

## The Wisconsin Fight for Academic Freedom

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The Committee for Academic Freedom and Rights (CAFAR) was organized at the University of Wisconsin–Madison in the summer of 1996 in response to the harassment of a member of the history department, in which several professors, led by a radical feminist and with the approval of the department chair, sought to control his speech and curb his academic freedom. At that time we were not aware that any equivalent committee of faculty members dedicated to active measures to defend free speech and academic freedom existed on any other North American campus.

The Madison campus has a proud tradition of supporting “that continual sifting and winnowing by which alone the truth can be found,” according to a regents’ statement more than a century ago.<sup>1</sup> It was severely buffeted by the student radicalism of 1966–1970, but survived. The rise of the new ideology of multicultural diversity and sensitivity in the later part of the century generated increasing pressure against free speech, a trend encouraged by the arrival of Donna Shalala as chancellor at the beginning of 1988, as she led the introduction

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<sup>1</sup>Theodore Herfurth, “Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin,” in *Academic Freedom on Trial: 100 Years of Sifting and Winnowing at the University of Wisconsin–Madison*, ed. W. Lee Hansen (Madison: Office of University Publications, University of Wisconsin–Madison, 1998), 58–59.

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of new policies approved by the faculty senate that impinged on speech and politicized administrative and other appointments.<sup>2</sup> Shalala left Madison in late 1992 to become Secretary of Health and Human Services in the new Clinton administration, but her policies and influence remained in her wake.

In the mid-1990s, several female professors in the history department dispatched a series of e-mails to the dean protesting “terrible conditions” of discrimination against women, though the number of female professors and graduate students was rising steadily. These complaints were so vague that no action was taken by the administration. In 1995 an event occurred that gave traction to such laments: a female graduate student in South Asian history filed a formal complaint against her advisor, charging him with harassment. An investigation upheld the complaint, despite the lack of any evidence other than the allegations themselves, and the new chancellor, David Ward, ratified it, denying a salary increase to the accused professor and placing a letter of reprimand in his personnel file.

The activist group of female professors in history was outraged by the weakness of this response, as they saw it, and convinced the department chair and the history faculty council (executive committee)—in an initiative also approved by Ward—to conduct a new investigation during the winter break of 1996–1996, by telephone, of the two professors who directed the graduate program in South Asian history. Its goal was to turn up evidence against the junior professor who had been targeted by the previous complaint, but, to avoid the appearance of double jeopardy, the operation was cast as a broad investigation of the entire program and thus also included investigation of the second professor, Robert Frykenberg, who had a spotless record of thirty-four years teaching and researching at the university. The initiative was not made public, but, somewhat by chance, Stanley Payne, another long-term department member, learned what was underway on January 4, 1996.

Payne had earlier advised the junior professor, who had protested his innocence, to hire legal counsel in his defense, but the latter had chosen not to do so. Payne immediately informed Frykenberg of what was afoot, and again strongly urged defense by legal counsel. Frykenberg followed this advice and hired the experienced Madison, Wisconsin, attorney Steven Underwood.

When the telephone investigation was completed, the history administration brought no further charges against the junior professor previously accused, but

<sup>2</sup>For further background, see Donald A. Downs, *Restoring Free Speech and Liberty on Campus* (Cambridge and New York: Cambridge University Press, 2005), 190–212.

sought to indict Frykenberg by declaring that some of his remarks to students about Indian history and other matters were abusive, demanding that he mend his ways, and placing him on probation—with the further requirement that he report on his progress, rather in the nature of an ostracized Communist Party member.

Frykenberg stood his ground, rejecting this effort to criminalize free speech. Through his attorney, he filed a Notice of Claim with the Wisconsin attorney general against several leading campus administrators and others involved,<sup>3</sup> bringing the action to a halt. In the meantime, John Sharpless, a member of the faculty council who had been excluded from the meeting at which the investigation was authorized, wrote a letter of protest to the department chair, demanding that the secret investigation be terminated unless its purpose was announced to the department. He stood up for Frykenberg's rights throughout the affair.

Though the history department chair at first insisted that "Frykenberg is completely isolated," this was never true and the department became badly divided. Approximately a third of its members directly supported the administration's action, another third vehemently opposed it, and the remaining third sought to avoid involvement but went along with the administration. During the following months the resolute stand by one professor evolved into the initiative of an organized group. Frykenberg's friend James Billington, the Librarian of Congress, dispatched a letter to Chancellor Ward, urging him to withdraw the accusations. Billington also wrote to Michael Joyce, president of the Bradley Foundation in Milwaukee, which supported a Center for Individual Rights, urging financial support for the costs of litigation. Joyce informed Frykenberg that while the foundation could not make a grant to an individual in such a case, it was willing to support an organized agency engaged in defending academic freedom and free speech.

Frykenberg, who had also turned for assistance to the Wisconsin Association of Scholars (WAS), came to the conclusion that an entirely new campus organization was needed to resist the harassment of faculty in the future. In June 1996, he and Payne met with a group of like-minded faculty at the Madison campus—many of whom were not WAS members—and decided to form a faculty committee for academic freedom and rights, apparently the first such organization formed on a North American campus. The sense of alienation from the university at this meeting of more than twenty individuals was palpable.

<sup>3</sup>Robert E. Frykenberg, Notice of Claim, Pursuant to Sec. 893.82, Wis. Stats., filed against several individuals at University of Wisconsin, Madison, Madison, WI, April 23, 1996.

## The Early Years

Payne served as committee chairman for the next four years. Jane Hutchison, a professor of art history and former president of the Wisconsin chapter of the AAUP, was treasurer. Political scientist Donald Downs, among other things a First Amendment and constitutional scholar already known on campus (along with Lester Hunt of philosophy) for his freedom of speech stances, was named secretary. Downs interpreted the office in a manner more consistent with the mission of a secretary of defense than with any stenographic duties. (In 2000, Downs assumed leadership of CAFAR from Payne.) Gordon Baldwin, a distinguished professor of constitutional law, served as legal advisor, while Underwood was retained as formal counsel. Initial financial resources were provided by a grant from the Bradley Foundation that was funneled through the National Association of Scholars.

Meanwhile, Madison's administration found itself unable to substantiate its charges against Frykenberg. At the beginning of September the dean of the College of Letters and Science invited Frykenberg and Payne to meet with him. A formal settlement put a very favorable end to the case for Frykenberg on September 12, 1996, while at almost the same time, CAFAR held its first open meeting to answer questions and recruit new faculty for its cause.

CAFAR facilitated recruitment by word of mouth and by advertisement in the campus and local press announcing its formation. The advertisement included a "Statement of Purpose" Downs crafted with editorial input from the original core members:

We hereby announce the formation of a new faculty group called the Faculty Committee for Academic Freedom and Rights. In recent years, faculty members at the University of Wisconsin have been subjected to sometimes alarming threats to their academic freedom and their constitutional rights. These threats, which continue, have come from a variety of sources at departmental, administrative, and campus-wide levels. Such infringements too often wrongfully harm the reputations, rights, and professional goals of individuals, and they do equal damage to the intellectual community as a whole. Strong institutional protection of such rights as freedom of speech and inquiry, due process, and equal protection of the law is essential to fostering the principles and goals of a community of scholars.

The advertisement and statement created a sensation on campus, leading to a sympathetic front-page story about CAFAR and the

Frykenberg case in the local paper of record, the *Wisconsin State Journal*, in which Downs, Hutchison, and Payne were interviewed. When reporter Jennifer Galloway asked why the committee was set up to be independent from the university, Hutchison replied, “We decided not to involve ourselves with the university because the university is part of the problem.”<sup>4</sup> The chancellor immediately asked for a lunch with Payne, and several faculty members joined the fledgling group. Before long, CAFAR consisted of a core of about twenty faculty members from across the campus and the political spectrum. Over the years, the core number oscillated between twelve and twenty, but the group also enjoyed many allies and sympathizers on campus.

### Strategic Vision

From its inception, CAFAR represented the coming together of something sorely needed and rare in higher education today: the intellectual and moral commitment of an independent (non-administration) group to free inquiry and academic freedom conjoined with strategic acumen, will, and fearlessness. The group was also careful to be politically and ideologically neutral. Even the appearance of partisanship would have thwarted any hope of influencing the campus mind, and would have been wrong per se. CAFAR also benefited from the fact that its members were successful teachers and researchers, most enjoying national, even international reputations. People had to take the committee seriously.

CAFAR quickly forged a three-prong strategic vision. The first goal was to use every opportunity to fill the public space with discourse supporting academic freedom and free speech. As Allan Bloom wrote in *The Closing of the American Mind*, “The most successful tyranny is not the one that uses force to assure uniformity but the one that removes the awareness of other possibilities.”<sup>5</sup> CAFAR achieved this goal by several methods, including building lasting alliances with the student press (the *Badger Herald* and the *Daily Cardinal*) and many other media organizations, which almost always supported free speech positions; forging bridges with student and faculty allies; bringing in speakers to address the problem of intellectual freedom on campus; and agreeing to participate in numerous campus panels and interviews. Downs also began teaching a large lecture course on the First Amendment, which

<sup>4</sup>Jennifer Galloway, “UW Faculty Defend Free Expression,” *Wisconsin State Journal*, November 16, 1996.

<sup>5</sup>Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (New York: Simon & Schuster, 1987), 249.

generated buzz on campus over the ensuing twenty years. Before long, the intellectual freedom position was widely known and acknowledged on campus, despite counterviews and counter-policies.

The second objective was to provide legal support for individuals who approached CAFAR with plausible claims that their academic freedom, free speech, due process rights, and/or equal protection had been violated. The first case emerged in early 1997. These individual defense efforts drew financial support from a \$100,000 Bradley Foundation grant and the legal services of Underwood, who often worked closely with other members of the committee. Over the years, CAFAR took on more than twenty individual cases, and for the majority managed to prevail or to achieve an acceptable settlement. Most involved Madison, but some also involved other campuses in Wisconsin. In general, these cases involved threats to free speech and due process. Clients typically responded to CAFAR's support with gratitude that they no longer "felt alone" and that the committee helped "save their careers."

The third objective was explicitly political: to engage in political action on campus and elsewhere to promote academic freedom, free speech, due process, and equal protection and policy outcomes conducive to these principles. Soon after its inception, CAFAR focused on the policy that had wreaked such harm in the Frykenberg and other notorious cases: the faculty speech code the senate had passed in the late 1980s.<sup>6</sup> Drawing on the notice and credibility obtained in the wake of the Frykenberg case and other efforts, CAFAR leaders convinced the University Committee—a six-member faculty group that controls the agenda of the faculty senate and is the main interface between the faculty, the senate, and the administration—to hold a hearing to address revising the code. WAS also brought renowned defense and civil liberty attorney Alan Dershowitz to campus to speak about free speech. In a rousing and widely publicized speech, Dershowitz castigated the code as the "worst speech code in the country." The *Badger Herald* headline the next day read: "Dershowitz: Abolish Speech Codes."<sup>7</sup>

On March 1, 1999, after two years of intense and widespread internal and external debate, the University of Wisconsin–Madison faculty senate voted 71 to 62 to abolish the faculty speech code in the classroom. This was apparently the first time an American campus had rescinded a speech code without being ordered to do so by a court. That it took place at Madison was both gratifying and ironic, given that institution's pivotal role in pioneering speech codes a

<sup>6</sup>Downs discusses these and related cases in chaps. 6 and 7 of *Restoring Free Speech*.

<sup>7</sup>Craig Laird, "Dershowitz: Abolish Speech Codes," *Badger Herald*, November 22, 1996.

decade before. The vote also grabbed national attention after CAFAR leaders informed the press of the debate on campus, garnering coverage by the *Chronicle of Higher Education* (a cover story), the *New York Times*, the *Wall Street Journal* (an editorial salute), the *Boston Herald*, the *Village Voice*, *Reason*, the *National Journal*, *Liberty*, and National Public Radio, among others.

### **The Power of Persuasion**

That this victory for free speech on campus was achieved in the faculty senate and not in a court is significant. By relying on a vote rather than a legal decision, CAFAR and its allies were compelled to engage in persuasion. Mobilization and persuasion had two lasting effects. First, it meant that a majority of the senate and many other campus citizens had actually changed their minds about speech codes due to the efforts of CAFAR and its growing list of allies. This situation augured well for the future. Second, achieving this victory necessarily entailed the formation of an infrastructure of activists centered on CAFAR that now had presence on campus.

A year after winning the speech code battle, the committee took on another crisis that had the potential to undermine what had just been achieved. During the summer of 2000 the Madison administration, pressured by student activists distraught by the speech code's abolition, authorized the institution of thirty-five "Anonymous Complaint Boxes" at key locations on campus. The program, entitled "Make a Respectful Campus" (MARC), encouraged anyone to place anonymous complaints in a box against anyone they wished to accuse of a variety of sins, including committing a crime, racial or sexual harassment, or simply saying something considered offensive or politically incorrect. The Orwellian aspect of the program—especially the speech aspect—was readily apparent, especially after CAFAR received information about the types of complaints the program was generating. CAFAR swiftly mobilized a media and campus campaign against the program, and within a month the new chancellor—John Wiley, who had not supported the program when it was instituted just before he began his chancellorship—ordered the program physically and officially dismantled. This was a signal success for CAFAR and its allies.

Over the years, the committee's achievements relied on the efforts of many of its members in addition to those already mentioned above: Mary Anderson (hydrogeology), James Baughman (journalism), Anatole Beck (mathematics),

Michael Fox (Hebrew studies), Lee Hansen (economics), Lester Hunt (philosophy), Lawrence Kahan (biomolecular chemistry), Anatoly Khazanov (anthropology), Kenneth Mayer (political science), Marshall Osborn (mathematics), Howard Schweber (political science), and John Witte (political science).

As new issues arose after 2000, CAFAR leaders sometimes found themselves working with the faculty senate to support faculty rights and tenure against outside influences, including the board of regents. In certain cases, the committee became partially “institutionalized.” CAFAR leaders were selected to serve on important university committees, including the University Committee and the official Committee for Faculty Rights and Responsibilities; CAFAR leaders interacted with the University Committee and other administration offices—behind and before the scenes—in many other policy matters.

In 2010, a drive initiated by CAFAR stalwarts Downs, Hansen, Underwood, and Ryan Hebel, a *Daily Cardinal* writer who studied with Downs, led to a unanimous senate vote in favor of extending broad free speech rights to faculty in all contexts, including the right

to speak or write—as a private citizen or within the context of one’s activities as an employee of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, the functioning of the university, and university positions and policies.<sup>8</sup>

This is one of the most protective standards regarding faculty speech rights in the country.

Despite its quasi-institutionalization, CAFAR remained adversarial when necessary, and it continued to support individuals in cases against their departments and other administrative units. For example, it provided legal support involving due process concerns in the area of sexual misconduct adjudication, a domain in which institutions across the country are being improperly pressured by the U.S. Department of Education. CAFAR also participated in campaigns on the national level, often in alliance with the Foundation for Individual Rights in Education (FIRE). It worked with FIRE in convincing the regents of the University of Wisconsin System to review a regent policy that encouraged the legal restriction of speech deemed offensive to protected groups, and Downs signed onto FIRE’s national campaign

<sup>8</sup>University of Wisconsin–Madison, *Faculty Policies and Procedures*, chap. 8, “Faculty Rights and Responsibilities,” Section 8.01, “Faculty Rights.”

against the U.S. Department of Education's unilateral expansion of its sexual harassment policy. This expansion departed significantly from the U.S. Supreme Court's standard in a direction that clearly threatens free speech interests by virtue of exposing a much broader range of speech relating to gender or sex to harassment charges. These are two of several broader efforts that CAFAR undertook in widening its sphere of interest. Finally, a core group of CAFAR members worked closely with members of the University of Wisconsin board of regents in the later months of 2015 to pass the University of Wisconsin System's version of the University of Chicago Statement on the Principles of Free Expression—a fitting final act for the group that was such an important part of our careers at Madison.

Alas, CAFAR's executive committee folded its wings in the spring of 2015 due to retirements and the dwindling of its original grant. CAFAR leaders decided to close shop for two reasons. First, the status of intellectual freedom on campus seemed basically secure after twenty years of pro-free speech activism and policy enactment. Second, the founders of CAFAR, regardless of personal politics, shared a suspicion of political correctness and almost always agreed on what threats mattered and how to deal with them. We respect many of our potential successors, but we believe the next generation of advocates should begin anew on their terms and with their own initiatives.

Thus ends an important chapter in the University of Wisconsin–Madison's history. But free speech is always under challenge in some form depending on the orthodoxy capturing campus opinion at the time—and no university is immune to the heightened calls for censorship that have emerged nationally over the past year. It is now up to potential successors to act on their initiative and at their own discretion. Perhaps the time is not far off when CAFAR will need to reconvene.