PREFACE: "THE MANSION HOUSE OF LIBERTY"

In 1644, John Milton, the great English poet, writing against censorship, called upon his nation to be "the mansion house of liberty." If the censors moved against books, he warned, why would they not next move to ban or license popular songs, preaching, conversations, or even street entertainments? He urged authority not to want the outward conformity of coerced belief and profession, but, rather, the living choices of free and tested citizens. "I cannot praise a fugitive and cloistered virtue," he wrote, "unexercised and unbreathed, that never allies out and sees her adversary." The mark of our character lay not in our protection from the words of others, but in our responsibility for our own choices. He urged authority further to trust that, under liberty and law, truth (and virtue) would win in a free and open contest against error and vice. "Let her [truth] and falsehood

grapple, who ever knew truth put to the worse, in a free and open encounter." Milton's words—meant for the particular context of seventeenth-century England—rise above their historical setting. If any institution on earth should be "the mansion house of liberty," trusting in "a free and open encounter" of truth and error, it should be higher education in a free society. This *Guide* intends to move us closer to that ideal. Free speech is an indispensable part of human dignity, progress, and liberty.

INTRODUCTION: FREE SPEECH THEN AND NOW

If our legal reality truly reflected our political rhetoric about liberty, Americans, and, especially, American college and university students, would be enjoying a remarkable freedom to speak and express controversial ideas at the dawn of the twenty-first century. Virtually every public official declares a belief in "freedom of speech." Politicians extol the virtues of freedom and boast of America's unique status as a nation of unfettered expression. Judges pay homage to free speech in court opinions. Even some fringe parties—communists and fascists who would create a totalitarian state if they were in power—have praised the virtues of the freedom they need for their survival.

Few individuals speak more emphatically on behalf of freedom of speech and expression, however, than university administrators, and few institutions more clearly advertise their loyalty to this freedom than universities

themselves. During the college application process, there is a very high probability that you received pamphlets, brochures, booklets, and catalogs that loudly proclaimed the university's commitment to "free inquiry," "academic freedom," "diversity," "dialogue," and "tolerance."

You may have believed these declarations, trusting that both public and private colleges and universities welcomed all views, no matter how far outside the mainstream, because they wanted honest difference and debate. Perhaps your own ideas were "unusual" or "creative." You could be a liberal student in a conservative community, a religious student at a secular institution, or even an anarchist suffering under institutional regulations. Regardless of your background, you most likely saw college as the one place where you could go and hear almost anything—the one place where speech truly was free, where ideas were tried and tested under the keen and critical eye of peers and scholars, where reason and values, not coercion, decided debate.

Freedom and moral responsibility for the exercise of one's freedom are ways of being human, not means adopted to achieve this or that particular point of view. Unfortunately, ironically, and sadly, America's colleges and universities are all too often dedicated more to indoctrination and censorship than to freedom and individual self-government. As colleges are frequently places where majority rule means that minorities are silenced, and where notions of "diversity" and "tolerance"—which

should expand the domains of liberty and difference—are twisted into justifications for suppressing any speech that differs from or offends the university's official orthodoxy in matters of politics or world view. In order to protect "diversity" and to ensure "tolerance," university officials proclaim, views deemed hostile or offensive to *some* students and *some* persuasions (and, indeed, *some* administrators) are subjected to censorship under campus codes. George Orwell, in his masterpiece about tyranny, *1984*, saw the perversion of language and clear moral meaning—above all, the use of coercion to produce uniformity and loyalty to the new ideals—as one of the terrors of the modern age. Higher education has accepted, too frequently, an Orwellian concept and practice: In order to ensure "diversity" and "tolerance," it will censor and silence those who are different or independent. Such a betrayal of liberty poses real dangers to your dignity as students and to your liberties as members of a free society.

In the pages that follow, you will read of colleges that enact "speech codes" that punish students for voicing opinions that simply offend other students, that attempt to force religious organizations to accept leaders who are hostile to the religious message of the group, that restrict free speech to minuscule "zones" on enormous campuses, and that—from students' very first day on campus—hold high-pressure "orientation" sessions where students are asked to renounce their prior beliefs. Simply put, at most

of America's colleges and universities, speech is far from free, and fashionable ideas are not tested but, instead, are forced down the throats of often unsuspecting students. College officials, in betraying the standards that they endorse publicly and that their institutions had embraced historically, to the benefit of liberty, have failed to be trustees and keepers of something precious in American life.

This *Guide* is an answer—and, we hope, an antidote—to the censorship and coercive indoctrination besetting our campuses. In these pages, you will obtain the tools you need to combat campus censors, and you will discover the true extent of your considerable free speech rights, rights that are useful only if you insist upon them. You will learn that others have faced (and overcome) the censorship you confront, and you will discover that you have allies in the fight to have your voice heard.

The *Guide* is broken into four primary sections. This introduction provides a brief historical context for understanding the present climate of censorship. The second section provides a basic introduction to free speech doctrines. The third provides a series of real-world scenarios that demonstrate how the doctrines discussed in this *Guide* have been applied on college campuses. Finally, a brief conclusion provides five practical steps for fighting back against attempts to enforce coercion, censorship, and indoctrination.

A Philosophy of Free Speech: John Stuart Mill

In terms of censorship and its justifications, the arguments of power rarely have changed, especially in societies that believe themselves free. Public officials in such nations have openly supported the ideal of free expression for centuries, but so many of those same officials also have worked to undermine the very freedom they claim to support. In his classic treatise, *On Liberty* (1859), the English philosopher John Stuart Mill noted that while many people claim to believe in "free speech," in fact just about everyone has his or her own notions of what speech is dangerous, or worthless, or just plain wrong—and, for those reasons, undeserving of protection. The contemporary civil libertarian Nat Hentoff succinctly described this point of view in the title of one of his books, *Free Speech for Me but Not for Thee*.

Mill's concerns remain timeless, commonsensical, and profound. For example, Mill addressed one of the major rationales for imposing constraints on free speech on campuses today, namely that speech should be "temperate" and "fair." Mill observed that while people may claim they are not trying to ban others' opinions but merely trying to banish "intemperate discussion…invective, sarcasm, personality, and the like," they never seek to punish this kind of speech unless it is used against "the prevailing opinion." Therefore, no one notices or objects

when the advocates of the dominant opinion are rude or uncivil or cruel in their denunciations of their detractors. Why shouldn't their opponents be equally free to show their disdain for the dominant opinion in the same way? Further, Mill warned, it always will be the ruling orthodoxy that gets to decide what is civil and what is not, and it will decide that to its own advantage.

Mill provided a thorough, powerful, and compelling argument for unfettered free speech. Human beings are neither infallible nor all-knowing, and the opinion one despises might, in fact, be right, or, even if incorrect, "contain a portion of truth" that we would not have discovered if the opinion had been silenced. Further, Mill argued, even if the opinion of the censors was the whole truth, if their ideas were not permitted to be "vigorously and earnestly contested," we would believe the truth not as a fully understood or internalized idea, but simply as a prejudice: something we believe obstinately without being able to explain *why* we believe it. (You may be very familiar with this phenomenon on your campus.) Mill understood, as Milton did, that if we did not have to defend our beliefs and values, they would lose their vitality, becoming merely rote formulas, not deep, living, and creative convictions. Mill's philosophy goes far beyond the practical, political, and historical reasons for protecting speech, and it shows us that "free speech" is much more than a legal concept: It is a philosophy of life, a

fundamental way of life for citizens in a pluralistic, diverse community.

While the American system of free speech, protected primarily by the First Amendment to the United States Constitution, tracks Mill's theories closely, there are important differences. Our legal freedom to speak is not without limits, and those limits will be discussed later in this *Guide*. By and large, however, our system leans very heavily toward unfettered free speech, toward what one famous Supreme Court justice has called "the free marketplace of ideas," where good and bad ideas, true and false ideas, compete for public acceptance. After all, what state official is qualified to determine the truth or worth of our ideas? Absent an infallible human ruler, the free marketplace of ideas is our only sane and progressive option.

When students find themselves having to argue with an academic administrator for their free speech rights, they should, in addition to making the *legal* arguments detailed in this *Guide*, make *philosophical* and *moral* arguments, including those advanced in *On Liberty* and other such texts. University administrators need to be reminded of the principles of free people, principles long deemed almost sacred in the academy itself. It is important, when making a free speech argument on your own behalf, to speak in terms of high principle and moral imperative as well as of legal rights. Academic adminis-

trators do not enjoy opposing in public the great words that have been uttered on behalf of liberty. It is for both moral and tactical reasons, then, that this *Guide* explains both the American struggle to attain free speech and the significance of such liberty.

Free Speech: A Brief History

The lessons of history are powerful tools of moral and political persuasion. It is, therefore, important to have some understanding of the many phases of free speech and of censorship in American history. Many college students have some knowledge of the great debates surrounding free speech and civil rights in the 1960s and 1970s, but few realize that battles over free speech have been a continual theme throughout our history. These battles have been fought by what might appear to us today unlikely heroes and censors. At different times, progressives, prudes, slave owners, patriots, presidents, capitalists, socialists, chauvinists, feminists, and even poets and novelists have called for censorship, while the champions of free speech have ranged from the deeply religious, to nudists, multimillionaires, countercultural revolutionaries, pacifists, anarchists, and members of every conceivable political party and stripe. The identity of those who argue for or against a truth or a moral principle does not determine its rightness. In American his-

tory, sadly, many groups have taken turns being the censored and the censors. When administrators at your school advance a rationale to punish a student for his or her speech, a student newspaper for an article, or a student group for a parody or satire, chances are they are recycling the reasoning of the censors of America's past. As Lord Acton famously said, "Power corrupts." Knowledge of that human vulnerability is one of the great motives for securing liberty from the arbitrary exercise of power.

THE ALIEN AND SEDITION ACTS

The first grave threat to free speech began less than a decade after the First Amendment was ratified in 1791. In 1798, during the presidency of John Adams, Congress passed the Alien and Sedition Acts, statutes that essentially banned any criticism of the government or the president. While the potential of war with France provided the excuse, the Sedition Act, in particular, was a partisan weapon directed above all at the political party of Thomas Jefferson, the rival of Adams's party. Since the Act recognized truth as a defense to any alleged violation, the Federalists claimed that the act was merely a law against seditious lying. However, it was up to the accused to prove their statements true. Consequently, Republican politicians and newspaper editors were sent

to jail for failure to prove the truth of their opinions. The Sedition Act has since been discredited and would not be considered constitutional by the Supreme Court today.

The Act, however, provided an important lesson: Democratic processes alone are not sufficient to protect minority viewpoints. Even democratically elected officials can and will use their power to suppress and silence their opponents. Ultimately, free speech exists as a check on official power, whether that power was elected, appointed, or inherited. Without that check, freedom suffers and tyranny flourishes.

THE SLAVERY DEBATE AND ATTEMPTS TO SILENCE ABOLITIONISTS

After the Sedition Act passed into oblivion and before the Civil War, the most significant free speech debate surrounded the right of abolitionists to agitate against the institution of slavery and to advocate emancipation. Southern politicians and pamphleteers rallied for national laws banning abolitionist expression, trying to convince even the northern states to pass laws prohibiting antislavery speech and publications. They argued that antislavery speech tended to produce slave revolts, that it threatened the cohesiveness of the Union, and, even, that the speech of abolitionists "inflicted emotional injury" on slave owners. (Ironically, protection from the "emotional injury" of speech is one of the most common

arguments in favor of restrictive speech codes on college campuses.) While some southern states did pass laws banning or limiting abolitionist speech, almost all of the calls for federal legislation or northern laws against abolitionist speech ended in failure.

In his book *Free Speech, "the People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000), historian Michael Kent Curtis argues that the failure of these laws was not due, in fact, to a belief that the First Amendment prevented the states from punishing speech. On the contrary, prior to the ratification of the Fourteenth Amendment in 1868, there was relative agreement that the First Amendment applied only to the federal government and not to the states (although the constitutions of many states did protect speech). Rather, Curtis showed, these initiatives were defeated by a popular, widespread belief in the principles of free speech. Most of these attempts to censor failed because ordinary Americans understood the fairness and importance of free speech. It was that shared value, above all, that prevented oppressive legislation from passing. This is an important lesson for students whose free speech is threatened: The public often understands the need for free speech even if your school may not. Freedom's popular appeal should not be underestimated, and you may at some point choose to take your free speech battle into the public arena, often, we have learned, with remarkable success.

Once the Civil War began, many civil liberties were seriously curbed, as frequently happens in time of war. In the name of national security, some newspapers were ordered to cease publication, the mails were heavily regulated, and a former Ohio congressman was exiled from the Union for agitating against the war. It is important to note, however, that few of the extreme measures taken by the Lincoln administration regarding civil liberties would survive under the current interpretation of the Constitution. Furthermore, the Civil War was surely the greatest crisis in American history and the closest America has ever come to collapse. You should be very skeptical of anyone who points to the restrictions of the truly exceptional Civil War era as establishing the allowable limits of civil liberties in times of crisis.

AFTER THE CIVIL WAR: CENSORSHIP BY MOB AND BY PRUDISHNESS

After the Civil War, there were many violations of basic free speech principles, especially against recently freed slaves who were silenced by mobs, by so-called "black laws," and by the Ku Klux Klan. These violations would continue, sadly, for at least two generations.

Also, as our country moved more deeply into the so-called Victorian era, pressure for one version of moral purity prompted the passage of laws that banned "immoral speech" of many different kinds. In the name of propriety, women's suffragists, atheists, advocates of

birth control of any kind and of more liberal divorce laws, and some merely deemed social misfits, however peaceful, were censored, charged with crimes, and sometimes sent to prison.

The period from the late nineteenth century to the end of World War I was, from contemporary points of view, a dark time for free speech. Restrictive rules, banning even what by today's standards would be the tamest speech, were justified in the name of public morals, safety, civility, or a general idea of decency. (This rationale may sound familiar to college students today—administrators who often view themselves as progressive might be horrified to learn how often they act like the Victorians.) Incidents during this period included a jail term for an author who used one of the most common curse words, a prosecution for an advocate of nude bathing, an attempt to ban Walt Whitman's *Leaves of Grass*, and a ban on an informative column on how to avoid venereal disease.

THE BIRTH OF MODERN FREE SPEECH DOCTRINE DURING THE "RED SCARES"

The modern age of free speech law began after America entered World War I and with the passage of the Espionage Act of 1917. (The Espionage Act made it a crime to "willfully cause or attempt to cause insubordination, disloyalty, [or] mutiny.") Frightened of revolutionaries, anarchists, and communists at home and

abroad, the government clamped down on speakers who opposed the government or advocated revolution, or, in some cases, who simply were pacifists or reformers. From the first Red Scare of the 1920s to the second Red Scare of the 1950s, political beliefs and statements were often punished directly through laws against "sedition," "espionage," and "syndicalism." Many radicals and diverse activists (including union activists) had their lives and careers ruined. Some lost their jobs, others were deported, and still others were sent to jail.

Starting in the 1920s and led by Justices Louis Brandeis and Oliver Wendell Holmes, the United States Supreme Court applied First Amendment restrictions to the states by defining censorship as "state action" violative of the "due process" guarantee of the Fourteenth Amendment. When the Bill of Rights (the first ten amendments to the Constitution) was first adopted in 1791, it was not at all clear that the protections of the First Amendment—including those related to speech, press, and religion—would apply to infringements by *state* governments (including, of course, state colleges and universities). The liberty guarantees contained in the Bill of Rights, as written, prevent only "Congress"—that is, the federal government—from interfering with the protected (and, since stated, "enumerated") rights and liberties of citizens. However, during the period between the two World Wars, federal courts increasingly bound state governments by many of the same restric-

tions applicable to the federal government. This process took place as the Supreme Court "incorporated" certain of the specific rights—enumerated in the Bill of Rights—into the guarantee of "due process of law" that the Fourteenth Amendment explicitly applied to the states. These restrictions, therefore, now limit the power of both federal and state governments (and of the agents or "entities" that they create), although they do not (with limited exceptions to be discussed later) restrict the power of *private* organizations to censor their members.

In this way, the Supreme Court gradually embraced a much stronger, more dynamic, and more expansive conception of free speech, protecting an increasingly broad spectrum of expression. The court also embraced the concept of the "marketplace of ideas," holding that the free exchange of ideas is necessary for the health of democracy. It would take many years for the most far-reaching views of Holmes and Brandeis to take hold—many of their broadest conceptions of free speech occurred in minority dissents—and free speech was under particular threats during the McCarthy era of the 1950s. Nonetheless, Holmes's and Brandeis's vigorous interpretation of the First Amendment provided the foundation for many of the freedoms that we enjoy today.

Such new interpretation served to protect even quite disturbing speech. As the Supreme Court said in *Terminiello v. Chicago* (1949), in reversing the disturbing-the-peace conviction of a notorious hate-monger, the

"function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." As Milton had argued in the 1640s, truth is well served by confrontation with error.

THE EXPANSION OF SPEECH PROTECTIONS FROM THE 1950s TO THE 1970s

As a result of a series of Supreme Court opinions beginning after World War I, and proceeding into the Civil Rights era of the 1950s and 1960s and the Vietnam War era of the 1960s and 1970s, the scope of free speech rights continued to expand. The cumulative weight of Court rulings established, in effect, a presumption that speech was to be free and unrestricted, *except* for a few quite narrow areas (which will be covered later in this *Guide*).

As the Civil Rights revolution of the 1960s spread across the nation, seeking to eliminate racial segregation and discrimination, the Supreme Court made clear that free speech protection extended even to speech that was vulgar, offensive, and more emotional than rational and logical. Expression, in other words, was to be protected as much as argumentation—the First Amendment, in effect, protects the good, the bad, and the ugly. In an opinion written in the Vietnam War case of *Cohen v. California* (1971), reversing the conviction of a young

man who wore the slogan "Fuck the Draft" on his jacket in a courthouse, the Supreme Court ruled that in a free society, it is "often true that one man's vulgarity is another's lyric." The Court protected here even a vehement and offensive style of expression, adding form to intellectual content in terms of what the First Amendment prevented government from suppressing. The Court strongly institutionalized a notion that had been expressed decades earlier in a dissent by Supreme Court Justice Oliver Wendell Holmes, namely that the First Amendment embodies "the principle of free thought—not free thought for those who are with us, but freedom for the thought that we hate." This is the view that prevailed later in the century and prevails today. Indeed, the Supreme Court's current view is even more expansive than Holmes's formulation, since the mode of expression is now as much protected as the content of the thought expressed. The government simply does not have the power to insist that we limit our expression of ideas to the use of certain "acceptable" words and phrases. As Mill had argued in 1859, power does not get to choose what is temperate and what is not.

The expansion of rights by the Supreme Court's interpretation of the First Amendment during the decades from the 1950s to the 1970s was based on a kind of golden rule of constitutional doctrine. Under this concept, we should fight for the rights of others if we wish to exercise those rights ourselves. "Equal protection of the

laws," another concept embodied in the Fourteenth Amendment, means that we are all either protected by, or potential victims of, the same laws. If you think about it, no better mechanism to achieve fairness and liberty is likely ever to be developed than that of forcing us all to live under the rules that we impose upon others. "Do unto others," the biblical golden rule instructs, "as you would have them do unto you." This doctrine, which underlies the concept of the rule of law, has very ancient antecedents indeed, and it is deeply embedded in both religious and secular culture. If the rules that we write apply equally to ourselves and to others, we think more closely and deeply about the rights involved. If they apply only to others, we all too often ignore the very issue of rights.

THE 1980s AND 1990s: FLAG BURNING, SPEECH CODES, "HARASSMENT," AND COLLEGE CAMPUSES

The decades of the 1980s and 1990s were times of contrast and contrary impulses in the field of free speech. On the one hand, the Supreme Court continued to deliver robust free speech opinions, including *Texas v. Johnson* (upholding the right to burn a flag), *Hustler v. Falwell* (upholding the right to engage in ferocious parody and criticism), and *R.A.V. v. St. Paul* (banning viewpoint discrimination even when the speech might be considered "hate speech"). On the other hand, new theories hostile to free speech began to emerge where one

least expected them—on our college and university campuses.

The new justifications for campus censorship, ironically, emerged from some truly positive developments. As walls of discrimination designed to keep women and disfavored minorities out of many colleges fell, schools saw an unprecedented influx of students from different races and religions and of women and openly gay students. Unfortunately, college administrations—claiming to assist the peaceful coexistence of individuals in their more diverse communities—began looking for ways to prevent the friction that they feared would result from these changes. Some asked what good it was to admit formerly excluded students if they were offended at universities once they arrived, as if individuals who had struggled so mightily for their liberty were too weak to live with freedom. Students of the 1960s had torn down most of the university *in loco parentis* (a Latin term that means standing in the role of parents). Too often, administrators from the 1970s on, and above all in the 1980s, chose to restore the *in loco parentis* role of their institutions with a vengeance, imposing a social engineering that went far beyond the authority the students of the 1960s had ended. One part of that coercive social engineering was the imposition of codes against "offensive speech." The codes generally did not bar *all* offensive speech. Rather, they sought to prevent, and to punish, speech that would offend one's fellow students on the

basis of the listener's race, religion, ethnicity, gender, or sexual orientation. Thus, these codes not only limited speech and expression, but did so in a manner that disfavored certain types of speech and favored certain points of view over others. Moreover, the codes often barred the expression of words and ideas that obviously belonged in any "free marketplace of ideas" but that administrators intent on avoiding student frictions or demonstrations proclaimed too disruptive to be worth protecting.

Codes against "offensive speech," however, are utterly incompatible with the goals of higher education. After all, the concept of "academic freedom," discussed later in this *Guide*, ensured, in theory at least, that discussion of even the most controversial and provocative issues should be vigorous and unfettered on campuses, all in the name of the search for truth that almost all liberal arts institutions long have claimed as their governing ethic. Thus far, courts have agreed, at least on constitutional grounds, striking down speech codes virtually every time that they have been directly challenged.

Nonetheless, "harassment codes" covering speech and expression still exist on the overwhelming majority of college campuses today, including *public* institutions bound by the First Amendment. These codes have survived in large measure because of a clever attempt by their drafters to confuse speech, including "offensive" speech (which enjoys clear constitutional and moral protection), with behavioral "harassment" (which, defined

in precise legal terms discussed later in this *Guide*, does not enjoy protection). This sleight-of-hand by the drafters of harassment codes will be discussed later in this *Guide*.

TODAY: PATERNALISM, LIABILITY, AND NATIONAL SECURITY

It is too soon to tell which legal rationale will become the dominant excuse for censorship in this early part of the twenty-first century. Would-be censors could rely on old themes like defending "civility" or "decency" while characterizing anything offensive as "harassment." National security could once again become a rationale for suppression of what should be protected speech, as it so often has been in our history. The censors of the modern age are exploring ever newer and more creative approaches to censorship, including, we shall see, removing the term "reasonable" from the "reasonable time, place, and manner restrictions" permitted by law, abusing private lawsuits, and enforcing intellectual property law in ways so broad that they suppress what should be protected expression.

When arguing in defense of your speech rights, in the face of administrative claims that speech deemed offensive by some students constitutes a violation of those students' civil rights, you unapologetically should take the high ground and point out that, in fact, the moral, practical, historical, and legal arguments long recognized in

this nation all favor free speech rather than censorship. Speech rights are not a "zero sum game" in which one person's gain is another person's loss (unless, of course, one person shouts down his opponent, in which case it is not the content of the speech that is improper, but the unreasonable *time*, *place*, *or manner* in which it is delivered). Rights, under our Constitution, are available equally to all. If Mary says something that offends John, the remedy is not to censor Mary, but to accord John an equal right to reply. This is how a truly free society works. This is how our basic institution of equality under the law plays out among free people. America has brought more and more individuals and groups into the warm sunshine of equal rights. To betray the core principle of legal equality would be a denial of the very ideals and struggles that led to a history of broadened rights.