free speech, academic freedom, and due process are important principles, especially at universities where the rights of dissenters are integral to the institutional mission, then these principles must receive very vocal support and be backed by some form of power. These two aspects of countervailing power are two sides of the same coin, for the substantive support of civil liberty on campus protects the open pursuit of truth.

In his noteworthy book, *Hate Speech: The History of an American Controversy*, Samuel Walker presents a simple yet powerful thesis: support for civil liberties prevails only when groups organize to provide the requisite support. "My central argument is that the strong tradition of free speech resulted from a series of choices. These choices have not only been Supreme Court decisions but also choices by advocacy groups that brought the major cases before the Court and choices by American society to affirm a very broad protection of free speech."²³ Perhaps because of his bias toward the ACLU and legal advocacy as an agent of mobilization, Walker downplays legislative and outright political mobilization to support civil liberties. But such mobilization can be even more effective in promoting respect for dissent and civil liberty than court action because they require broad persuasion and the establishment of a political network or infrastructure that is poised to engage in subsequent action when necessary.

Countervailing Power and the University

In the absence of individuals who resist such pressure, countervailing pressure and power must be brought to bear. In the context of the present crisis of civil liberty on America's campuses, more power must be exerted on the side of civil liberty. Such power can come from two sources: administrative leadership, or student and faculty groups. The fate of speech codes at Duke University provides an interesting example. Pro-speech code forces were prevalent on campus when Duke considered jumping on the national bandwagon by adopting a code in 1989. A code seemed inevitable until the Vice President of Student Affairs, who had formed a special committee with representatives of various groups to deal with the issue, brought noted law professor William Van Alstyne into the process. To cut to the chase: Van Alstyne stopped the code movement dead in its tracks. He raised serious questions about a code's advisability, and his prestige on campus gave his claims great weight. According to David P. Redlawsk, who studied the case,

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.²⁴

Alan Kors has been an even more outstanding example of individual resistance at the University of Pennsylvania. Though he has had allies and an important predecessor, Kors was an extraordinary entrepreneur in discrediting and undermining the Penn speech code in the wake of the infamous “water buffalo” case in the early 1990s. (In 1995, the new president abolished the code on her own executive authority, largely because of the climate Kors had almost single-handedly fostered.) This case is discussed more fully later.

Compare the situation at Duke to Wisconsin and Michigan in the late eighties. At Michigan, no prominent voices or groups opposed the codes; even Law School Dean Lee Bollinger, who had written one of the most noted and eloquent defenses of the free speech rights of hate speakers in 1986, refused to engage the debate in any public capacity.²⁵ A similar situation prevailed at Wisconsin in the late eighties, and the numerous law professors who gave advice unanimously supported the code that ultimately proved to be unconstitutional. Though the pro-code movement seemed inevitable in many respects, the fact remains that many supporters felt sheepish about them because of the free speech and civil liberty issues that lurked not far beneath the surface. So determined opposition could have made a difference. When the Faculty Senate debated whether to adopt the student and faculty codes in 1988, a few hardy souls spoke against the student code on grounds of utility or principle, but no one had prepared a unified front to promote an anti-censorship point of view. The student code passed by a wide margin. Immediately following this vote, the Senate passed the faculty code without any dissent whatsoever.²⁶

Overall, the sense of racial (and gender) moral emergency that reigned at the time was so strong that opposition may have proved futile, at least in the short run. The politics was a matter of social psychology as much as law and policy. But stronger counter-voices needed to be heard for the sake of pedagogical ethics and the marketplace of ideas. And opposition might have proved successful in some cases. Timothy Shiell portrays the scene in terms of countervailing power at Wisconsin, Michigan, and Yale:

We must remind ourselves, however, that what 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.”²⁷

There were three reasons that an opposition force did not develop at Madison during the first speech code cycle in the late eighties. First, many individuals believed that properly crafted codes were justified in the light of recent racial incidents on campus. Others maintained that such measures were justified with or without such contingent events. (I held the latter position at this point in time, which was based on the argument that I articulated in 1985 in my book, *Nazis in Skokie*.)²⁸ The incidents included a fraternity placing a large cut out of a black man on its lawn to advertise a Fiji Island party, and a handful of racist name-calling incidents on campus. The most notorious incident was a so-called “slave auction” at a fraternity in which a white student performed a skit dressed up as an African-American man. The administration and press treated the incident as scandalous, but the committee that investigated the case (some of whose members were very critical of the fraternity at first) discovered to its surprise that the incident was harmless: the auctions simply entailed students bidding on performers to raise money for charity, and the student who dressed up as an African-American did a reportedly hilarious imitation of rock star Michael Jackson. According to a source, the investigating committee broke out in laughter when it heard the audio track of the skit, and dropped all charges against the fraternity on the spot. Nonetheless, the University never cleared the air about what actually happened, so many individuals who voted for the speech codes later simply assumed that the skit had been riddled with racism or racial insensitivity.²⁹

A second reason for the opposition’s feeble status was the failure of those who harbored strong doubts to organize and present a consistent, coherent critique in the public sphere or the Senate. Such an organization could have made a difference by creating “cover” for other dissenting voices or for individuals who remained on the fence, empowering them to take public stands and thereby making the pro-free speech position look less unreasonable or extreme.

The third reason was something that academic and free speech activists have consistently lamented: the reluctance of actual opponents to speak their minds in the face of the strong moral consensus that had taken over the campus, encouraged at the highest levels of the administration. Speech codes were part of a broader plan to enhance racial harmony on campus — an obviously praiseworthy goal in itself. In 1988, the University developed the Madison Plan, which sought to increase racial diversity on campus at a variety of levels. Speech codes were a component of this effort. The problem was that the overwhelming consensus smothered dissent, opening the door to such unwise policies as speech codes. A *Badger Herald* report of a “leadership breakfast” in downtown Madison in April 1988 reveals the mindset that amounted to a “war on racism,” and how Shalala construed it as a key element in the agenda that she was bringing to the campus:

Madison Mayor Joseph Sensenbrenner announced Wednesday that it is the “collective responsibility” of community leaders to act to stop racism. . . . Shalala emphasized the need to “link arms to make the community better.” She said the action is being taken because there are “new people in town” to motivate it.³⁰

Many commentators have discussed how taking such a stance often exposes one to sometimes severe criticism. Building a movement in a hostile, ideologically charged environment requires overcoming psychological obstacles, especially the fear of being criticized or labeled. (In tyrannical and totalitarian regimes, physical safety can even be a problem. Such danger seldom prevails in the university setting, though leaders have been subjected to anonymous hate calls.)³¹ The typical response is to assume a conformist public posture rather than honestly expressing one’s beliefs. In *Private Truths, Public Lies: The Social Consequences of Preference Falsification*, Timur Kuran analyzes “preference falsification,” the process by which individuals adopt public beliefs that contradict their private beliefs. Kuran deals with several dimensions of the problem, including the psychological aspects of forming false preferences, the various factors that influence beliefs and public opinion, and the social and institutional consequences of distorting or denying one’s beliefs in the face of social pressures (perceived or real). He also compares the mentality and resources of those who resist falsification with those who do not. He demonstrates how change can arise when certain key events combine with action undertaken by an activist core that is willing to take on the necessary risks and burdens:

[A]t some point the right event, even an intrinsically minor one, can make a few sufficiently disgruntled individuals reach their thresholds for speaking out against the status quo. Their switches then impel others to add their own voices to the opposition. Public opposition can grow through a bandwagon process, with each addition generating further additions until much of society stands publicly opposed to the status quo.³²

Some person or group has to be willing to take on the pressure of criticism and vilification. At the University of Pennsylvania, for example, Alan Kors and a small number of allies (especially physics professor Michael Cohen) were exceptionally strong in the face of such pressure during the 1990s. Kors and Cohen possess a remarkably clear sense of the importance of core constitutional rights to universities’ missions, and have the strength of character to stand up to the scorn of critical colleagues. With consummate skill, Kors pounced on a notorious case in 1993 and generated devastating negative national publicity against the university. Freshman Eden Jacobowitz had called some African-American students “water buffalos” after they had disturbed his studying by making loud noises outside his dorm. The students filed a complaint under the campus speech code and the university unwisely pursued the case. The investigation and disciplinary proceeding looked like a witch-hunt to the outside world, which overwhelmingly rejected the university’s rationale for pursuing the case. The water buffalo case became the poster case against speech codes and political correctness in the nineties, discrediting Penn’s President Sheldon Hackney. Kors leveraged the case to win unprecedented institutional reform: the next president rescinded the speech code, student discipline was changed, and the student orientation sessions abandoned attempts at mind control. And administrators who placed “political correctness” above the due process and free speech rights of students were replaced by individuals who paid due respect to these core rights. Kors claimed that he achieved “total victory” by the end of 1995.³³ At Wisconsin, change was wrought in the later nineties by a small band of activists who established the Committee for Academic Freedom and Rights (CAFR), which will be discussed later.

These reflections show that the constitutional principle of checks and balances can be as important as the First Amendment in fostering a climate conducive to free speech and civil liberty. The complementary principles embedded in *Federalists 10* and *51* get to the heart of the matter. Both essays deal with the problems of tyranny of dominant or majority factions violating norms of justice and the rights of minorities or dissenters. James Madison presents what we may call the societal remedy to factional tyranny in *Federalist 10*: expand the geographic scope of the polity so that a large multitude of groups renders control by a dominant faction less likely. In other words, promote pluralism. *Federalist 51* turns to controlling the government itself through the system of checks and balances. These remedies are “negative,” in the sense that pluralism and checks and balances are designed to simply facilitate opposition groups who will negatively check or limit the power of other groups; but they are also “positive” in the sense

that it is hoped that notions of public justice and respect for rights will emerge out of the clash of interests represented in society and the government. The negative aspect reflects the practice of interest group liberalism, whereas the positive aspect points toward republican notions of virtue and citizenship. Paul Eidelberg depicts how the societal and governmental/structural aspects of checks and balances was designed to protect democracy in America from its darker intolerant tendencies, which arise out of the unchecked pursuit of equality (an urge very germane to the reign of speech codes and related policies):

[T]he first object of government is to guard against any attempt to remove the latent causes of faction. . . . the first object of government is to prevent the attempt to bring about a massive uniformity of opinions, passions, and interests . . . Madison wished to institute a system of checks and balances to preserve the republic from the leveling spirit. To guard against that spirit is to guard against the degradation of the republican form of government. . . .³⁴

CHECKS AND BALANCES AT THE UNIVERSITY

The Framers' classic understanding illuminates what went wrong on many campuses during the nineties. First, countervailing power ceased to check dominant power. Second, all too many campus leaders (faculty, administrators, and students) were blinded to the sometimes questionable consequences of their actions and policies because of their fervent beliefs in their own good intentions. An egalitarian version of moralism trumped the skepticism and caution that support the practice of rights.³⁵ An example arose at Wisconsin in 1997, when two high-level administrators at a College of Arts and Letters Senate meeting publicly denounced economics professor Lee Hansen for even publicly raising the issue of the appropriateness of certain affirmative action policies. Despite the fact that such policies are among the most hotly contested policies in America (and discussed openly in the media and other forums outside the university), these critics made it clear that a university dedicated to "diversity" should not tolerate the presentation of this counterview. In other words, it should not tolerate a diversity of ideas. (It should be noted, however, that by this time many faculty considered these comments very ill advised.)³⁶

By not properly distrusting themselves (or by caving into the demands of interest groups), university leaders in America forsook the spirit of constitutionalism. They failed to institute and nourish appropriate mechanisms of countervailing power that could check or question the growing monopolization of policy and opinion. One aspect of this problem is that universities' structures lack meaningful checks and balances unless faculty governance plays the role of a meaningful legislative checker. At Wisconsin, CAFR and the mobilization movement behind the faculty speech code battle have managed to revive a sense of faculty governance to some extent; for example, the mere threat of a CAFR-based challenge to proposed due process reforms led the University Committee (UC) to withdraw these reforms two months after the Senate voted to abolish the speech code in 1999.

In all too many cases, campus administrative leadership — the first place one would look for the protection of rights — was unwilling to protect rights in word and deed; and seldom have faculty stepped in to fill the void of administrative leadership. For example, I can not think of a single instance at Wisconsin over the last fifteen years in which a high-level administrator has taken a strong stand in favor of free speech in the face of the several major threats that have emerged. And nationwide, not enough faculty have been willing to undertake the efforts needed to establish a counter-position favoring free speech and civil liberty that links the principle of open discourse to the proper ends of the educational institution. As Madison wrote in *Federalist 51*, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."³⁷ The perception of this imbalance was one of the most important factors that led me to enter the ring as a leader of the UW-Madison free speech movement. I was committed to teaching and exploring ideas with students, and I taught courses on constitutional law, civil liberties, and free speech. As the nineties wore on and incidents took place that could not be ignored, it became obvious that one of the key problems on campus was the lack of public commitment to free speech and civil liberty. It was time to begin establishing some countervailing power.

THE BASIC POLITICS OF THE UW-MADISON FREE SPEECH MOVEMENT

The First Time Around

Any discussion of the UW-Madison free speech movement must begin with the stark fact that there was little hope of success when the quest began in the early nineties. New legal and political theories had been flourishing since

the later eighties that emphasized the harmful and discriminatory effects of insensitive speech, and these influences joined hands with a new generation of administrators and campus leaders who wrought a new *Weltgeist* that demoted concerns about free speech and civil liberty to secondary status. The climate that accompanied the Faculty Senate's passage of the student and faculty codes in 1988 produced a bandwagon effect in which voices of dissent were largely ignored. Most importantly, the Senate deferred very strongly to the expertise of the law professors who had drafted the code. All of the law professors involved in the drafting process argued for the constitutionality of both codes, and all but one strongly favored codes as a matter of policy. When the Senate voted for the codes, no one presented a dissenting legal argument; so most Senators — the vast majority of whom lacked relevant legal knowledge — simply assumed that the codes posed no constitutional problems.

To the law professors' credit, Wisconsin's student code was relatively narrow, even requiring an intent standard. (Unfortunately, the same thing could not be said for the faculty code, which was surprisingly broad.) One reason was that two of the leading experts who drafted the codes, Gordon Baldwin (who would eventually become CAFR's legal advisor and a code opponent) and Ted Finman, appreciated the First Amendment claims at stake. Finman, who was always the most important force behind the codes, sought to balance the values of free speech and protection against racial vilification. But another law professor involved in the drafting was Richard Delgado, who was well on his way to becoming a founder of the "critical race theory" movement and a leading critic of liberal legal principles and free speech doctrine.³⁸ Delgado's presence and the influence of such other champions of codes as law professor Linda Greene kept the codes from being too limited, especially when it came to the faculty code.

An important point must be stressed about the initial code votes. As mentioned, no debate accompanied the overwhelmingly favorable vote for the faculty code. One reason was that passions had already been spent on the debate over the student code, which preceded the faculty code debate. Another reason was that while everyone recognized and conceded that the student code was a *speech code*, very few — if anyone — recognized that the faculty code amounted to the same thing applied to faculty speech in teaching. The reason was simple: the faculty code was presented as an *anti-harassment* measure modeled on emerging sexual harassment hostile environment law. It appeared in the section of University rules dealing with "prohibited harassment," which made it appear to be a regulation of *conduct, not speech*. None of the legal authorities who presented the rule admitted that it covered ideas and speech as much as conduct, and no one else in the Senate was willing or able to challenge this point of view. One colleague of mine who did fathom this point said years later that he wanted to stand up and expose the speech-basis of the faculty code, but felt that his act would be futile because the bandwagon was headed in the opposite direction, and no one understood the point in the first place. Thus was a speech code smuggled into University rules under the guise of a conduct code — like a Trojan horse? To this day, this misrepresentation is one of the most important reasons that speech codes are tolerated on campuses.³⁹

The Second Time Around

After a federal court declared the student code unconstitutional in 1991, Chancellor Shalala convened a group of professors in November to consider drafting a new code that could meet constitutional muster. This time I was asked to join the Chancellor, Finman, and a small group of faculty to discuss the matter. The group included my political science colleague Joel Grossman, who served on the University Committee, the six-member committee that controls the agenda of the Senate and acts as a mediator between the administration and the faculty. Grossman was a lifelong civil libertarian who had harbored strong doubts about codes and had spoken against such policies in his own capacity in various forums. But he had not fostered or joined any alliance of similar-minded faculty. Grossman asked me to attend because he sensed (correctly) that I had finally started to become wary of speech codes, and would present at least some alternative viewpoints. The basic objective of the meeting was to decide whether the committee should ask the Senate the following week to authorize a new ad hoc committee to devise a second student speech code. (The University Committee could have sanctioned such a committee on its own authority, but the Chancellor wanted broader faculty backup or cover.) With Finman leading the way, this group agreed to take a case to the Senate; a week later, the Senate gave the ad hoc committee the green light. Some Senators questioned the advisability of enacting a new measure, while I told the gathering that any code we reenacted should be extremely limited and *view-point neutral*: that is, it should eschew political correctness by not singling out for prohibition those forms of fighting words or offensive speech dealing with such politically-preferred and controversial topics as race, gender, and sexual orientation. Of course, the entire political logic behind codes was to protect racial and gender sensitivities, so

my argument met little sympathy, and perhaps even less understanding. Though this argument was unusual at that time, it was surprisingly adopted by the United States Supreme Court some six months later in a path breaking decision that halted the adoption of the second code in its tracks. (I had nothing to do with this decision, of course, other than foreshadowing its use.) It was also a sign of how far I had moved in the direction of an abolitionist position.⁴⁰

Regardless, the Senate gave the committee the authority to draft a new code, which the Senate would then consider the following March. This committee consisted only of such law professors as Finman, Carin Claus, Linda Greene, and Baldwin. Looking toward the upcoming Senate meeting that spring, I knew that I had to finally take a public stand one way or the other on codes. My reputation on campus as a civil liberty scholar and commentator had grown in the years following the first code debates, and students and others were now looking to me for guidance or input.

Over the previous two years it had become evident that all codes are problematic for several reasons: codes inherently reinforce a political orthodoxy; codes are premised on the assumption that the University should protect students from offending and uncomfortable thoughts; whereas, on the other hand the University should be preparing students to deal constructively with such matters; codes represented victim ideology; codes are too often enforced in unprincipled ways that chill dissent and discriminate against dissenting viewpoints (books had begun to appear about the pall of orthodoxy that codes supported); codes inhibit the incentive to seek the truth in teaching, writing, and speaking. Finally, many students who were dedicated to free speech were urging me to reconsider my position. A few days before the Senate vote in March 1992, I was asked to appear on a *Wisconsin Public Radio* call-in show dealing with the upcoming Senate vote. They wanted me to take a position. The evening before the show I made up my mind to be an abolitionist.

The new student code responded to the federal court's criticism by clearly limiting itself to fighting words. The key provision designed to address the federal court's concerns defined "epithet" as:

a word, phrase or symbol that reasonable persons recognize to grievously insult or threaten persons because of their race, sex, religion . . . and . . . would tend to provoke an immediate violent response when addressed to a person of average sensibility who is a member of the group that the word, phrase or symbol insults or threatens.⁴¹

The Senate meeting in March was replete with powerful and emotional arguments. On the one hand, the debate revealed how far abolitionists had to travel. On the other hand, it provided the first glimmer of abolitionist hope. A large number of Senators applauded when some code advocates played the race card by linking those who spoke against renewal to racism. A leading member of the University Committee responded to criticisms of the code's chilling effect by declaring that it was about time that speech dealing with race and gender was chilled. Further applause filled the room when a leading supporter of the revision broke into tears when he recalled the pain that inappropriate epithets can inflict. The meeting exemplified how deeply the ethic of political correctness had penetrated the University. As Alan Wolfe observed in 1994, "The period when political correctness achieved its high point was a period of emotion, not one of reason."⁴²

But this time a minor opposition movement sparked considerably more debate and dissent. Behind the scenes, Grossman wrote an alternative motion that represented a University exhortation against hate speech, while eschewing sanctions and censorship. He asked me to speak for the statement on the heels of his introduction of it. The punch line of my speech was that the University's ultimate mission is to train critical minds in the pursuit of truth, and that speech codes compromise this mission in the name of sensitivity and alleged social justice. After I spoke, several professors came to the microphone to support the alternative motion. Evoking the classic rhetoric of free speech discourse, these speakers drew on the belief in unbridled free speech that still lurked beneath the surface of the University's collective consciousness despite its momentous rhetorical commitment to competing principles of racial sensitivity. As the anti-code speakers gained headway, it even appeared that our motion might carry the day. Sensing the turn of thought, supporters made their move, making the speeches mentioned above in an attempt to stem the tide. They carried the day. But it had been a good battle — and a sign of what can be accomplished when even a small group is prepared to make a concerted and organized defense of civil liberty principles. It would be a lesson I would not forget.⁴³

[C]odes are premised on the assumption that the University should protect students from offending and uncomfortable thoughts; whereas, on the other hand the University should be preparing students to deal constructively with such matters

It is interesting to compare this meeting with the scene in the Senate seven years later when the Senate held its first of three meetings on the *faculty* code. The Senate had for its consideration two proposals from an ad hoc committee that had been formed in 1997 to deliberate what to do about the code in the wake of publicity we had generated about questionable or improper investigations. During the 1997-98 academic year, the ad hoc committee was the site of countless hours of debate, study, and political intrigue. The “Majority Report” the committee sent to the Senate (led by Finman and Claus) called for substantial reform of the code, while the “Minority Report” (signed by me, journalism professor Bob Drechsel, mathematics professor Steve Bauman, staff member Bill Steffrenhagen, and the three student members of the committee, Amy Kasper, Jason Shepard, and Rebecca Bretz) called for radical reform that came close to abolition. Our radical group did not call for abolition at this point because we did not think it was politically feasible. But at the first meeting on December 7, 1999, virtually every senator who spoke attacked the modest reform proposal; many called for outright abolition. The debate took the form of a constitutional assembly, dedicated to pronouncing the first principles of liberty and the University. In the giddy atmosphere that followed this meeting, the activist core decided to go for outright abolition.

Before turning to the faculty code abolition movement, it is important to point out what happened to the second student speech code. After the Senate passed the measure, other authorities took it up. Because the student code was a system-wide measure (unlike the faculty code, which pertained only to the Madison campus), it had to receive authorization from the state legislature and the Regents. I spoke before an education committee at the legislature in late Spring 1992 along with several of my abolitionist students who went on to argue against the code before the Regents. Our arguments were in vain, for the code bandwagon was still going strong. But a short while before the Regents were to meet to place the final stamp of approval on the measure, the United States Supreme Court issued a stunning opinion that shook the regime of codes to its core, *R.A.V. v. St. Paul*.⁴⁴

On June 22, 1992, the Supreme Court invalidated St. Paul’s hate speech code on the grounds that it was overly broad and constituted *viewpoint discrimination* for singling out only certain forms of fighting words for prohibition: the usual categories of race, gender, color, creed, or religion. It was clear right then and there that the newly adopted Wisconsin code failed the new test. Though Finman and other supporters of the code maintained then and to this day that *R.A.V.* left an opening for campus hate speech codes, most commentators disagreed. More importantly, so did the Regents, who soon thereafter axed the new measure. Since that day, the University has not had a student speech code.

THE ROAD TO ABOLITION OF THE FACULTY CODE

Despite the generation of debate over the second student code and that code’s collapse in the wake of *R.A.V.*, code opponents failed to develop any sort of free speech movement that could be relied upon to protect free speech interests in the face of censorship crises that might arise. For example, there was no organized resistance to the overwhelming condemnation of the *Badger Herald* that erupted in Spring 1993 when angry students misinterpreted a cartoon as racist. Administrators condemned the *Herald* without duly considering the true intent of the cartoon or the free speech implications, and a horde of angry students committed intimidating acts against the *Herald’s* staff and stole hundreds of thousands copies of that edition. A couple of professors, including me, made public statements in defense of the *Herald*, but we were hardly heard over the din of misguided moral outrage.⁴⁵

During the next two years a few of us, especially philosophy professor Lester Hunt and I, (Grossman had moved on the Johns Hopkins University by the mid-nineties) took advantage of every opportunity we had to fill the public space with pro-free speech and civil liberty discourse. We gave speeches and media interviews, held forums, and published essays in local and student papers. In Fall 1993, Lee Hawkins, an African-American man who was the *Herald’s* editorial page editor and a leading anti-code activist in 1992, dedicated the fall term to the First Amendment. He published several controversial articles that pushed the First Amendment envelope and literally gave life to free speech principles on campus.⁴⁶ Hawkins was an outstanding model of student free speech activists whose oratorical and literary skills were matched by their courage.

In December 1993, Hunt and the Wisconsin Association of Scholars (WAS) brought Jonathan Rauch to campus to speak about his new book that was to become a mini-classic in free speech literature, *Kindly Inquisitors: The New Attacks on Free Thought*. The talk received good publicity. The WAS was a well-organized group of largely conservative scholars who had fought against political correctness and other aspects of Shalala’s reforms on campus, such as the new ethnic studies requirement that was instituted in the late eighties. But they had not contributed much to

the civil liberty debates. Civil liberty and free speech advocates were still isolated actors, supported only by a few superb student allies. But through persistence, public consciousness of an alternative viewpoint on free speech and civil liberty was mounting. By the mid-nineties, Hunt and I were sought out by the press or students whenever a free speech or civil liberty issue arose. The foundation was being laid for the building of a movement if the right circumstances came together.

In 1994, another advocate emerged: economics professor Lee Hansen. Hansen organized a conference in Fall 1994 to celebrate and discuss the Regents' publication one hundred years earlier of the famous "sifting and winnowing" statement defending academic freedom. Though modestly attended, the conference was well covered in the local press, and its papers were published in a book.⁴⁷ The conference added another ingredient to public consciousness and introduced Hunt and me to Hansen, who became a stalwart in the free speech movement. Journalism professor James Baughman chaired the speech code panel of this conference (which included papers by Finman, Greene, *Wisconsin State Journal* editor Tom Still, and me); we became good friends, and Baughman came on board as a noteworthy ally.

FORGING A POLITICAL MOVEMENT

The Rise of the Faculty Code as an Issue

Though we had become the main defenders of free speech and academic freedom on campus, Hunt and I were organizationally challenged, partly because of lack of training in this area, partly because no one appeared willing to take the time and trouble to join us in a coalition. We longed for more allies, especially after we became aware of the detrimental effects of the faculty code, which had surprisingly been forgotten by everyone in the wake of all the fuss over the student code. But the only allies we had were Hansen, Baughman, a few student allies, and some of the leading figures on the student papers.

Before 1993, we had concentrated on the student code and the general status of free speech on campus. But events transpired that gave us a new target that would galvanize a movement: the faculty speech code that had lurked in the dark shadow cast by the student code. The faculty code proved to be an excellent organizational tool because it addressed the self-interest of faculty in a way that the student code did not — a point that gained credibility when we began discovering and exposing improper investigations that had been conducted in its name. Focusing on the faculty code and the investigations also gave us a concrete target that concentrated our energies and served as a politically useful symbol. Finally, fighting the faculty code obligated us to engage in political activity and campus-wide persuasion because we were not able to convince the Wisconsin Civil Liberties Union (WCLU) — which had successfully litigated the student code — to take the case. The WCLU bought into the claim that the faculty code was a necessary anti-harassment code, not a speech code. Though anti-code supporters were upset at this decision (especially because the WCLU refused to even publicly support the movement in any fashion once the issue went to the Senate for consideration in 1998-99), in the end the WCLU's turning its back on the movement meant that anti-code supporters were forced to abolish the code through a political movement. This effort would prove to be much more meaningful and effective than litigation for at least three major reasons: (1) it wrought a political movement with widespread support that is now poised for action when civil liberty crises arise; (2) it required reaching out to public opinion on campus (and around the country) and changing campus citizens' minds about free speech and civil liberty; and (3) it meant that the abolition of the code was a statement by the University itself, not something imposed by a court.

The Cases

The first case involving an improper investigation concerned art professor Richard Long in 1991. Interestingly, the first time the public heard about the case was when Long called in to the *Wisconsin Public Radio* show that I did a few days before the March 1992 Senate debate on the second student code. Long did not go into details or give his name, remaining simply what the interviewer called him, "Richard from McFarland." I will never forget the moment. "Professor Downs, thank you for the points you have made against the code," Long said. "I agree with you. But you should know that there is another code, a worse code. A faculty code." "What do you mean?" I asked, taken com-

pletely by surprise. “There is a faculty speech code. I should know because I have been persecuted by it.”⁴⁸ I remained skeptical until Long called me at home that evening and told me his story. In a very real sense, the movement against the faculty code was born during that call.

Long’s transgression was shouting “*seig heil*” to a graduate student who had been harassing him in public for several weeks because of Long’s conservative politics. Long did not know that the student’s wife was Jewish. The student filed a complaint against Long for violating the code, and the University set up an investigation that amounted to a witchhunt of his beliefs. At one meeting, an investigator asked him, “Is it not true that you once used the word ‘femi-nazi’ with a colleague?” Gordon Baldwin generously offered his services as free counsel for Long. When the University dropped the charges because of their transparent absurdity, Long was then “informally” investigated by his department for displaying “racism, sexism, and homophobia” in the classroom. The department abandoned this effort, as well, but the University declined to publicly vindicate Long, and refused to give him any records of the investigation. As Long told Jonathan Rauch (who wrote an article on the abolition vote for the *National Journal*), “Your name is tarnished forever. For twenty years I tried to do everything they asked me to do. I loved being a professor. My father was a tenant farmer, so I saw this as a kind of opportunity. I venerated this university. I was a fool, obviously.”⁴⁹

Long’s case was the first revelation of an improper investigation. But at this point in time, opponents still remained voices in the wilderness. Other cases and events would emerge in the next few years that galvanized a movement. In late December 1994, for example, student Tim Graham published a lengthy interview with Long in the *Badger Herald*. This was the first exposé of such a case, and more were to follow.

Then the second case took place. None other than Lester Hunt was investigated for racism after a Native American student accused him of racially motivated grading, of using the word “injun” in a conversation with her, and of making a joke about the Lone Ranger and Tonto in class to make a point. Though he was completely vindicated by a fair process, Hunt was stunned by the accusation against him and by the fact that the lead administrator in the investigation (someone no longer with the University) told him that he could lose his job for his sins. Once again, the process was the punishment. Picking on Hunt was a major blunder for those dedicated to codes, for no one was more able and motivated to present and promote powerful arguments against the validity of codes. The case further radicalized Hunt, and made the cause even more urgent. The University Committee did not select Hunt to be on the ad hoc committee because he was an aggrieved party, but Hunt attended every meeting and was a leader of the abolition movement in the Senate. He also gave riveting testimony about his case to the ad hoc committee, helping to turn even the anti-abolition members against the existing code. The next case was fateful.

Your name is tarnished forever. For twenty years I tried to do everything they asked me to do. I loved being a professor. My father was a tenant farmer, so I saw this as a kind of opportunity. I venerated this university. I was a fool, obviously.

In later 1995 and into 1996, the History Department engaged in a secret investigation of professor Robert Frykenberg for alleged gender bias. The case is very delicate, and space is limited, so here are only the major points. In a nutshell, a faction of faculty members who were angered by the way the University had handled a sexual harassment case the previous year engineered the highly politicized investigation. When the faculty member received what they considered an insufficient penalty (a reprimand and no raise in pay for a year), they organized and convinced the department to conduct an investigation of gender relations, focusing on Frykenberg because he had not had women graduate students for many years. Individuals high up in the administration encouraged the investigation — about which Frykenberg remained ignorant for a substantial period of time. In the

end, it produced no meaningful evidence of harassment or discrimination. In the eyes of his supporters and others, Frykenberg was scapegoated for a political purpose, and the department and University lacked the authority to conduct this type of investigation.⁵⁰

After intense internal conflict and debate, two colleagues told Frykenberg what had been transpiring behind his back. One was future Congressional candidate John Sharpless who became a member of our coalition. Deeply wounded, Frykenberg sued the University through the Attorney General’s office, which is the route required by state law. The case was settled out of court. Frykenberg said that he would have pursued the case further had he had the kind of access to a lawyer that CAFR would eventually provide.

Though the faculty speech code was not the basis for the investigation, target Bob Frykenberg always considered the code to be the moving force behind the inquiry. The case shook the divided and politicized History Department,

alarming many liberals who had previously downplayed such problems. Frykenberg then became a leading advocate of change, motivated by his observation that the University had acted like an unchecked “Leviathan” in his case.⁵¹

The case in the History Department was the catalytic event for which the movement waited. It transformed the situation by bringing well-connected allies of Frykenberg into the fray. Most importantly, it led to the formation during Summer 1996 of an independent faculty civil watchdog group from across the political spectrum, the Faculty Committee for Academic Freedom and Rights (now the Committee for Academic Freedom and Rights — CAFR). Based on the connections of several members, the committee received outside funding from the Bradley Foundation and has retained Madison attorney Steven Underwood to handle cases. Leading members include Stanley Payne, Lester Hunt, Jane Hutchison, Mary Anderson, Lee Hansen, Marshall Osborne, Bob Frykenberg, James Baughman, Michael Fox, Eric Triplett, Gordon Baldwin, and me.

In November 1996, CAFR announced its formation in the student papers. The next day, the *Wisconsin State Journal* carried a front-page story on the committee that shook the University, carrying quotations by Jane Hutchison, Stanley Payne, and me. Hutchison told the paper that we had established ourselves independently of the University because the University was itself the source of the problem. Soon thereafter, WAS brought in noted civil liberty professor Alan Dershowitz to give a speech about speech codes. Dershowitz declared that the UW faculty code was “the worst speech code in the country.” These events focused public attention on the faculty code for the first time, leading the head of the University Committee, Evelyn Howell (encouraged by University Committee and eventual CAFR member Mary Anderson) to invite members of the committee to address the UC in January 1997 about the problems with the code. As a result of these discussions, the University Committee established the ad hoc committee to study what to do about the speech code. At long last, the movement had momentum, as a confluence of favorable events had turned the faculty speech code into a “public issue” that the University had no choice but to confront. It had crossed the critical threshold that all movements have to pass in order to achieve success.⁵²

Over the course of the next few years, CAFR took on several individual cases. In 1997, for example, it took the case of a 74-year-old professor who was accused of violating the code, and taken out of class to be questioned in a closed room protected by armed guards. The University settled the case with a minor sanction based on factors other than the code. The group has been involved in other cases as well. No such group is known to exist on any other campus. As mentioned, in 1999 the committee also played the pivotal role in preventing the University from adopting reforms to its procedures for disciplining faculty that posed problems for individual rights. And CAFR was the group that brought down the notorious anonymous complaint boxes set up around campus in Fall 2000.

Having told the story to this point, it is now time to discuss the key facets of the movement in relation to the points concerning countervailing power and politics discussed in the first part of this essay.

Forming an Activist Core

Throughout the nineties, we steadily built an activist core of faculty and students. Several students opposed the codes in articles in the student papers and in student government, but the first known group who lobbied and acted politically against the codes emerged in the debate over the second student code in 1992. Bill Dixon, Lee Hawkins, Mark Sniderman, Simon Olson, and Sarah Evans were among the leading activists. Each of these students took my undergraduate seminar on Criminal Law and Jurisprudence, and it was they who ultimately persuaded me to take a public stand against the codes. Our student allies had connections to the student government, the student papers (the *Badger Herald*, and the *Daily Cardinal*) and a number of student groups. As mentioned, Hawkins later became the editor of the editorial page of the *Herald*, and dedicated Fall 1993 to the First Amendment. In 1992, Hawkins, an African-American, was browbeaten by a top administrator to remain quiet about his opposition to codes in the name of loyalty to his race. Though initially traumatized by this “request,” Hawkins soon responded with anger and a sharpening of his opposition to codes. He was not the last target of administrative pressure who rose up to contribute to the movement.

Over the years other exceptional students with political acumen and commitment joined the fight, helping to lay the foundation for the future. The most prominent have included: Shira Diner, Tim Graham, Katie Culver, Christine Fredenberg, Kevin St. John, Jamie Fletcher, Mitch Pickerill, Even Gerstmann, Anat Hakim, Martin Sweet, members of the Jefferson Society, Andrew Browman (who matched Lee Hawkins’s editorial prowess at the *Herald* with his own powerful editorials with the *Cardinal* during the battle of the final two years), and Rebecca Bretz. (I personally

received invaluable advice and support from four other students: Kate Ross, Bob Schwoch, Sheerly Avni, and Michael Gauger.)

Amy Kasper and Jason Shepard (two other students of mine) deserve special mention for their incredible efforts that were indispensable in pushing us over the finish line in 1999. A former editor of the *Herald*, Jason was an extraordinary writer and speaker for the cause, and he single-handedly convinced the *Herald* to support abolition in an editorial. Amy worked best behind the scenes, and organized a major media event in Spring 1997 that raised the community's consciousness about the code. Among other things, she placed a poster in each lecture room on campus that asked, "Did You Know that There Is a Speech Code for this Class?" She also ensured that there would be ample media coverage of a teach-in. More people spoke to me about the code in the week following Amy's media event than at any time in previous years. The fact that Jason and Amy are minorities also added to their persuasiveness and credibility. (Amy is an Asian woman, Jason an openly gay man.) In his article on the Wisconsin movement for *Reason* magazine, Kors said of Amy and Jason, "Those who worry about the future of liberty should take heart from these students."⁵³

The recruitment of faculty to the cause was also important. The formation of CAFR was crucial. In addition, once the ad hoc committee began meeting, the code emerged as a major issue on campus, making more faculty aware of what was going on. The ad hoc committee itself was a key base of political action, as we ultimately drew committee chair Bob Drechsel to our side. Gaining Drechsel's support was a pivotal move, for Drechsel was respected and not considered a member of our controversial radical core. In addition, though the University Committee had the primary say in picking members of the ad hoc committee, we worked hard to make sure that the activist core had representation. In the months leading up to the final senate vote, other faculty joined the bandwagon in formidable ways, including Larry Kahan, Eric Triplett, and John Sharpless.

Taking Advantage of Faculty Governance

Our movement also took advantage of another difference between Madison and many other campuses, including Penn and Columbia: a tradition of faculty governance, institutionally linked to the Faculty Senate. Though faculty governance is being steadily undermined in various ways at Wisconsin and other schools (for example, by placing more students and staff on important committees — a move that the Senate stalled to some extent in 2001 at Wisconsin), Wisconsin's relatively strong tradition of faculty governance nonetheless continues in the Senate, which maintains the ultimate power to set policy for due process and speech. At Columbia, in comparison, the Senate seats students and administrators, in addition to faculty — a legacy of the 1968 uprisings. This made it more difficult for the faculty to resist the strong student movement on behalf of the new sexual misconduct policy. Numerous faculty claim that faculty governance and involvement is notoriously weak at that University. At Penn, the Senate's power has been steadily eroded by administrative policies and faculty apathy over the years, according to several interviewees.⁵⁴ Accordingly, President Sheldon Hackney possessed the executive authority to pass a speech code on his own initiative in 1987 (over what Kors called "strenuous faculty opposition"), and the incoming president, Judith Rodin, exercised the same power to abolish the code when she assumed power in 1995.⁵⁵ Though Kors won unprecedented victories at Penn, today he worries that the legacy of civil liberty is wearing thin because of the lack of a dedicated infrastructure at Penn.⁵⁶ (Kors devotes most of his attention to his national organization, FIRE, a major success story. No one has emerged to fill his shoes at Penn.)

At Wisconsin, however, major decisions involving speech and due process have to pass through the Faculty Senate, so the right kind of organization and pressure there can make a difference. In 1988, the Senate followed the lead of the administration and the special speech code committee in passing the student and faculty codes, whereas in 1999 it went the other way. Several CAFR leaders serve in the Senate, including Hunt, Anderson, Triplett, and me, as do several allies. We were the leading activists in preparing the content and strategy for the abolition vote in March 1999.

Other Strategic Moves

Three other strategic moves also proved crucial. The most important was working behind the scenes in Summer 1997 to ensure that the students picked for the ad hoc committee would not be ideologues committed to codes.

Though the ultimate decision rested with a subcommittee controlled by students, those students were receptive to our claims. As seen, the three students this committee picked ended up being strong opponents of codes; we could not have succeeded without them.

Geology professor Mary Anderson (who had had to fight her own battles within the University Committee the previous year) also provided indispensable support behind the scenes. First, she recommended to the UC that Drechsel and I be appointed to the ad hoc committee in Spring 1997. Despite these efforts, the committee was stacked with influential people who opposed radical reform. Anderson also informed me that Evelyn Howell, who at that time chaired the University Committee (but was leaving the UC the next year), was going to be placed on the ad hoc committee, and that it was being arranged for her to be nominated as the chair of the ad hoc committee at the first meeting in September 1997. Mary emphatically informed me that Howell's chairing the committee would deal our cause a blow. The fact that Mary's prediction proved true provides at least some support for the claim that the ad hoc committee was set up to resist radical change.

Some of us discussed an alternative nomination in advance of the meeting. So when an ally of Howell's nominated her as chair at our first meeting in September 1997, we were prepared. We pointed out that making the former chair of the UC the chair of the ad hoc committee could create an appearance of conflict of interest between the new committee and the administration. (True enough, but hardly our real concern.) We offered Drechsel as an alternative. At the time, Drechsel was unknown to most of the members of the committee, and he was undecided about his position on codes. Eventually, however, he became one of the most important leaders of the abolition movement, adding immensely to our power as a minority activist core within the ad hoc committee. (Drechsel is not a member of CAFR — but is a strong ally who also serves on the Senate.)

Once the issue went to the Senate and the debate pitted abolition against reform, we worked very hard to expand our base by discussing the issue with other faculty and students, holding numerous private and public meetings. By the time of the vote in March 1999, we could feel a seismic change coming over the campus. The speech code was now on the defensive, and advocating abolition was "in." It was an exhilarating feeling that defied belief.

Reaching Out

As mentioned, we sought to publicize our cause at every opportunity. We knew that the world outside had a jaundiced view of codes, and that exposure of our cause could put pressure on the University to be more open to change. The outside was an ever-present ally. In the early nineties we wrote pieces in the student papers and local press. I began teaching a lecture course of three hundred students on the First Amendment, and the course gained notoriety on campus.⁵⁷ Then we upped the ante when things got hot after the History case arose and CAFR broke ground. *Isthmus* published an inside account of the History case and the debate over the code, and students at the *Herald* and *Cardinal* (especially Andrew Browman, editor of the *Cardinal*) began advocating change. In the days before the eventual senate vote on March 1, 1999, Jason Shepard spent hours successfully convincing the editors of the *Herald* to back abolition. Normally a staunch ally in the civil liberty and free speech struggle, the *Herald* was irresolute because it was still reeling from having had its offices taken over the previous Fall by minority students angered at a cartoon. (Such fracasos take place every few years.) Typically, Jason carried the day. Three leading talk show hosts on *Wisconsin Public Radio* also did shows on the issue (Tom Clark, Jean Ferraca, and Ben Martens), and Tom Still and Sonny Schubert editorialized on our behalf for the *Wisconsin State Journal*. *The Capital Times* also favored free speech. Then we went national.

In Summer 1998, *The Chronicle of Higher Education* called me to discuss the *Southworth* First Amendment case at Wisconsin involving the use of student fees to support student groups. (Along with the speech code debate and the controversy over the *Reebok* non-disparagement clause in 1996, the *Southworth* case made Wisconsin the most prominent university in the country for free speech issues in the 1990s.) At the end of the interview, I informed the interviewer of the speech code debate, and he relayed the information to reporter Robin Williams, who came to campus in Fall 1998 to conduct interviews. The *Chronicle* ran a cover piece on the Wisconsin battle in October, generating interest across the country, and continued to cover the issue throughout the climactic year. Soon *The New York Times*, *The Boston Globe*, *Associated Press*, and other national press started investigating and writing about the story. After the final vote, articles appeared in these venues, as well as *The Wall Street Journal*, *The Village Voice*, *Reason*, *Liberty*, *National Public Radio*, and the *National Journal*.

One example of how exposure helped was the national coverage of an incident during the second Senate debate on February 1, 1999. Student abolition opponents brought forth a spokeswoman who presented the case that they hoped would stop serious reform in its tracks: she told the stunned assembly that a professor had recently used the word “niggardly” in class, and that this deeply offended her as a black woman. She made this remark a mere week after a similar misunderstanding of the same word took place in the city government of Washington, D.C., becoming a laughingstock across the country. The *AP* carried the University of Wisconsin story nationally, and the administration began receiving correspondence from alumni decrying the state of education at the University. At long last, the code was becoming an embarrassment for the administration.

Creating an Alternative Policy

The final aspect of the politics involved the need to break the prevailing monopoly of legal interpretation. The law professors involved with the code had convinced everyone of four things: that the faculty code was constitutionally valid; that it was mandated by federal anti-harassment law; that the University could lose federal funding if it rescinded the code (we called this the Chicken Little claim); and that it was essentially an *anti-harassment code* rather than a *speech code per se*. (Shalala and university leaders across the country have often resorted to this claim.) Debate over these issues tore the ad hoc committee at its seams. Our experience on the ad hoc committee had taught us that we had to challenge the law professors’ interpretations. We had to show either that their interpretations were wrong, or that the legal status of such codes was unclear. After the ad hoc committee sent its two reports to the Senate in fall 1998, we turned our attention to developing a legal and policy critique of this logic. Drechsel, Hunt, Hansen, Kasper, Shepard, and I were the main people involved in this enterprise, with some help from Triplett and Kahan. This enterprise became especially important when the University Committee decided to turn the February 1999 meeting into a debate over the legal issues.

Over Christmas break we labored to fashion a legal document for the February meeting. We contacted experts around the country, including Eugene Volokh of UCLA Law School and the Center for Individual Rights in Washington, D.C. Then Hunt contacted the *Shadow University’s* co-author, Harvey Silverglate, who wrote a long memo/essay on the infirmity of codes. Later, I arranged for Silverglate to come to campus for the February meeting and to deliver a speech presenting our side of the legal and policy issues. *The Wisconsin State Journal* covered his speech on the top of the front page, stressing his claim that the legal position of the other side was misguided. Silverglate also did a *Wisconsin Public Radio* show and conducted interviews with the student papers. Later we recruited Jonathan Rauch to deliver a public lecture a few days before the final vote.

We succeeded in neutralizing what had once been the dominant (indeed, monopolistic) legal interpretation, and many individuals said that they found our analysis much more credible. It was well worth all the work.

Postscript

Two months after the speech code vote in 1999, the University Committee presented the Senate with a set of reforms to change the procedures covering faculty discipline that would be voted on at the next meeting. The changes included allowing for anonymity of complainants and making it easier to prosecute cases. CAFR’s executive committee met with Underwood and composed a memo pointing out problems that Payne took to the next UC meeting. Payne told the UC that CAFR’s Senate members would challenge the reforms at the next Senate meeting, and the UC responded by pulling the recommendations and establishing a new ad hoc committee on which Payne served. A year later the Senate adopted a measure that ameliorated CAFR’s concerns, including the anonymity issue. CAFR’s victory on the speech code issue gave our allies and us deterrent power, which was manifestly evident two months later.

Fall 2000 presented an even greater challenge. Over the summer the administration gave in to the demands of student activists and established a program that encouraged individuals to drop anonymous complaints about harassment and disparaging speech into special boxes set up around the campus. Activists proclaimed that they intended the UW-Madison program to be a launching pad for the country. Immediately mindful of the obvious Orwellian implications of this program (called MARC, for Make a Respectful Campus), CAFR held an emergency meeting and set out to fight the program. We began by engaging in a massive email campaign to enlist faculty support — which

was overwhelming — and contacted *Isthmus*, which ran a major story that had a great impact. The title of the story was “Sifting, Winnowing, and Informing.” Then a group of four CAFR members met in early October with the acting chancellor, John Wiley, who had opposed MARC when he was the provost. Baughman, Hutchison, Hunt, and I told Wiley of our concerns, and let him know that a faculty revolt was brewing on the issue. Wiley asked us to wait a month as he investigated the matter. On election day, a month later, he dismantled the program. We felt that it was fair to ask whether this result could have been achieved at any other major university.

CONCLUSION

A few lessons can be garnered from the success of the University of Wisconsin-Madison free speech movement. First, individuals dedicated to free speech and liberty must seek out kindred spirits in order to spawn the conditions necessary for a movement, and to show individuals that they are not alone. Second, activists need to establish an organizational structure and support system that is able to withstand and exert pressure — engage in interest group politics. They need to reach out to students, many of whom hunger for the commitment to liberty and are drawn to professors who honor it by example. It is also important to draw on any positive legacies of the institution. At Wisconsin, we took advantage of the potential of faculty governance and drew on the famous university motto on the Bascom Plaque: “Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state university of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone truth can be found.”

NOTES

1. See Amendments to UW-Madison Faculty Policies and Procedures, II-303-306 ("Prohibited Harassment: Definitions and Rules Governing the Conduct of UW-Madison Faculty and Academic Staff"). May 3, 1999.
2. Rauch, "An Earthquake in PC Land," *National Journal*, March 6, 1999.
3. See Alan Charles Kors and Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press, 1998). Other notable books among a long list are Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993); Nat Hentoff, *Free Speech for Me — But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (Harper Collins, 1994); Edith Kurzweil and William Phillips, eds., *Our Country, Our Culture: The Politics of Political Correctness* (Partisan Review Press, 1994), p. 286; and Richard Bernstein, *A Dictatorship of Virtue: Multiculturalism and the Battle for America's Future* (Knopf, 1994).
4. "Rethinking Limits on Faculty Speech: U. of Wisconsin Debate Reflects Changing Views of Political Correctness and Academic Freedom," *The Chronicle of Higher Education*, October 2, 1998, p. A1.
5. Wis. Admin. Code, Sec. UWS 17.06(2).
6. *UWM Post, Inc., et al. v Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (1991). Michigan's code also fell in court: *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).
7. *Cory, et al., v. Stanford*, Santa Clara Superior Court, case no. 740309, Feb. 27, 1995; *Iota Chapter of Sigma Chi Fraternity v. George Mason University*, 773 F. Supp. 792 (E.D. Va. 1991). See also *Dambrot v. Central Michigan*, 839 F. Supp. 477 (E.D. Mich. 1993). On the various types of speech codes, see Martin Golding, *Free Speech on Campus* (Rowman and Littlefield, 2000), Ch. 1.
8. See Andrew Brownstein, "ABattle of Wills, Rights, and P.R. at Columbia: University Rethinks Judicial Code after Civil-Liberties Group Uses 'Guerilla War' to Attack It," *Chronicle of Higher Education*, July 2, 2001.
9. Interview with Columbia Law Professor Vivian Berger, April 2001.
10. "Due Process at Columbia," *Wall Street Journal*, 10-4-00, p. A26. The two exceptions were physics 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 Notes of Columbia Senate, February 5, 2000, and interviews with Applegate and Lynch, June 2001.
11. Ward interview.
12. Lawrence Kaplan, "Columbia Blues," Washington Diarist, *New Republic*, December 4, 2000, p. 58. On these issues, see the web pages on the reforms, and FIRE's website at: www.theFire.org.
13. *Ibid.*
14. On the Fletcher case, see: Interview with George Fletcher, May 2001; FIRE's materials on the case at: www.theFire.org. On the due process reforms, see FIRE's website, as well as: Karl Ward's site and SAFER's website at: www.columbia.edu/cu/safer/studentproposal.html
15. David Wiener, "The History," in *The Diversity Hoax: Law Students Report from Berkeley* (Foundation for Academic Standards and Tradition, 1999), David Wiener and Marc Berley, eds., pp. 19, 34. Interview with Weiner, June 2001.
16. For these numbers, see Marc Berley, "Missing larger point in campus free-speech flap," *Houston Chronicle*, March 29, 2001, p. 35A.
17. See the extraordinary materials on the *Brown Herald's* website: www.Brownherald.com.
18. Rauch, "ACollege Newspaper Messes Up, and So Might You," *National Journal*, March 24, 2001. I have been CAFR's advisor to the *Badger Herald* during this and other episodes. Among other things, I wrote some articles defending them. See "Free speech finds a home in Madison," *Chicago Sun Times*, March 24, 2001, p.16; "Badger Herald takes bold, courageous free speech stand," *Milwaukee Journal-Sentinel*, March 19, 2001, p. 9A; "Free speech and racial sensitivity aren't mutually exclusive," *Capital Times*, May 10, 2001.
19. Hentoff, "Chilling Free Speech on Campuses: Sensitivity Above All?" *Village Voice*, May 31, 2001.
20. *Badger Herald*, August 31, 2001; *Daily Cardinal*, September 4, 2001.
21. On how interest group liberalism undermined the pursuit of public justice, see Theodore Lowi, *The End of Liberalism: the Second Republic of the United States* (Norton, 1979).
22. Rauch, *Kindly Inquisitors*, p. 86; John Stuart Mill, *On Liberty*.

23. Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press, 1994), p. 2.
24. 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.
25. David Sedler, the lawyer who won the case against the Michigan code, told me in 1990 that Bollinger's absence from the debate was shocking to him. See Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986).
26. Tape of Faculty Senate, May 2, 1988.
27. Timothy C. Shiell, *Campus Hate Speech on Trial* (University of Kansas Press, 1998), p. 55.
28. Donald Alexander Downs, *Nazis in Skokie: Freedom, Community, and the First Amendment* (University of Notre Dame Press, 1985).
29. Interview with Stephen Hurley, attorney for the fraternity.
30. *Badger Herald*, April 28, 1988, p. 1.
31. I have been so targeted several times. Kors told me that he has never received such a call.
32. Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* (Harvard University Press, 1995), p. 20.
33. Interview with Kors, July 2001. Kors told me that he conducted a survey of news stories about the case, and found at least 600 stories. On the case itself, see *The Shadow University*, Ch. 1. Kors told me, "if I had had ten strong allies, I could have changed the world."
34. Eidelberg, *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* (Free Press, 1968), p. 153. Tocqueville's notions of the need for "remedies" for the conformist tendencies (especially the "tyranny of the majority") of American democracy are similar to the logic of checks and balances that Eidelberg articulates here. See Alexis de Tocqueville, *Democracy in America*, Vols I and II (Schocken Books, 1961), H. Reeve, trans.
35. See Richard Flathman, *The Practice of Rights* (Cambridge University Press, 1976).
36. On how certain aspects of the American Left have harbored and contributed to the fostering of illiberal ideas in the name of social justice and progress, see Richard J. Ellis, *The Dark Side of the Left: Illiberal Egalitarianism in America* (University of Kansas Press, 1998). Ellis argues that some aspects of "political correctness" represent such illiberal impulses.
37. *Federalist 51*, in *The Federalist Papers*.
38. See, e.g., Mari J. Matsuda, Richard Delgado, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).
39. Such leading critics of codes as Kors, Silverglate, and Hentoff now make this claim repeatedly. See, e.g., *The Shadow University*.
40. Senate meeting, November 4, 1991.
41. Wis. Admin. Code, sec. UWS 17.06(2) Revised.
42. Wolfe, "The New Class Comes Home," p. 286.
43. The events described here are based on the tape of the Senate meeting, March 1992, and my own recollections. See also Kiki Jamieson, "Paved with Good Intentions: the University of Wisconsin Speech Code," in Heumann and Church, *Hate Speech on Campus*, pp. 170-91.
44. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
45. See full page interview of Donald Downs by *Herald* editor Jodie Cohen, "Professor Accuses University of Lack of Support for Intellectual Freedom." May 1993.
46. Hawkins was a student of mine. He launched the semester with five lengthy interviews with me in the *Herald* about the meaning and importance of free speech.
47. W. Lee Hansen (ed.), *Academic Freedom on Trial: 100 Years of Sifting and Winnowing at the University of Wisconsin-Madison* (Office of University Publications, University of Wisconsin-Madison, 1998).
48. The quotations here are based on my reconstructed memory, not the tape of the show, which I do not possess. They are very close to what was actually said.
49. Rauch, "An Earthquake in PC Land," *The National Journal*, March 6, 1999. Long presented the details of his case to the ad hoc committee as well. He also granted a long interview with the *Badger Herald*, which I discuss later.

50. Frykenberg file, which is presently in my possession.
51. Frykenberg has used this term in many statements about his case. A look through materials related to the case show the extent to which the University was one-sided in its approach to the History case.
52. See Joseph Gusfield, *The Culture of Social Problems: Drinking — Driving and the Symbolic Order* (University of Chicago Press, 1981), p. 3 (“Human problems do not spring up, full blown and announced, into the consciousness of bystanders. Even to recognize a situation as painful requires a system for categorizing and defining events.”)
53. Kors, “Cracking the Speech Code,” *Reason*, July 1999, p. 34.
54. Interviews with Alan Kors, Michael Cohen, Henry Teune, and Anthony Tomanzinas, July 2001.
55. Interview with Kors; Kors and Silvergate, *The Shadow University*, p. 10.
56. Interview with Kors.
57. The first time I taught the course in 1993 I was a crusader, but I then realized that this was not an appropriate way to teach. The next times I taught the course I played both sides of the fence while also letting my own views be known in appropriate spots. (Most students knew anyway.) In the end, this approach was probably both more responsible and effective in disseminating free speech values by example rather than preaching.

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