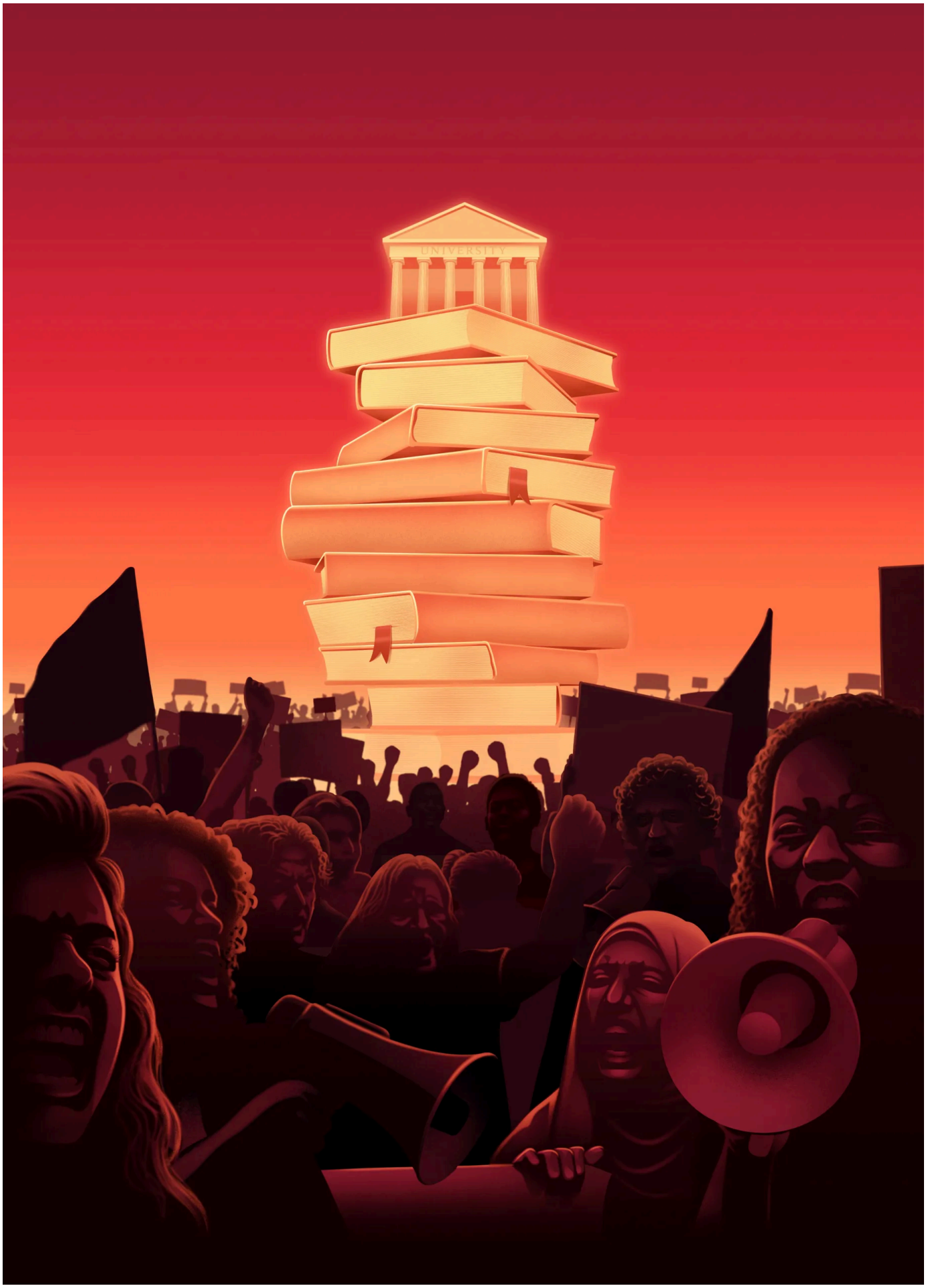
A CRITIC AT LARGE

ACADEMIC FREEDOM UNDER FIRE

Politicians despise it. Administrators aren't defending it. But it made our universities great—and we'll miss it when it's gone.

By Louis Menand

April 29, 2024


UNIVERSITY

Historically, when it comes to freedom of expression, institutions of higher education have policed themselves. Now, on university campuses from Columbia to the University of Michigan, that system is being put to the test. Illustration by Nash Weerasekera

The congressional appearance last month by Nemat Shafik, the president of Columbia University, was a breathtaking "What was she thinking?" episode in the history of academic freedom. It was shocking to hear her negotiating with a member of Congress over disciplining two members of her own faculty, by name, for things they had written or said. The next day, in what appeared to be a signal to Congress, Shafik had more than a hundred students, many from Barnard, arrested by New York City police and booked for trespassing—on their own campus. But Columbia made their presence illegal by summarily suspending the protesters first. If you are a university official, you never want law-enforcement officers on your campus. Faculty particularly don't like it. They regard the campus as their jurisdiction, and they have complained that the Columbia administration did not consult with them before ordering the arrests. Calling in law enforcement did not work at Berkeley in 1964, at Columbia in 1968, at Harvard in 1969, or at Kent State in 1970.

What's more alarming than the arrests—after all, the students *wanted* to be arrested—is the matter of their suspensions. They had their I.D.s invalidated, and they have not been permitted to attend class, an astonishing disregard of the fact that although the students may have violated university policy, they are still students, whom Columbia and Barnard are committed to educating. You can't educate people who cannot attend classes.

The right at stake in these events is that of academic freedom, a right that derives from the role the university plays in American life. Professors don't work for politicians, they don't work for trustees, and they don't work for themselves. They work for the public. Their job is to produce scholarship and instruction that add to society's store of knowledge. They commit themselves to doing this disinterestedly: that is, without regard to financial, partisan, or personal advantage. In exchange, society allows them to insulate themselves—and to some extent their students—against external interference in their affairs. It builds them a tower.

The concept originated in Germany—the German term is *Lehrfreiheit*, freedom to teach—and it was imported here in the late nineteenth century, along with the model, also German, of the research university, an educational institution in which the faculty produce scholarship and research. Since that time, it has been understood that academic freedom is the defining feature of the modern research university.

In nineteenth-century Germany, where universities were run by the government, academic freedom was a right against the state. It was needed because there was no First Amendment-style right to free speech. *Lehrfreiheit* protected what professors wrote and taught inside (although not outside) the academy. In the United States, where, after the Civil War, many research universities were built with private money—Chicago, Cornell, Hopkins, Stanford—the right was extended to protect professors from being fired for their views, whether expressed in the classroom or in the public square. The key event was the founding, in 1915, of the American Association of University Professors, which is, among other things, an academic-freedom watchdog.

Academic freedom is related to, but not the same as, freedom of speech in the First Amendment sense. In the public square, you can say or publish ignorant things, hateful things, in many cases false things, and the state cannot touch you. Academic freedom doesn't work that way. Academic discourse is rigorously policed. It's just that the police are professors.

Faculty members pass judgment on the work that their colleagues produce, and they decide whom to hire, whom to fire, and what to teach. They see that the norms of academic inquiry are observed. Those norms derive from the first great battle over academic freedom in the nineteenth century—science versus religion. The model of inquiry in the modern research university is secular and scientific. All views and all hypotheses must be fairly tested, and their success depends entirely on their ability to persuade by evidence and by rational argument. No a-priori judgments are permitted, and there is no appeal to a higher authority.

There are, therefore, all kinds of professional constraints on academic expression. The scholarship that academics publish has to be approved by their peers. The protocols of citation must be observed, ad-hominem arguments are not tolerated, unsubstantiated claims are dismissed, and so on. Although academics regard the word "orthodoxy" with horror, there is a lot of tacit orthodoxy in the university, as there is in any business. People who are trained alike tend to think alike. But, as long as academic judgments are made by consensus, not by fiat, and by experts, not by amateurs, it is assumed that the knowledge machine is operating fairly and efficiently. The public can trust the product.

All professions aspire to be self-governing, because their members believe that only fellow-professionals have the expertise needed to make judgments in their fields. But professionals also know that failures of self-regulation invite outside meddling. In the case of the university, it is in the faculty's interest to run their institution equitably and competently. They need to be trusted to operate independently of public opinion. They need to keep the tower standing.

This is why the phenomenon that goes by the shorthand October 7th was a crisis for American higher education. The impression that some universities were not policing themselves competently, that their campuses were out of control, provided an opening to parties looking to affect the kind of knowledge that universities produce, who is allowed to produce it, and how it is taught—decisions that are traditionally the prerogative of the faculty. Politicians who want to chill certain kinds of academic expression think that they can do this by threatening to revoke a university's tax-exempt status or tax its endowment. In the current political climate, it is not hard to imagine such things happening. If they did, it would be a straight-up abrogation of the social pact.

But would it be unconstitutional? What kind of right is the right to academic freedom? Is it a legal right or a moral one? This question, long a subject of scholarly contention, is addressed in not a small number of new books, notably, "You Can't Teach That!" (Polity), by Keith E. Whittington; "The Right to Learn" (Beacon), edited by Valerie C. Johnson, Jennifer Ruth, and Ellen Schrecker; and "All the Campus Lawyers" (Harvard), by Louis H. Guard and Joyce P. Jacobsen.

The fate of academic freedom is also a concern in new books by two former university administrators: Derek Bok's "Attacking the Elites" (Yale) and Nicholas B. Dirks's "City of Intellect" (Cambridge). Bok is a former president of Harvard; Dirks was a chancellor of the University of California, Berkeley. The general sentiment in these books is that academic freedom is in peril and that it would not take much for universities to lose it.

Whittington, who says he is "on the political right," is highly protective of academic freedom. He can see no reason why we would want politicians to dictate what can and cannot be studied and taught. It would be like putting a syllabus up to a popular vote every year. His book is concerned mainly with public colleges and universities (where some seventy per cent of American students are enrolled), since their faculties are public employees and state legislatures control their

budgets. This also means, however, that their speech is protected by the First Amendment. Florida's 2022 Individual Freedom Act, popularly known as the Stop WOKE Act, which prohibits the teaching in public educational institutions of ideas that some legislators define as "divisive," was struck down, in part, by the Eleventh Circuit for being what it plainly is: viewpoint discrimination, which is barred by the First Amendment. (The power of states to dictate content in K-12 classrooms, on the other hand, is fairly well established.)

The Florida act was one of a hundred and forty educational gag orders passed by state legislatures in 2022; almost forty per cent of these targeted colleges and universities. The gag-order phenomenon is one of the topics covered in "The Right to Learn." The volume's editors argue that efforts such as these are worse than McCarthyism. McCarthyism went after individuals for their political beliefs; today, the targets are the curriculum and the classroom, the very bones of the educational system.

The editors see the defense of academic freedom as "inextricably linked to the larger struggle against the racial, gender, and other systems of oppression that continue to deform American life." Given that disinterestedness is a central ingredient in the social pact, this view may not have universal appeal. But there are disciplines, or subfields within disciplines, in which professors (and students) understand their academic work as a form of political engagement. Academic freedom would seem to cover these cases (although not everyone would agree). What academic freedom would not cover is indoctrination, a violation of academic norms.

What about students? The student version of academic freedom is *Lernfreiheit*, the freedom to learn. This rule is a little harder to apply. Students don't typically determine the curriculum, and they are usually passive subjects of a disciplinary regime called grading. Originally, "freedom to learn" referred simply to the freedom to choose one's course of study. Now it gets invoked in the contexts of classroom speech, where instructors are witnessing a lot of self-censorship, and

campus speech, where students chant, carry banners, and exercise civil disobedience.

Some students report that they don't feel free to express their views, because what they say might be received as hurtful or offensive by other students, and instructors find themselves second-guessing the texts they assign, since students may refuse to engage with works that they find politically objectionable. Instructors worry about being anonymously reported and subjected to an institutional investigation. Instructors and students can also, needless to say, suffer trial by social media. These are not great working conditions for the knowledge business. You may lose the argument in an academic exchange, but you have to feel free, in the classroom, to have your say without sanction.

Commentators have blamed this situation on a system of "coddling" in which people who say that they feel "unsafe" just being in a room with someone they disagree with are given resources to demand that something be done about it. The institutional symbol (or scapegoat) for this culture is the campus office of diversity, equity, and inclusion (D.E.I.). State legislatures have taken steps to ban D.E.I. in public colleges and universities, and conservative critics of higher education are quite explicit that bringing down D.E.I. is a primary goal.

"All the Campus Lawyers" helpfully shows that the regime of "coddling" and D.E.I. was largely the creation of the federal government. Together, Title VI and Title VII of the 1964 Civil Rights Act prohibit discrimination on the basis of race, color, sex, religion, or national origin in programs and activities that receive federal funds, as most universities do. The Supreme Court recently (and somewhat surprisingly) ruled that Title VII covers sexual orientation and gender identity. Title IX of the Education Amendments of 1972 prohibits sex-based discrimination, including sexual harassment, in such programs and activities. In 2016, an expanded definition of "disability" was added to the Americans with Disabilities Act in response, in part, to advocacy on behalf of people with

A.D.H.D. and learning disabilities. The act defines disability as a physical or mental impairment that substantially limits one or more "major life activities," and "writing" is now included as a major life activity.

For universities, these laws provide a potential cause of action at every turn. Students and employees who feel harassed, unsafe, or generally uncared for by virtue of their identities are entitled, under federal law, to make a complaint. The result is what Guard and Jacobsen call the "lawyerization of higher education." Universities live in constant fear of being taken to court because someone was treated differently.

But it's not the individuals accused of discriminatory conduct who are being sued. The laws do not apply to them. It's the university itself. A group of women who said that they were sexually harassed by the Harvard professor John Comaroff are not suing Comaroff. They are suing Harvard, for a Title IX violation. (Comaroff has denied their allegations.) And when, in January, a group of Jewish students sued Harvard for "enabling antisemitism" on campus, they did so under Title VI of the Civil Rights Act.
The pro-Palestinian demonstrators who created the conditions that the Jewish students allege are antisemitic are immunized by the First Amendment. "From the river to the sea" is a political slogan, classic protected speech. That is why Congress does not subpoena the demonstrators but goes after university presidents instead. The members of Congress who grilled Shafik want universities to punish demonstrators precisely because the government cannot.

Almost all instructors want open and robust discussion of controversial issues in their classrooms and on campus, because that is how academic inquiry works. No doubt university administrators want that as well. But the risks are not imaginary, and they arise, paradoxically, out of Congress's desire to create a level playing field. Would you call the Civil Rights Act, Title IX, and the A.D.A. "coddling"? Probably not if you were Black or trans or had A.D.H.D. Professors often complain about bureaucratic bloat, but in a big university you need a large legal

and administrative apparatus to insure compliance with the law, and you need a large student-life bureaucracy to instill feelings of, well, equity and inclusion. These are the goals that Congress envisioned when it passed those laws. The professoriat did not invent them.

As for diversity, that was a concept imposed on higher education by the Supreme Court. In 1978, in the case of Regents of the University of California v. Bakke, the Court ruled that universities could consider an applicant's race as a factor in admissions. The Justice who wrote the opinion, Lewis Powell, said that universities had this right as a matter of academic freedom, which he said was guaranteed by the First Amendment—the first time that the concept of academic freedom had been extended to insulate an entire institution, not just individual faculty members, from outside interference.

However, Powell said, there had to be a reasonable justification (in legal terms, a "compelling state interest") for considering an applicant's race, which would otherwise be barred by the Fourteenth Amendment's guarantee of "equal protection." He rejected the argument that it was justified because it helped remedy past discrimination or because it would be socially desirable to increase the number of nonwhite doctors, lawyers, and chief executives. The only constitutionally acceptable justification for race-conscious admissions, he said, was diversity. A diverse student body was a legitimate educational goal and universities had a First Amendment right to pursue it.

Powell's opinion was affirmed in 2003, in the case of Grutter v. Bollinger, and again in 2016, in the case of Fisher v. University of Texas. Both times, the Supreme Court said that race could be considered in admissions but only for the purpose of creating a diverse class, with the implicit understanding that diversity extends beyond race.

This means that when Harvard's admissions case came before the Supreme Court, in 2022, Harvard and other universities had been promoting the educational value of diversity, and preaching it to students and faculty, for forty years. It was a way of preserving race-conscious admissions. In fact, it was the *only* way of preserving race-conscious admissions. And when the Court struck down the race-based admissions programs at Harvard and the University of North Carolina, in 2023, it specifically rejected the very diversity rationale that it had initially prescribed and repeatedly approved. The concept of diversity, the Court now said, is insufficiently "measurable and concrete." How can universities prove that racial diversity has the educational benefits that they claim it does? As for Powell's ruling that academic freedom is a legal right constitutionally grounded in the First Amendment, the Court's opinion completely ignored it.

"Diversity" is not as straightforward an educational good as it may seem. In the nineteen-twenties and thirties, for example, Harvard used "diversity" as a method for limiting the number of Jews it admitted. At the time, "diverse" meant geographically diverse, a student body with more Southerners and Midwesterners and fewer students from New York and New Jersey. It was affirmative action for Gentiles.

In other words, diversity can underwrite many agendas. Today, for example, there are demands that private universities be compelled to admit a socioeconomically diverse class or hire an ideologically diverse faculty. The fact that élite universities, like Harvard and Columbia, which enroll barely one per cent of all college students in the U.S., are being asked to fix social problems—wealth inequality, political polarization—that no one else can seem to fix is a chief subject of Bok's "Attacking the Elites." Bok clearly feels that these demands are unreasonable; Dirks, in "City of Intellect," expresses a similar impatience. But both Bok and Dirks think that it would be unwise for universities to ignore such demands. Bok calls them "the burden of success."

Diversity presents an educational challenge as well. If you are telling students that they were admitted in part because of their race, in the interest of viewpoint diversity, they may feel that they are expected to represent whatever viewpoints members of their racial group are presumed to have. Thinking this way is antithetical to a traditional aim of liberal education, which is to get students to think outside the box they were born in—or, these days, outside the boxes they checked on their applications. Liberal education is about questioning givens, not reaffirming them.

A university is a community, and everyone is there for the same reason—to learn. The community has every right to bar outside parties and to insist on norms of civility and respect, understanding that those ideals are not always immediately attainable. In most universities, physical confrontations, the targeting of individuals with threats or harassment, and the disruption of campus activities are explicitly proscribed. When the rules are violated, the best approach is for the community to find ways to police itself. But most forms of expression have to be tolerated. Tolerance is the price academics and students pay for the freedoms society has carved out for them.

Still, the fact remains that all the emphasis on diversity and inclusion did not prevent October 7th from becoming a powder keg. The real problem is that all these issues are playing out in the public eye, and universities are not skilled at public relations. Since 1964, they have been adapting to a legal environment created largely by Democratic Congresses and a Supreme Court still marginally liberal on racial issues. Now a different political regime is in the saddle, in Congress and on the Court, and there are few places left to hide.

Academic freedom is an understanding, not a law. It can't just be invoked. It has to be asserted and defended. That's why it's so disheartening that leaders of great universities appear reluctant to speak up for the rights of independent inquiry and free expression for which Americans have fought. Even after Shafik offered up faculty sacrifices on the congressional altar and called in the N.Y.P.D.,

Republicans responded by demanding her resignation. If capitulation isn't working, not much is lost by trying some defiance. ♦

An earlier version of this article misidentified the publisher of "All the Campus Lawyers."

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