

# THE UNIVERSITY OF WISCONSIN, FREE SPEECH, AND THE FIRST AMENDMENT

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It has been over a year now since the University of Wisconsin faculty senate voted to abolish its speech code governing faculty speech with students, thereby becoming the first major university in the country to do away with a code on its own initiative, without being ordered to by a court. Enacted in 1988 along with a student code that a federal court invalidated in 1991, the faculty code prohibited

instructors from making statements or gestures that "demean" students on the basis of race, gender, sexual orientation, culture, handicapped condition, and the like. Few senators who voted for the faculty code understood that it was a *speech* code, as its defenders presented it as a straightforward prohibition of discriminatory conduct mandated by federal law.

Though the code embodied some laudable objectives (mainly to foster due respect for students considered vulnerable because of their minority status), in the end the University of Wisconsin could not escape the stubborn lessons of the history of censorship. The code fostered a chilling effect on speech dealing with controversial subjects in the classroom — though it must be acknowledged that the intolerant



erant mindset and attitudes behind the code were the major villains in this respect. And it instituted the authority that ultimately led to several investigations of innocent parties, inquiries that seemed to step right out of the pages of Kafka.

When we began the Madison free speech movement in the early nineties, we resembled modern Sisyphuses straining

to roll our free speech pebbles up Bascom Hill. Few on campus seemed to worry about what was happening to free thought or due process. The University had earned fame for being one of the foremost leaders in the national speech code movement and as a haven for political correctness. What happened to bring about this reversal of fortune at Wisconsin, of all places?

## Wisconsin's Decade Of The First Amendment

The nineties was a trying decade for the First Amendment on American campuses, and

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no institution epitomized this crisis more than Wisconsin. During the nineties, Wisconsin had to deal with three important free speech or First Amendment issues that captured national attention: 1) the speech codes (faculty and student); 2) the enactment in 1996 of a contract with Reebok that brought millions of dollars to the University and required the University to take "prompt and reasonable action" when any "employee, agent, or representative" said something "disparaging" of Reebok; 3) the *Southworth* case dealing with the First Amendment status of the system for allocating compulsory student fees to political groups, a case that ended up in the United States Supreme Court.

Despite some qualifications, the University came out on the right side of the First Amendment in the latter two cases. The Chancellor rescinded the Reebok speech clause after hundreds of professors sent him an e-mail message castigating the offending provision. This act was only a qualified victory for free speech, however. While opposing Reebok was necessary, the stance seemed as much politically motivated as principled (would a similar clause concerning a less politically incorrect company have engendered such overwhelming opposition?), and it did not require standing against the prevailing political winds. In April, the University won the *Southworth* case, 9-0, largely because *Southworth* never contested the fee system's potential Achilles heel: viewpoint discrimination in the distribution of fees to student groups. Because the Supreme Court ruled that viewpoint neutrality is constitutionally required in such systems, that issue is being investigated as we write.

Nonetheless, we believe that the University has learned something over the last decade, and that the status of free speech and academic freedom is now somewhat more secure. A look at the battle over the faculty speech code provides a lens by which to evaluate this claim, for that code's demise entailed many individuals changing their minds about free speech and the legitimacy of codes.

Much good work has been written about the legal and normative policy implications of campus speech codes, so we do not intend to retrace that important ground here. As activists in the free speech movement at Madison, what we find most meaningful about our own participation in the movement is something that has not been adequately addressed in the literature: the political and institutional factors that contributed to our unexpected success. A look at these factors can teach us something about what it takes to reinvigorate the conditions conducive to liberty on America's campuses and elsewhere.

### **The Resort To Politics**

The decade-long struggle over speech codes took place on legal and political fronts. The student code, which was passed along with the faculty code in 1988, was declared unconstitutional by a federal court in 1991. (*UWM Post v. Board of Regents*) In spring 1992, the faculty senate responded to this ruling by voting for a revised version of the student code, but the Regents refused to ratify this decision in the wake of a Supreme Court ruling in another case in June that rendered the revised student code constitutionally suspect. (*R.A.V. v. St. Paul*) We were saved by the judiciary. Consequently, no student code has existed at Wisconsin since 1991. Despite the dire warnings of those who advocated renewal of the student code, no prominent incidents of hate speech have been reported on campus since 1991.

The faculty code, however, was never tested in court. One reason was that the state branch of the Wisconsin Civil Liberties Union refused to take the case, even though it had been instrumental in bringing down the student code. Later, the Wisconsin ACLU also refused to endorse the abolition movement in the days leading up to the faculty senate vote, even though the Supreme Court has placed academic freedom at the heart of the First Amendment. In Justice Brennan's words, "That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (*Keyishian v. Board of Regents, 1967*)

In the end, we were glad that we had to slay the code ourselves because this meant that we had to forge a political infrastructure based on an activist core of approximately twenty faculty and students that reached out to a broader audience across the political spectrum — a process that will prove far more useful to the cause of free thought in the future than reliance upon a mere court order. Court orders amount to impositions from outside the institution, not requiring the politics and convincing of other minds that are necessary features of democratic politics. The debate over the code captured the attention of the University community (and was covered by leading newspapers and magazines across the country), and many individuals renewed their commitment to liberal principles of intellectual freedom. Such principles now comprise part of the public consciousness of the University, and, at the very least, will have to be reckoned with in the crises that no doubt will come our way in the future. We know of no other university where such an infrastructure exists.

#### **How Far We Had To Come**

Many of us, including some members of the later abolition movement, originally supported speech codes. Indeed, co-author Donald Downs voted for both codes as a member of the senate in 1988, and co-author Anat Hakim did not oppose them as a participant in student politics. We agreed with the desire to make the University a more hospitable place for minority students, and some troubling incidents of racism had occurred on campus that raised concerns. In addition, new legal and political theories were flourishing in the later eighties that alleged the harmful and discriminatory effects of insensitive speech. In conjunction with the rise of new administrators and campus leaders dedicated to equality and

social justice, a new *Weltgeist* emerged that placed free speech and the First Amendment decidedly on the defensive. Whereas free speech was instrumental to the success of the civil rights movement, by the later eighties prominent scholars of race maintained that free speech posed an obstacle to racial progress. Only now are we starting to recover from the effects of this logic, which was historically uninformed and empirically suspect.

The senate debate over the revision of the student code in spring 1992 highlights how things stood early in the decade. At this dramatic and emotionally charged meeting, many members of the senate applauded when some code advocates played the race card by associ-

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ating those who spoke against renewing the code with racism. More applause erupted when the chair of the University Committee (the six-member group of faculty that controls the agenda of the faculty senate) responded to criticisms of the code's chilling effect by declaring that it was about time that controversial speech about racial and gender issues 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 senate's responses to these remarkable statements show how deeply engrained political correctness was at Madison back then, and how the traditional notion of a university as a place dedicated to the sometimes difficult and painstaking pursuit of truth and the vibrant clash of ideas had given way to a new notion dedicated to egalitarian sensitivity and the therapeutic ethic of self-esteem. As Alan Wolfe has observed, "The period when political correctness achieved its high point was a period of emotion, not one of reason."

By this time, some of us who had originally supported codes were filled with doubts.

The problem was not so much the goals embedded in the codes (though some of these were open to question), but rather the illiberal means universities had chosen to achieve these ends. It was a classic story of questionable means serving valid ends, of good intentions going awry, reminding us of the words of Justice Louis Brandeis in a famous civil liberty case: "Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." (*Olmstead v. U.S.*, 1914) The 1992 senate debate reminded many of us of the words.

### The Seeds Of Change

At this point in time, however, critics of the codes were limited in number and unorganized. The Wisconsin Association of Scholars (WAS), the state branch of the National Association of Scholars, had publicly opposed the codes, but its main agenda concerned the curriculum and related matters (though WAS's existence would later prove valuable as an ally to such non-members as Downs, Mary Anderson, Robert Drechsel, and Lee Hansen). Also, in 1992 a small student group formed that established the blueprint for later faculty-student alliances. Political science students and political entrepreneurs extraordinaire, Bill Dixon, Lee Hawkins, Mark Sniderman, and Simon Olson banded together and spoke against the second student code in the student papers and at hearings by the Regents and the state legislature. A year later, Hawkins (a black man who had once been brow-beaten by a leading member of the administration to support the codes in the name of loyalty to his race, an act that Hawkins considered unconscionable) became editor-in-chief of the *Badger Herald*, and dedicated the fall semester of 1993 to the First Amendment. That fall the *Badger Herald's* pages burst with articles and interviews concerning free speech.

At the 1992 senate meeting, political scientists Joel Grossman and Downs introduced an amendment opposing the revised student code. Such free speech advocates as journalism

professor James Baughman (who remained a steadfast member of the abolition movement throughout the struggle) spoke in favor of the motion. Though foes of the codes remained essentially isolated for several more years, the senate debate over the student code in 1992 was, in effect, the beginning of the free speech movement at Madison, despite the tone of the meeting discussed above.

A few days before this 1992 vote, Downs and host Mark Paulsen received a phone call from a man named "Richard" during a Wisconsin Public Radio call-in show on the student speech code. Richard told them that they should turn their attention to "another code, a worse code. I know because I've been persecuted by it." Later that evening art professor Richard Long called Downs and told him his story. Long's revelation was one of the factors that got the faculty code politics rolling.

What happened to Richard? Back in 1991, Long said *seig heil* to a graduate student who had been harassing him in public for several weeks because the student could not suffer Long's conservative politics. Unbeknownst to Long, the student's wife was Jewish. Unable to deal in an intellectual fashion with being accused of acting like a Nazi, the student filed a complaint against Long for violating the code. For saying what millions of Americans have said in similar circumstances, Long was formally investigated by the University in a manner that amounted to a witch hunt 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?" When the University came to its senses and determined that the charge against him was unsustainable, Long was then "informally" investigated by his department for displaying "racism, sexism, and homophobia" in the classroom. Eventually, the investigations were dropped because of their absurdity, but the University declined to publicly vindicate Long, and refused to give him any records of the investigation. As Long told journalist 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 every-

thing 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." Long's case was the first revelation of an improper investigation, and it brought several of us together to start discussing what to do about the code. But at this point in time, we remained voices in the wilderness.

As the nineties wore on, other questionable investigations took place that had catalytic effects on our movement. In 1992, a Native American student accused philosophy professor Lester Hunt of racism for the way he graded her exams, for using the word "injun" in a conversation with her, and for using a joke in class about the Lone Ranger and Tonto to illustrate a point about conflicting loyalties. Though Hunt was completely vindicated by the investigation (which, unlike Long's, was handled with respect for due process), he was alarmed by the implications of the code for teaching. Perhaps more than anyone, Hunt fathomed how the presence of the code thwarts conscientious teaching. As Hakim wrote in an unpublished article, teaching had become "a game of strategic thinking — an academic cat-and-mouse exercise. The vitality of the cauldron of ideas that is the university is extinguished when giving offense is forbidden." A long-time advocate of liberty and academic freedom, Hunt networked with other speech code critics and became an intrepid member of the fledgling free speech movement.

By the mid-90s, our small group had little influence, but we spoke out against the code every chance we had. WAS and student activists brought such champions of free speech to campus as Rauch (who had just written a classic book defending free thought) and Nat Hentoff (who had also written an impor-

tant book), Downs began teaching a lecture course of several hundred students on the First Amendment, activists like Hunt wrote articles and spoke repeatedly to the media about free speech issues. Professors and students developed a synergy that would energize the final drive a few years down the road. A new generation of students spoke out against the codes, led by Laura Evans, a member of the student government. And a notorious incident in May 1993 in which students intimidated the editors of the *Badger Herald* and destroyed hundreds of copies of the paper after they misinterpreted a cartoon as racist raised more public consciousness of the fragility of free speech on campus. In the face of pressure, the free speech viewpoint slowly began to enjoy a public presence on campus. Later on, other able students joined the fray on our behalf, including Shira Diner, Tim Graham, and Kevin St. John. But the forces behind the code remained entrenched.

### **The Turning Point**

Then in 1996, another notorious case arose that involved an illegitimate secret investigation of an innocent professor in the history department who was targeted as a scapegoat for another issue. Though the faculty code was not invoked in the case, the logic that drove the investigation was similar to that behind the code, and the target of the investigation linked the code to his plight. In the target's estimation, in sanctioning the investigation, the University became a Leviathan that did not care if it crushed him under its feet, his decades of outstanding service notwithstanding. The case sent shivers through the divided and politicized history department, and shocked many liberals who had been too nonchalant about the illiberal forces that had been tolerated on campus for too long. When conscientious colleagues finally informed the tar-

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get of what was going on (one was John Sharpless, the future congressional candidate who was another movement participant), he sued the University and won a settlement that represented vindication.

The history department case transformed the situation. It led certain members of WAS to reach out to non-members who shared a concern about civil liberties and free speech. We formed a group named the Faculty Committee for Academic Freedom and Rights (FCAFR), headed by history professor Stanley Payne, dedicated to protecting civil liberties on campus. (Its executive committee consists of Payne, Downs, Hunt, Jane Hutchison, Mary Anderson, Lee Hansen, Marshall Osborne, and Robert Frykenberg.) The group attained outside funding to support legal cases, and has taken on several cases in recent years. The group's formation was announced on the front page of the *Wisconsin State Journal* in November 1996 in an article that also mentioned the history department case — an exposure that shook the University. Later that fall, WAS brought in noted Harvard civil liberty professor Allan Dershowitz to speak about the faculty speech code. Dershowitz pronounced the code the "worst speech code in the country." These events focused public attention on the code for the first time, leading the head of the University Committee, Evelyn Howell (encouraged by University Committee member Mary Anderson) to invite members of the FCAFR to address the committee about the code in January 1997. As a result of these discussions, the University Committee established an ad hoc committee to study what to do about the speech code. During this time another improper investigation arose that was never made public: a 74 year old professor was pulled out of lecture and questioned in a closed room in the presence of two armed guards. The allegations against the professor proved to be without merit, and the University dropped the case after the FCAFR got involved.

At long last, we had momentum. A confluence of favorable events had turned the faculty speech code into a "pubic issue" that the

University had no choice but to confront. We had crossed the critical threshold that all movements have to pass in order to achieve success.

### **The Ad Hoc Committee**

The ad hoc committee (which consisted of 17 voting members and 2 ex officio members, the latter of which included the main author of the existing code) began meeting in September 1997. It was stacked in favor of more modest reform rather than radical reform or abolition, as the University clearly intended to keep some type of meaningful code. But a core of radicals emerged who formed a strong minority: Downs, journalism professor Robert Drechsel (the committee chair), mathematics professor Steven Bauman, academic staff member William Steffenhagen, and three die-hard student activists, undergraduates Amy Kasper and Jason Shepard, and law student Rebecca Bretz. The committee and its subcommittees met for countless hours over the course of the year, engaging in everything from high-level discussions about the mission of the university to political intrigue and calculation. A book could be written about its memorable experiences alone.

The students were crucial to the cause. Amy and Jason are minorities (Amy is Asian and Jason is gay), and this status combined with their eloquence and political savvy to discredit claims that minority students need speech codes to protect their sensibilities. Over the course of the next two years, Jason and Amy engaged in endless political activities to sway opinion, including cajoling the student papers to support abolition. Senior class president Christine Fredenberg assisted us and got a major committee of student government to support abolition. Soon co-author Hakim jumped into the fray after returning to Madison to work at Foley and Lardner. Among other things, she unsuccessfully tried to enlist the ACLU in the cause. The student papers took our side, especially the *Daily Cardinal*, whose editor, Andrew Browman, wrote biting commentary against the code. The *Badger Herald* followed suit.

In late May 1998 the ad hoc committee split almost down the middle in the recommendations it sent to the senate for a vote the following academic year. The "majority" report, favored by the administration and the University Committee, advocated significant yet non-radical change. The "minority" position was radical, close to abolition.

### Politics And The Senate

It had finally come down to the senate. The senate debated the code in December and February, with the vote to take place on March 1. Though the administration and the University Committee favored the majority report, we thought we had an outside chance if we appealed directly to the campus and the senate, circumlocuting the powers that be. In the fall of 1998, student activists shouted down anti-affirmative action activist Ward Connerly during his address at the Union Theatre, an act of censorship that received local and national attention. This event helped our cause because it revealed the precarious status of unpopular and dissenting speech on campus. Earlier

that fall, we contacted the *Chronicle of Higher Education*, which published a cover story on the code politics at Wisconsin, opening the door to coverage by other national media. We nourished media contacts because we knew that codes were highly suspect in the outside world, and that exposing what had taken place at Wisconsin would put the University on the defensive. The local media obliged, especially the *Wisconsin State Journal*, *Isthmus*, and Wisconsin Public Radio.

Then in December, something remarkable happened. The senate stunned everyone when virtually every person who took the floor attacked the majority report. The debate took

on the tone of a constitutional assembly, dedicated to liberty, pronouncing the first principles of educational government. In the giddy atmosphere following this meeting, we decided to throw caution to the wind and introduce a motion for outright abolition at the March vote. The contrast between the 1992 senate meeting discussed earlier and the December 1998 meeting could not have been more stark. Could this have been the same University?

Encouraged, we shifted into overdrive during the Christmas break, contacting media and civil liberty lawyers and institutions around the country to plead our case and to ask them to assist us in hammering out our

legal arguments against the code at the next senate meeting. Hunt initiated discussions with Harvey Silverglate, co-author with Alan Kors of *The Shadow University: The Betrayal of Liberty on America's Campuses* (1998). Silverglate wrote a legal memo for us, and gave a speech after the February meeting that was the *Wisconsin State Journal's* front page headline story the next morning. Later, Jonathan Rauch came to cover the case and deliver

a speech. Writers for the *New York Times* and the Associated Press (AP) attended the February meeting, and witnessed a student activist castigate reform by complaining that a professor had used the word "niggardly" in class the previous week. She made this remark a mere week after a similar misunderstanding of the same word occurred in Washington, D.C., becoming a laughingstock across the nation. The AP carried the story about her speech the next day, and within days the administration started receiving angry letters from alumni around the country, desecrating the state of education at the University. At long last, the code was becoming an embarrassment to the administration.

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In the busy days leading up to the climactic senate vote on March 1, we were unbelievably busy speaking with senators and members of the campus community, and we worked on our abolition motion. We could really feel the momentum swinging. It was an amazing and even intoxicating feeling, but we kept mum about our hopes out of fear of jinxing the process we were so surprised to witness. The vote itself came at the end of a tumultuous, confusing meeting that had all the virtues and vices of an important faculty meeting. But we prevailed, 71-62. When the meeting ended, applause broke out, and Richard Long rushed to the floor of the senate and kissed the hands of the leaders of the movement, as he had promised to do once upon a time when he had virtually no expectation that he would have to deliver.

### Conclusions

Many things can be learned from our experience, so we will focus on the political lessons. They are simple. First, those who believe in free speech and thought must not be afraid to speak out. Change cannot occur unless the principles of freedom forcefully and conscientiously carve out a place for themselves in the public realm. Supporters of freedom need to know that they are not alone, and it takes a committed few to provide cover for others to join the cause. As Allan Bloom wrote in *The Closing of the American Mind* (1987), "Freedom of mind requires not only, or even especially, the absence of legal constraints but the pres-

ence of alternative thoughts. The most successful tyranny is not the one that uses force to assure uniformity, but the one that removes the awareness of other possibilities."

Second, activists need to establish a political infrastructure or movement that can act under pressure. The institution will have to reckon with this presence whether it wants to or not. In addition to the principle involved, it is a simple matter of interest group politics. The movement should also be as broad as possible, embracing different political beliefs but a common commitment to civil liberty. It should also be sure to reach out to student activists, who are invaluable. Certain students hunger for the commitment to liberty, which is deeply rooted in the American consciousness and human nature, and are drawn to professors who honor it by example.

Finally, draw on any positive legacies of the institution. Before the advent of the codes, Wisconsin had a nationally reputation for respecting intellectual freedom. As the famous Plaque on the wall of the entrance to Bascom Hall states, "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." By 1999, a majority of professors at Wisconsin showed renewed commitment to these words. Hopefully this commitment will provide strength in the crises that await us down the road.