

2000

Incitement to Hatred: Should There Be a Limit

Nadine Strossen
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

25 S. Ill. U. L. J. 243 (2000-2001)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

INCITEMENT TO HATRED: SHOULD THERE BE A LIMIT?*

Nadine Strossen**

I. INTRODUCTION AND OVERVIEW

I am honored to address this important forum, celebrating Southern Illinois University Law School's distinguished founding dean, Hiram Lesar, and his dedication to civil rights.

I was asked to discuss the American Civil Liberties Union's (ACLU) strong defense of freedom of speech, even for speech that conveys bias or advocates discrimination.

I realize that this topic is of special concern on your campus now, given the controversy surrounding Southern Illinois University Law School's recent graduate, Matthew Hale, leader of the white supremacist "World Church of the Creator." Although Hale passed the Illinois bar exam and pledged to abide by all requirements for bar membership, including the non-discriminatory treatment of individuals seeking legal services, the state bar authorities nonetheless rejected his membership application because of his racist beliefs, statements, and associations.¹ Of course, freedom of thought, expression, and association are fundamental rights protected by the First Amendment to the United States Constitution (as well as counterpart provisions in the Illinois state constitution and the constitutions of every other state). The ensuing controversy drew nationwide—and even international—attention,² and yet again raised the recurrent question of whether First Amendment freedoms should extend to what is commonly called "hate speech."

Consistent with the ACLU's signature mission to neutrally defend all fundamental freedoms for all individuals, no matter who they are or what they

* This essay is based on the Hiram H. Lesar Distinguished Lecture, which Nadine Strossen delivered at Southern Illinois University School of Law on March 8, 2000.

** National President, American Civil Liberties Union; Professor of Law, New York Law School. For research and administrative assistance with this piece, Professor Strossen thanks her Academic Assistant, Kathy Davis, and her Research Assistants Hilary Buyea, Elisa Gerontianos, Judith Krauss, Mara Levy, April Myers, Daniel Parisi, and Janice Purvis.

1. *In re Hale*, 723 N.E.2d 206 (Ill. 1999).

2. See, e.g., Editorial, *White Supremacist Denies Himself Entrance to Bar*, SEATTLE POST-INTELLIGENCER, June 30, 2000, at A18; World Report United States, *White Supremacist Denied Law License*, THE GLOBE AND MAIL (Toronto, Can.), June 27, 2000 at A11.

believe,³ we defended Matthew Hale's rights to express his racist views through speaking, writing, organizing, and advocacy, so long as he did not express such views through discriminatory or illegal conduct. Just as Hale should not be able to use his sought-after status as a member of the Illinois bar—and, hence, an officer of the state court system—to discriminate against any individual, correspondingly, we argued, no other court or bar official should be empowered to discriminate against any individual, including Hale himself. Indeed, we argued that state officials should not be permitted to conduct inquisitions into any bar applicant's beliefs, so long as the applicant pledged to abide by all rules of professional responsibility, including those mandating non-discrimination.⁴

The Hale case is simply the latest local entry in a long litany of cases from all over the world that present the important, enduring questions about the appropriate legal status of hate speech. I welcome your invitation to use the Hale controversy as a springboard for exploring those general questions. The term "hate speech" is apt in two senses. First, the speech expresses hateful thoughts toward certain individuals and groups—for example, racial or other minorities. Second, all of us who believe that all human beings are entitled to full and equal rights hate the diametrically different thoughts expressed by the likes of Matthew Hale.

This "double-barreled" hateful content does not justify suppressing hate speech. To the contrary, as famously explained by former Supreme Court Justice, Oliver Wendell Holmes: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."⁵

As Holmes' statement indicates, the ACLU position on hate speech has been incorporated into United States law, through the Supreme Court's decisions interpreting and enforcing the First Amendment. Hence, in defending freedom for hate speech, I speak not only for my organization, but also for my country and its Constitution. Moreover, this position has been endorsed by some human rights organizations in other countries and by some international human rights organizations.

Our position is not that government may *never* restrict speech, but rather, that it may do so only under very limited circumstances. In a nutshell,

3. See Ken Chowder, *The ACLU Defends Everybody*, SMITHSONIAN, Jan. 1998, at 86.

4. Amicus Brief of American Civil Liberties Union of Illinois at 3, *In re Hale*, 723 N.E.2d 206 (Ill. 1999) (No. 16075). Although this view ultimately did not prevail in the Illinois Supreme Court, it was endorsed by the lone dissenter, Justice Heiple. *Id.*

5. *United States v. Schwimmer*, 279 U.S. 644, 655 (Holmes, J., *dissenting*).

government may suppress speech only if necessary to prevent a clear and present danger of actual or imminent harm. Examples of speech that would satisfy this appropriately strict standard are: threats of violence; targeted verbal harassment, focused on one individual or a small group; and intentional incitement of imminent violent conduct or other illegal conduct.

What I have said so far summarizes my answer to the specific question I was asked to address: "Should there be a limit to incitement to hatred?" My answer is "Yes," but only under the narrow circumstances specified by modern United States law: only if the speaker intended to incite imminent violence or illegal conduct and was likely to actually incite such conduct. From now on, when I refer to censorship of hate speech, I am referring to suppression of speech that does not pose a "clear and present danger."

Recently, we have heard many arguments in favor of relaxing American law's traditional, speech-protective standard, and allowing government to suppress hate speech that does not satisfy the "clear and present danger" test. This speech-protective standard has long distinguished the United States apart from other countries that generally protect human rights, including free speech.⁶ Moreover, since the 1980s, the United States legal system's protection of hate speech has been subject to vociferous criticism by some human rights advocates in the United States.⁷ That criticism initially fueled calls for "hate speech codes" on college and university campuses.⁸ More recently, with the advent of the Internet, that criticism has focused on calls for restricting online hate speech.⁹

Coincidentally, tomorrow night, I am going to participate in a major program on Internet hate speech that is being sponsored by the Anti-Defamation League (ADL) in New York City. The ADL is well known for staunchly and effectively fighting against prejudice. I think it is not as well known, though, that the ADL also staunchly and effectively fights against censorship, including censorship of prejudiced ideas or hate speech. That is true in the Internet context too.

Ever since the Internet became a household word, the ADL has been monitoring online hate speech, including biased disinformation, such as so-

6. See Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKLEY. J. INT'L. L. 3 (1964).

7. See, e.g., MARI J. MATSUDA, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (Westview Press, 1993).

8. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* in *HATE SPEECH ON CAMPUS: CASES, CASE STUDIES, AND COMMENTARY* (Milton Heumann & Thomas W. Church eds., 1997).

9. See, e.g., Peter H. Lewis, *Group Urges an Internet Ban on Hate Groups' Messages*, THE N.Y. TIMES, Jan. 10, 1996 at A10.

called "Holocaust revisionism"—the Big Lie that the Holocaust was a Big Lie. The ADL maintains its own informative Web site¹⁰ and publishes reports to counter cyberhate. It also urges others to do the same, to take advantage of the new technology to pursue the constitutionally appropriate—and effective—response to speech with which we disagree: not censorship, but rather, counterspeech. For example, the ADL's first comprehensive report on online hate speech, *The Web of Hate*, concludes as follows: "What can and must be done is clear. People of goodwill must continuously monitor the Internet . . . to counter messages of hate with information that challenges bigotry, exposes the bigots, and promotes tolerance, decency, and truth."¹¹

The ADL also has reaffirmed its opposition to suppressing hate speech in the context of the Hale case, which I described above. The Chicago office of the ADL has supported Matthew Hale's right to practice law, noting that the same rationale that has been invoked to deny his attorney's license could also serve to exclude individuals who hold unpopular views on other controversial issues, ranging from abortion to school prayer.¹²

Hate speech has sparked growing controversy not only in the United States, but also in many other countries recently, especially as movements for human rights and democracy have been spreading all over the world. I have participated in many such debates in other countries.¹³ Across the various settings, though, the debates all center on the same basic issues. Therefore, I am not going to confine my discussion specifically to hate speech codes on United States campuses, a topic that I understand is of special interest on this campus. Instead, I hope to shed light on that particular topic by addressing the broader issues concerning hate speech generally.

On campus and elsewhere, advocates of restricting hate speech have raised important concerns. They argue that hate speech has led to discrimination and violence against minority groups and other groups that are relatively powerless in the political system, such as women. Conversely, they argue that suppressing hate speech would reduce intergroup violence and discrimination. Thus, advocates of restricting hate speech see a tension

10. See *Anti-Defamation League* at <<http://www.adl.org>> (visited Feb. 8, 2001).

11. See *Hate on the www: A Brief Guide to Cyberspace Bigotry* at <[http://www.adl.org/special/reports/hate on www.html](http://www.adl.org/special/reports/hate_on_www.html)> (visited Feb. 8, 2001).

12. See Pam Belluck, *Avowed White Racist is Denied Illinois Law License; Ruling Ignites Free Speech Fight*, THE TIMES-PICAYUNE, Feb. 14, 1999, at A6.

13. See e.g., Nadine Strossen, *Freedom for the Thought that We Hate*, LM MAGAZINE (UK), Sept. 1998, at 16; Nadine Strossen, *Streitfall Porno: Amerikas Feministinnen debattieren über Zensur und Meinungsfreiheit*, SPIEGEL, Oct. 1997 (Spiegel Special: "Liebe, Laster, Literatur"); Nadine Strossen, Conference in Auckland, New Zealand, "Liberty, Equality, Community: Constitutional Rights in Conflict?" (Aug. 20, 1999).

between First Amendment free speech rights and Fourteenth Amendment equality rights.

The ACLU takes these claims very seriously. Throughout the ACLU's 80-plus-year history, we always have been as dedicated to rights of equality and non-discrimination as we have been to free speech rights. This was noted, for example, in a comprehensive history of the ACLU that recently was published by none other than the Southern Illinois University Press: "From the outset, the ACLU challenged racial discrimination and segregation. . . . Roger Baldwin, [the ACLU's principal organizer and its first Executive Director], was recognized as an advocate for black Americans [and as such was] in a distinct minority among white Americans."¹⁴

Throughout our history, the ACLU had also defended free speech rights to engage in hateful expression. But we undertook a critical re-examination of that position a dozen years ago—as we regularly re-examine many of our positions—when some civil rights advocates first started calling for campus hate speech codes, making the then-new equality-based arguments in favor of these codes.

I hasten to emphasize the word *some*. Many civil rights advocates and minority group leaders have strongly opposed restrictions on hate speech. That is specifically true in the Matthew Hale situation. For example, advocates of Hale's bar admission include the syndicated *Chicago Tribune* columnist, Clarence Page, an African-American whose writings regularly advocate civil rights,¹⁵ and one of Hale's own lawyers, Anita Rivkin-Carothers, an African-American civil rights lawyer.¹⁶

Because the ACLU has always fought for equality of educational opportunities, we carefully considered arguments by advocates of campus hate speech codes that these codes were necessary to promote true equality of educational opportunity. However, based on that analysis, the ACLU loudly reaffirmed our traditional speech-protective position. We did so not because we elevated free speech rights above equality rights. Rather, we did so because we concluded that censoring hate speech would not in fact foster equality, but, to the contrary, might well undermine equality.¹⁷

14. See SAMUEL WALKER, IN DEFENSE OF AMERICAN CIVIL LIBERTIES: A HISTORY OF THE ACLU 34 (1999).

15. See Clarence Page, *Candid Bigotry Should Not Block Racists Right to Practice Law*, THE FRESNO BEE, Feb. 18, 1999, at B9.

16. See Stebbins Jefferson, *Defending the Constitution, Not Hate*, THE PALM BEACH POST, Sept. 11, 1999, at 1A.

17. See *Free Speech and Bias on College Campuses*, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, at Policy No. 72a (adopted by the ACLU National Board of Directors, without dissent, on October 13, 1990).

This was the conclusion of a 1995 book that I co-authored, entitled *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*.¹⁸ It is a collection of six essays, including several by leading members of minority groups and advocates of their rights—for example, Henry Louis (Skip) Gates, the African-American scholar and writer who is Chair of the Afro-American Studies Department at Harvard University, and Anthony Griffin, a prominent African-American civil rights lawyer. Every essay concludes that censoring hate speech may well do more harm than good to the vitally important causes of promoting equality and combating discrimination.

Alas, racial discrimination and other forms of discrimination and discriminatory violence are still endemic in the United States, as well as in many other countries. Therefore, I consider it tragic that so much energy has been spent on the most superficial manifestation of these deep-seated problems of racism and other prejudices: namely, a few words. I say “a few,” because even those who advocate restrictions on hate speech recognize that such restrictions can punish only the most blatant, crudest expressions of racism; the more subtle, and hence the more insidious, expressions will necessarily go unredressed. My co-author Skip Gates made this point in our book with characteristic flair. He wrote: “In American society today, the real power commanded by racism is likely to vary inversely with the vulgarity with which it is expressed . . . Unfortunately, those who [advocate restrictions] . . . worry more about speech codes than coded speech.”¹⁹

Instead of banning a few of the crudest, most superficial symptoms of discriminatory attitudes, we should turn to more effective, constructive measures to counter the root causes of such attitudes, as well as actual acts of discrimination and violence.

My discussion thus far lays out the overview of the ACLU’s position on the important topic you asked me to address. Now I will elaborate on the key points in this position. I will first explain why hate speech restrictions violate core First Amendment principles and why it is vitally important to continue to enforce those principles. Then, I will discuss why hate speech restrictions are at best ineffective, and at worst counterproductive, in redressing discrimination and promoting equality.

18. See generally HENRY LOUIS GATES ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1994).

19. *Id.* at 47.

II. THE CASE FOR MAINTAINING TRADITIONAL FIRST AMENDMENT STANDARDS

The ACLU staunchly supports the traditional, strictly speech-protective, First Amendment standards concerning hate speech, and opposes any relaxation even in the alleged service of such laudable goals as promoting equality and reducing discrimination. As I already noted, though, the traditional standards do not provide that *all* speech is absolutely protected. Thus, in the campus context, we would not oppose a code that simply reflected longstanding, legitimate limits on speech that the ACLU never has opposed in any other context—for example, prohibitions on threats. On this point, the relevant ACLU policy reads as follows:

This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. Although these are imprecise terms susceptible of impermissibly overbroad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation.

The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation. For example, intimidating phone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression.²⁰

A. Restricting Hate Speech Would Violate Cardinal Free Speech Principles

To allow restrictions on hate speech beyond these traditional, contextual limitations on all speech—in other words, to allow restrictions on hate speech because of its offensive content—would violate the two most fundamental principles underlying the First Amendment's free speech guarantee. The first

20. See *Free Speech and Bias on College Campuses*, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, at Policy No. 72a & n.4 (adopted by the ACLU National Board of Directors, without dissent, on October 13, 1990).

such principle specifies what *is* a sufficient justification for restricting speech, and the second prescribes what is *not* a sufficient justification.

I already have touched on the first cardinal free speech principle, which is often encapsulated by the phrase, “clear and present danger.” It holds that a restriction on speech may be justified only when necessary to avert imminent harm to an interest of compelling importance, such as physical safety. As former Supreme Court Justice Oliver Wendell Holmes observed in a much-quoted opinion, consistent with this principle, the First Amendment would not protect someone who falsely shouted “Fire!” in a theater and caused a panic.²¹

To be restricted consistent with this principle, the speech must clearly pose an imminent, substantial danger. Allowing speech to be curtailed on the speculative basis that it might indirectly lead to some possible harm sometime in the future would inevitably unravel free speech protection. All speech might lead to some potential danger at some future point. As Justice Holmes put it, “[e]very idea is an incitement.”²² Therefore, under such a watered-down approach, scarcely any idea would be safe, and surely no idea that challenged the status quo would be.

Until the 1960s, the United States Supreme Court did apply this relaxed, so-called “bad tendency” approach to free speech. Over dissents by such respected Justices as Holmes and Brandeis, the Court allowed government to suppress any speech that might have a tendency to lead to some future harm.²³ This approach endangered all critics of government policy and advocates of political reform. For example, during the World War I era, thousands of Americans were imprisoned for peacefully criticizing United States participation in the war and other government policies. Likewise, at the height—or depth—of the Cold War, members of left-wing political groups were imprisoned for criticizing capitalism or advocating socialism.

In light of this history, it is ironic that people toward the left of the political spectrum would now champion a return to the censorial standards that were so long used to suppress their ideas. Yet, that is precisely what the advocates of hate speech codes are doing.

In the modern era, the Supreme Court has resoundingly repudiated this bad tendency rationale for suppressing controversial speech. In the modern era, moreover, the high Court has recognized the crucial distinction between *advocacy* of violent or unlawful conduct, which is protected, and intentional,

21. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

22. *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

23. *See, e.g., Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

imminent *incitement* of such conduct, which is not. The Court enshrined this distinction in a landmark 1969 ACLU case, *Brandenburg v. Ohio*.²⁴ In *Brandenburg*, the Court unanimously upheld the First Amendment rights of a Ku Klux Klan leader who addressed a rally of supporters, some of whom brandished firearms and advocated violence and discrimination against Jews and blacks.²⁵ The Court held that this generalized advocacy was neither intended nor likely to cause immediate violent or unlawful conduct, and therefore could not be punished.²⁶

Notably, the Supreme Court consistently has applied *Brandenburg's* critical distinction between protected advocacy and unprotected incitement to shelter incendiary expression of every stripe—not only racist hate speech, but also fiery rhetoric in support of civil rights causes and protests.²⁷

Once again, the recent controversy surrounding Matthew Hale's case is instructive. The Illinois authorities denied his license to practice law because of his advocacy of white supremacist views, with no allegation—let alone evidence—that he had crossed the line between protected advocacy and prohibited incitement. If the United States Supreme Court had applied a similar standard in the important 1982 case of *NAACP v. Claiborne Hardware*,²⁸ the NAACP (National Association for the Advancement of Colored People) and its leaders would have faced severe penalties that would have threatened the ongoing viability of this leading civil rights organization.

In stark contrast with the stance of Illinois bar officials and judges toward Matthew Hale, who was punished for advocating peaceful law reform to enshrine his racist views, the Supreme Court held that NAACP leaders had a First Amendment right to advocate not only violence, but indeed violence against African-Americans. Specifically, the Court protected the right of NAACP leaders to advocate violent reprisals against individuals who violated an NAACP-organized boycott of white merchants who allegedly had engaged in racial discrimination.²⁹ Even though some violence was subsequently committed against blacks who patronized white merchants, it occurred weeks or months after the inflammatory addresses. Accordingly, in a major victory for the civil rights cause, as well as for free speech principles, the Supreme

24. 395 U.S. 444 (1969).

25. *Id.* at 445.

26. *Id.* at 449.

27. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

28. *Id.*

29. On April 21, Charles Evers gave a . . . speech to several hundred people, in which he . . . called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

Court overturned a lower court ruling that had declared the boycott unlawful and held the NAACP responsible for white merchants' large financial losses.³⁰ The Court explained the fundamental free speech principles at stake as follows:

The [NAACP leaders'] addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."³¹

The second fundamental free speech principle that would be violated by suppressing hate speech requires "content neutrality" or "viewpoint neutrality." It holds that government may never limit speech just because any listener—or even, indeed, the majority of the community—disagrees with or is offended by its content or the viewpoint it conveys. The Supreme Court has called this the "bedrock principle" of our proud free speech tradition under American law.³² In recent years, the Court has steadfastly enforced this fundamental principle to protect speech that conveys ideas that are deeply unpopular with or offensive to many, if not most, Americans—for example, burning an American flag in a political demonstration against national policies,³³ or burning a cross near the home of an African-American family that had recently moved into a previously all-white neighborhood.³⁴

The viewpoint-neutrality principle was also essential to protect expression by pro-civil rights demonstrators during the Civil Rights Movement in the 1960s. In many Southern communities where Martin Luther King, Jr., and other civil rights activists demonstrated and aired their ideas, their views were seen as deeply offensive, abhorrent, and dangerous to traditional community mores and values concerning racial segregation and discrimination. Efforts

30. *Id.* at 934.

31. *Id.* at 928.

32. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

33. *Id.* at 399; *United States v. Eichman*, 496 U.S. 310, 312 (1990).

34. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Court recognized that this symbolic expression could be constitutionally prohibited under many laws, such as those prohibiting arson, vandalism, and trespass; it stressed, though, that this expression could not be prohibited under a law that focused on the ideas it conveyed—namely, a city ordinance that prohibited expression that "arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender." *Id.* at 391.

to censor and punish these expressions, though, were thwarted by court rulings enforcing the viewpoint-neutrality principle.³⁵

So this core principle is firmly entrenched in United States law. But it still meets a lot of public resistance, at least on first impression. I can illustrate this through a story about my own beloved father. After he retired, Dad moved to San Diego. About 15 years ago, I was invited to give a lecture there, following some well-publicized, ugly incidents of anti-Semitic and racist expression. I was asked to explain why the ACLU defends free speech even for racist and religious bigots, and why we win those cases.

My father came to hear my talk. Now, mind you, he was not a card-carrying ACLU member! But he still came because he had not heard me give a speech since my high school commencement address—which, incidentally, he also disagreed with! Anyway, he listened very attentively. Afterwards, he came up to me and said: “I appreciate that excellent explanation of ACLU positions and constitutional law. I now understand that the ACLU is correctly interpreting the First Amendment. Thank you for making it clear to me that the problem is the First Amendment.”

I don't mean to pick on my dear Dad unfairly. To the contrary, his reaction was quite typical. Most people don't realize the importance of defending free speech for ideas that they find outrageous until or unless their own ideas are subject to censorship because other people find them outrageous.

Let me cite another story that makes this point. It involves an African-American schoolteacher in Florida named Bill Maxwell. He wrote a newspaper column about this incident, with this telling title: “ACLU is Quintessential American Group.” Bill Maxwell's column refers to the ACLU case that, above all others, epitomizes not only the ACLU's commitment to viewpoint-neutrality, but also our Constitution's commitment. This case comes from right here in Illinois. I am talking about the famous—or infamous—“Skokie case,” in which we defended the free speech rights of neo-Nazis to march in Skokie, Illinois.³⁶ As you may know, that city has a large Jewish population; even more poignantly, at the time of the case, it had a large population of Holocaust survivors.

While the Skokie case was—and still is—very controversial among the general public, it was very straightforward as a legal matter, involving a classic application of the “viewpoint-neutrality” principle. Still, Bill Maxwell's experience confirms that these principles are hard to accept as such—namely, as abstract principles—and that they make far more sense to

35. See *infra* Section III C, A Robust Freedom of Speech is Especially Important for Advancing Egalitarian Causes.

36. *Village of Skokie v. Nat'l Socialist Party*, 69 Ill. 2d 605 (1978); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

most people when they bring about some concrete, practical, personal benefit for them, or for people whose ideas they share. Here is what he wrote:

Like millions of other Americans, I have a love/hate relationship with the ACLU. I donate money to it because I support its absolutist positions on civil liberties. Often, though, I curse this high-minded group and swear I'll never give it another dime.

The last time I fell out of love and canceled my membership was in 1977, when the ACLU defended the right of the American Nazi Party to demonstrate in Skokie, Illinois.

Ironically, I needed the ACLU a year later when three [other] black teachers and I tried to distribute a handbill critical of our university's hiring policies. No other teachers or administrators supported us. In fact, placards produced by our colleagues labeled us as "racists," "niggers" and "educated monkeys." But the ACLU took our case and won. Our attorney explained that although the university community saw us as "obnoxious subversives," we had a constitutional right to speak.

Suddenly, I recalled the Skokie Nazis. The next day I mailed a check to the ACLU.³⁷

B. A Counterspeech Strategy is Both Principled and Pragmatic

The viewpoint-neutrality principle reflects the philosophy, first stated in pathbreaking opinions by former United States Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis, that the appropriate response to speech with which one disagrees in a free society is not censorship but counterspeech—more speech, not less. Persuasion, not coercion, is the solution.³⁸ Accordingly, the appropriate response to hate speech is not to censor it, but to answer it. Recall, as I discussed earlier, that this is the strategy that the Anti-Defamation League has been pursuing so effectively in response to Internet hate speech.

37. Letter from Bill Maxwell to Nadine Strossen (on file with the author).

38. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring):
To courageous, self-reliant men, with confidence in the power of free and fearless reasoning . . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

This counterspeech strategy is better than censorship not only in principle, but also from a practical perspective. That is because of the potentially empowering experience of responding to hate speech with counterspeech. I say "potentially," since I realize that the pain, anger and other negative emotions provoked by being the target of hate speech could well have an incapacitating effect on some targeted individuals, preventing them from engaging in counterspeech. Even in such a situation, though, other members of the community who are outraged by the hate speech could engage in counterspeech, and that is likely to have a more positive impact than a censorial response. Furthermore, once other community members denounce the hate speech, it should be easier for the target to join them in doing so.

I will illustrate these practical benefits of a non-censorial, counterspeech response to hate speech in the campus context. Far from being paternalistic, counterspeech is empowering to students; it transforms students who would otherwise be seen—and see themselves—largely as victims into activists and reformers. It underscores their dignity, rather than undermines it.

One excellent example of the effective use of counterspeech comes from Arizona State University (ASU) in Tempe, Arizona. Under the leadership of a law professor on that campus, Charles Calleros, the faculty and administration rejected any code that outlawed hate speech or punished students who expressed it. Instead, they endorsed an educational or counterspeech response to any hate speech. Significantly, as a Latino, Charles Calleros is himself a member of a minority group. As such, though, he believes that stifling or punishing hate speech is no better for advancing non-discrimination and equality than it is for free speech. And, based on his university's actual experience with the non-censorial, more-speech response to hate speech, Professor Calleros' original speech-protective views have been reinforced.

Professor Calleros has written articles about the positive impact of the non-censorial approach to hate speech at ASU, explaining how it has been empowering and supportive for the would-be "victims" of the hate speech, and also educational and promotive of tolerance and anti-discrimination values for the university community as a whole.³⁹ Because it is so instructive, I would like to quote at some length Professor Calleros' description of the first

39. Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249 (1995); Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205 (1992).

hate speech incident under ASU's pro-educational, non-censorial campus policy:

[F]our black women students . . . were understandably outraged when they noticed a racially degrading poster near the residence of a friend they were visiting in Cholla, a campus dormitory. Rather than simply complain to their friends . . . they took positive action. First, they spoke with a Resident Assistant who told them that they could express their feelings to the owners of the poster and encourage them to remove it The students knocked on the door that displayed the racist poster and expressed their outrage in the strongest terms to the occupant who answered the door He agreed that the poster was inappropriate, removed it, and allowed the women to make a photocopy of it.

[T]he four students then met with the staff director of Cholla. That director set up a [meeting] for all members of Cholla [A] capacity crowd showed up All seemed to accept the challenging conclusion that the poster was protected by the First Amendment, and I regard what followed as a model example of constructive response.

First, the black women who discovered the poster explained as perhaps only they could why the poster hurt them deeply The Anglo-American students assured the black women that they did not share the stereotypes reflected in the poster, yet all agreed that they would benefit from learning more about other cultures. The group reached a consensus that they would support ASU's Black History events and would work toward developing multicultural programming at Cholla. The four women who led the discussion expressed their desire to meet with the residents of the offending dormitory room to exchange views and to educate them about their feelings and about the danger of stereotyping. I understand that the owner of the poster is planning to publish an apology in this newspaper today and a personal communication with the four women would be an excellent follow-up

The entire University community then poured its energy into the kind of constructive action and dialogue that took place in the Cholla meeting. Students organized an open forum. The message was this: at most, a few individuals on a campus think that the racist poster is humorous; in contrast, a great number of demonstrators represent the more prevalent campus view that degrading racial stereotypes are destructive. Such a message is infinitely more effective than disciplining the students who displayed the racist poster.⁴⁰

In addition to empowering the students who encountered the racist poster and educating the students who had displayed it, the non-censorial response

40. Letter to the Editor, *African-American Women Respond to Poster with Courage, Intelligence*, STATE PRESS, Feb. 15, 1991, at 5.

to this hate speech incident also galvanized constructive steps to counter bias campus-wide. One of the student leaders of this constructive college-wide response was Rossie Turman, who was then Chairman of the African-American Coalition at Arizona State University. Turman's leadership in supporting both free speech and non-discrimination earned him much recognition, including an award from the Anti-Defamation League. As one press account stated:

Turman and other campus minority group leaders handled their anger by calling a press conference and rally to voice their concerns and allow students and administrators to speak Within days, the ASU Faculty Senate passed a previously-proposed domestic diversity course requirement. Turman said: "When you get a chance to swing at racism, and you do, you feel more confident about doing it the next time. It was a personal feeling of empowerment, that I don't have to take that kind of stupidity The sickest thing would have been if the racists had been kicked out, the university sued, and people were forced to defend these folks. It would have been a momentary victory, but we would have lost the war."

After this incident, Rossie Turman went on to be elected student body President at ASU, the first African-American to hold that position on a campus that had an African-American student population of only 2.3%. Upon his graduation from college, he went to Columbia Law School. Therefore, for him, what could have been a disempowering, victimizing experience with hate speech became instead an empowering, leadership-development experience—not *despite* the absence of censorship—but precisely *because* of it.

In contrast with the more-speech response to hate speech adopted by Arizona State University, a censorial response does not empower the maligned students. To the contrary, it may well perpetuate their victimization. Worse yet, ironically, censoring hate speech may well empower verbal abusers, by making them into free speech martyrs. This point was captured by the *Progressive* magazine:

[T]he attempt to ban or punish hateful speech does nothing at all to empower the presumed victims of bigotry. Instead, it compels them to seek the protection of authorities whose own commitment to justice is often, to put it mildly, less than vigorous. Restraining speech increases the dependency of minorities and other victims of hate and oppression. Instead of empowering them, it enfeebles them.⁴¹

41. *The Speech We Hate*, PROGRESSIVE MAGAZINE, Aug. 8, 1992.

III. THE INEFFECTIVENESS OF SUPPRESSING HATE SPEECH

Censoring hate speech is doubly flawed. Not only does it violate fundamental free speech principles, as I have just explained, but worse yet, it does so with no countervailing benefit. Many advocates of suppressing hate speech hope thereby to promote equality and non-discrimination. In practice, though, censoring hate speech is at best ineffective in promoting these important goals, and at worst counterproductive.

A. Suppressing Hate Speech Does Not Advance Equality

Based on actual experience and observations in countries around the world, the respected international human rights organization, Human Rights Watch, concluded that suppressing hate speech does not effectively promote equality or reduce discrimination. In 1992, Human Rights Watch issued a report and policy statement opposing any restrictions on hate speech that go beyond the narrow confines permitted by traditional First Amendment principles. Human Rights Watch's policy statement explains its position as follows:

The Human Rights Watch policy attempts to apply free speech principles in the anti-discrimination context in a manner that is respectful of both concerns, believing that they are complementary, not contradictory. While we recognize that the policy is closer to the American legal approach than to that of any other nation, it was arrived at after a careful review of the experience of many other countries This review has made clear that there is little connection in practice between draconian "hate speech" laws and the lessening of ethnic and racial violence or tension. Furthermore, most of the nations which invoke "hate speech" laws have a long way to go in implementing the provisions of the Convention for the Elimination of Racial Discrimination calling for the elimination of racial discrimination. Laws that penalize speech or membership are also subject to abuse by the dominant racial or ethnic group. Some of the most stringent "hate speech" laws, for example, have long been in force in South Africa, where they have been used almost exclusively against the black majority.⁴²

Similar conclusions were generated by an international conference in 1991 organized by the international free speech organization, Article 19,

42. HUMAN RIGHTS WATCH, *'Hate Speech' and Freedom of Expression*, A HUMAN RIGHTS WATCH POLICY PAPER, Mar. 1992, at 4.

which is named after the free speech guarantee in the Universal Declaration of Human Rights. That conference brought together human rights activists, lawyers, and scholars, from fifteen different countries, to compare notes on the actual impact that anti-hate-speech laws had in promoting equality, and countering bias and discrimination, in their respective countries. The conference papers were subsequently published in a book, *Striking A Balance: Hate Speech, Free Speech, and Non-Discrimination*.⁴³ The conclusion of all these papers was clear: not even any correlation, let alone any causal relationship, could be shown between the enforcement of anti-hate-speech laws by the governments in particular countries and an improvement in equality or inter-group relations in those countries. In fact, often there was an inverse relationship. These findings were summarized in the book's concluding chapter by Sandra Coliver, who was then Article 19's Legal Director:

Laws which restrict hate speech have been flagrantly abused by the authorities. Thus, the laws in Sri Lanka and South Africa have been used almost exclusively against the oppressed and politically weakest communities. In Eastern Europe and the former Soviet Union these laws were vehicles for the persecution of critics who were often also victims of state-tolerated or sponsored anti-Semitism. Selective or lax enforcement by the authorities, including in the United Kingdom, Israel and the former Soviet Union, allows governments to compromise the right of dissent and inevitably leads to feelings of alienation among minority groups.

Such laws may also distract from the need for effective legislation to promote non-discrimination. The rise of racism and xenophobia throughout Europe, despite laws restricting racist speech, calls into question the effectiveness of such laws in the promotion of tolerance and non-discrimination. One worrying phenomenon is the sanitized language now adopted to avoid prosecution by prominent racists in Britain, France, Israel and other countries, which may have the effect of making their hateful messages more acceptable to a broader audience.⁴⁴

Many other illustrations of the unconstructive impact of censoring hate speech can be drawn from history. One situation that may be foremost on many of our minds is that of Germany under Adolf Hitler. Given the unparalleled horrors of the Holocaust, surely even the most diehard free speech champions would support censorship if we could be persuaded that it

43. STRIKING A BALANCE: HATE SPEECH, FREE SPEECH, AND NON-DISCRIMINATION (Sandra Coliver ed., 1992).

44. Sandra Coliver, *Hate Speech Laws: Do They Work?*, *supra* note 43, at 373-74.

might have averted that tragedy. Speaking for myself, as the daughter of a German-born Holocaust survivor, that is certainly the case.

I know that this perspective is resonant with many members of the Southern Illinois University community, because of your concern about the locally educated but nationally notorious white supremacist, Matthew Hale, who has endorsed many of Hitler's horrific views, including white supremacy and anti-Semitism. Indeed, the Committee on Character and Fitness of the Illinois Bar cited Hale's ideological allegiance to Hitler as a purported justification for its refusal to admit him: "If the civilized world had no experience with Hitler, Matthew Hale might be dismissed as a harmless 'crackpot.'"⁴⁵

The historical record makes clear, however, that censorship was no more effective a response to the rise of anti-Semitic hatred in Germany's pre-Hitler era than it has been in other circumstances. This point was discussed in a 1990 Canadian Supreme Court opinion, considering a constitutional challenge to Canada's anti-hate speech law:

Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate [speech] law. Moreover, those laws were enforced with some vigor. During the 15 years before Hitler came to power, there were more than 200 prosecutions based on anti-Semitic speech. And, in the opinion of the leading Jewish organization of that era, no more than 10% of the cases were mishandled by the authorities. As subsequent history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it. Indeed, there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency. They used the trials as platforms to propagate their message.⁴⁶

B. Censoring Hate Speech May Do More Harm Than Good For Equality Rights

The authorities I have cited so far summarize some of the many reasons why censoring hate speech may well do more harm than good in terms of

-
45. *In re Hale*, Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois (1998). As the opinion was forced to acknowledge, Matthew Hale had not threatened to exterminate anyone. It then relied on an explicitly speculative potential connection between some views and some conduct, noting that "extermination is sometimes not far behind when governmental power is held by persons of his racial views." *Id.* Not only does this qualified generalization not refer directly to Hale himself; to the contrary, it expressly refers to government officials, and Hale neither held, nor had any foreseeable prospect of holding, government office.
46. *R. v. Keegstra*, Supreme Court of Canada, 61 C.C.C. 3d 1; 11 W.C.B. 2d 352 (Dec. 13, 1990).

countering bias and discrimination. Let me list the most important such reasons now:

- Censoring hate speech increases attention to, and sympathy for, bigots.
- It drives bigoted expression and ideas underground, thus making response more difficult.
- It is inevitably enforced disproportionately against speech by and on behalf of members of minority groups.
- It reinforces paternalistic stereotypes about members of minority groups, suggesting that they need special protection from offensive speech.
- It increases resentment against members of minority groups, the presumed beneficiaries of the censorship.
- Censoring hate speech undermines a mainstay of equal rights movements, which have always been especially dependent on a robust concept of free speech.
- An anti-hate-speech policy curbs candid intergroup dialogue concerning racism and other forms of bias, which is an essential precondition for reducing discrimination.
- Positive intergroup relations will more likely result from education, free discussion, and the airing of misunderstandings and insensitivity, rather than from legal battles; in contrast, anti-hate-speech rules will continue to generate litigation and other forms of controversy that increase intergroup tensions.
- Last but far from least, censorship is diversionary, making it easier to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, strategies for combating discrimination. Censoring discriminatory expression diverts us from the essential goals of eradicating discriminatory attitudes and conduct.

I will now expand on three of the most important of the foregoing reasons for concluding that censoring hate speech would be as inimical to equality rights as to free speech rights.

C. A Robust Freedom of Speech is Especially Important for Advancing Egalitarian Causes

First and foremost, all those who seek equal rights have an especially important stake in securing free speech. For example, as I have already noted, the Civil Rights Movement in the United States was dependent on a robust concept of free speech, one that was capacious enough to encompass hate speech. Critical to the success of that movement were the landmark rulings of the United States Supreme Court under the leadership of Chief Justice Earl Warren—not only the Warren Court's rulings dealing directly with the Constitution's equal rights guarantee, but also its rulings upholding a strong concept of free speech, even for the most provocative and controversial speech.⁴⁷

Important as the Court's equal protection rulings were for advancing the civil rights cause, those rulings could not even have been achieved, let alone effectively implemented, without the organizing and litigating efforts of the NAACP (National Association for the Advancement of Colored People), without the speeches and demonstrations of Martin Luther King, Jr. and other civil rights leaders and activists, and without the press coverage that mobilized the support of the American public and of the national government.

All of these essential foundations for advances in civil rights depended upon the Warren Court's broad, vigorous conception of free speech—a conception sufficiently broad and vigorous that it necessarily also encompassed hate speech and other forms of speech that now are said to undermine equality. The Warren Court record conclusively shows that, in the words of historian Samuel Walker, “The . . . civil rights movement . . . depended on the First Amendment.”⁴⁸

Civil rights leaders concur in this judgment. In the words of Benjamin L. Hooks, former Executive Director of the NAACP, “The civil rights movement would have been vastly different without the shield and spear of the First Amendment.”⁴⁹ Likewise, Eleanor Holmes Norton, an African-American woman who served as Director of the Equal Employment Opportunity Commission, and who now represents the District of Columbia in Congress, succinctly summarized the positive, symbiotic relationship between free

47. For a fuller discussion of this theme, see Nadine Strossen, *Freedom of Speech in the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE 68-84* (Bernard Schwartz ed., 1996).

48. SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 241* (Oxford University Press 1999) (1990).

49. Statement quoted in Phillip Morris Companies, Inc., Press Release (May 7, 1990).

speech and equality during the Civil Rights Movement; she said, “There was always the First.”⁵⁰

In his 1994 book, *Hate Speech: The History of an American Controversy*, Samuel Walker shows that, throughout the twentieth century, the equality rights of African-Americans and other minority groups were dependent on a robust free speech concept. He further shows that, realizing the importance of protecting even speech viewed as hateful or dangerous—because their own speech certainly was so viewed in many Southern and other communities—the major American civil rights organizations consistently opposed efforts to restrict hate speech. As Walker concluded, “The lessons of the civil rights movement were that the interests of racial minorities and powerless groups were best protected through the broadest, most content-neutral protection of speech.”⁵¹

In his 1965 book, *The Negro and the First Amendment*, University of Chicago Law Professor Harry Kalven documented that the Civil Rights Movement depended on free speech principles. These principles allowed protestors to carry their messages to audiences who found them highly offensive and threatening to their most deeply cherished views of themselves and their way of life. Equating civil rights activists with Communists, subversives, and criminals, government officials mounted inquisitions against the NAACP, seeking compulsory disclosure of its membership lists and endangering the members’ jobs and lives. As Kalven concluded, “Only strong principles of free speech and association could—and did—protect the drive for desegregation.”⁵²

Martin Luther King, Jr., wrote his historic letter from a Birmingham jail,⁵³ but the Birmingham parade ordinance that King and other demonstrators had violated eventually was declared an unconstitutional invasion of their free speech rights.⁵⁴ Moreover, the Civil Rights Act of 1964, which these demonstrators championed, did become law.

The more disruptive forms of civil rights protest, such as marches, sit-ins, and kneel-ins—which some observers credit as being the most effective—were all especially dependent on generous judicial constructions of the free speech

50. WALKER, *supra* note 48 at 120.

51. SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* at 126 (Univ. of Nebraska Press, 1994).

52. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 6 (1965).

53. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, 289 (James M. Washington ed., HarperCollins 1986).

54. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

guarantee.⁵⁵ Notably, many of these protective interpretations initially had been formulated in cases brought on behalf of anti-civil rights demonstrators. But the same principles and precedents also sheltered the insulting and often racist language that militant black activists hurled at police officers and other government officials.⁵⁶

An awareness of these principles and practicalities is precisely what prompted the African-American civil rights lawyer, Anita Rivkin-Carothers, to represent the white supremacist Matthew Hale in his effort to secure a license to practice law in Illinois. One journalist paraphrased his interview with her on this point as follows:

She urges her critics to remember that without First Amendment rights, the Rev. Dr. Martin Luther King never would have marched. Without free speech protection, Julian Bond—having called the Vietnam War racially discriminatory—would have been barred from taking the seat in the Georgia legislature to which he had been duly elected. She would remind Muslims, among her harshest critics in the Chicago area, that Louis Farrakhan could not speak his beliefs without the First Amendment.⁵⁷

Significantly, the ACLU has come to the defense of the free speech rights of every single one of the individuals whom Rivkin-Carothers cites—Martin Luther King, Jr., Julian Bond, and Louis Farrakhan alike—since all of their views have been deemed dangerous and subversive by some authorities in some places at some points in our history. Therefore, all of them—along with Matthew Hale himself—have been vehicles for protecting the overarching free speech rights at stake for the benefit of everyone in this country, just as Rivkin-Carothers stated.

The same insight was emphasized by another African-American civil rights advocate who also defended Hale's right to practice law, journalist Clarence Page. In a syndicated column explaining why Hale should not be denied bar admission, Page wrote: "The First Amendment swings both ways and so does every effort to restrict it. Attempts to silence unpopular minority

55. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536, 550 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

56. See *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Lewis v. New Orleans*, 415 U.S. 130 (1974).

57. Stebbins Jefferson, *Defending the Constitution, Not Hate*, THE PALM BEACH POST, Sept. 11, 1999, at 1A.

views at one extreme inevitably swing back to squash minority views on the other side.”⁵⁸

The mutually reinforcing relationship between a strong free speech guarantee and equality rights obtains for other equality movements, in addition to the Civil Rights Movement on behalf of African-Americans. For example, the movements for women’s rights and reproductive freedom always have depended upon strong protection of free speech for ideas that many communities have seen as wrong, offensive, and dangerous. Conversely, censorship has always been a particularly potent weapon for thwarting advances in women’s rights, including reproductive freedom. The same pattern holds for the lesbian and gay rights movement. I explore these mutually-reinforcing relationships between equality and free speech more thoroughly in my book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*.⁵⁹

Indeed, for one of our newest civil rights movements—on behalf of lesbians, gay men, and other sexual-orientation minorities—defending free speech is essentially indistinguishable from promoting equality rights.⁶⁰ The first essential step for lesbians and gay men in seeking equal rights is “coming out of the closet,” or publicly acknowledging their sexual orientation. This act is at once an exercise of free speech rights and an assertion of equality rights.

Conversely, those who discriminate against lesbians and gay men often simultaneously attack their free speech and equality rights. A prime example is the United States military’s exclusionary “Don’t Ask, Don’t Tell” policy.⁶¹ Under this policy, even the most outstanding, brave, and patriotic service members will be drummed out not only for engaging in homosexual conduct, but also for just saying something that indicates their sexual orientation, even if they had never engaged in any actual homosexual conduct. That is the “Don’t Tell” prong of the policy.

Accordingly, in the ACLU’s constitutional challenge to this policy, which we brought jointly with the Lambda Legal Defense Fund, we argued that it is

58. Clarence Page, *Candid Bigotry Should Not Block Racist's Right to Practice Law*, THE FRESNO BEE Feb. 18, at B9.

59. NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS*, 224–29 (New York Univ. Press 2000).

60. See, e.g., William B. Rubenstein, *Since When is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 280–99 (1995).

61. National Defense Authorization Act § 571, 10 U.S.C. § 654 (1993).

doubly unconstitutional, violating both equality and free speech rights, and the lower court agreed with us on both scores.⁶²

D. Censorship Consistently Has Been Used to Suppress Civil Rights Causes

Just as free speech always has been the strongest weapon to *advance* equal rights causes, correspondingly, censorship always has been the strongest weapon to *thwart* them.

Ironically, the explanation for this pattern lies in the very analysis of those who want to curb hate speech. They contend that racial minorities and women are relatively disempowered and marginalized. I agree with that analysis of the problem, and am deeply committed to working toward solving it. Indeed, I am proud that the ACLU is, and always has been, on the forefront of the struggles for racial justice, women's rights, and other equality movements.

I strongly disagree, though, that censorship is a solution for our society's persistent discrimination. To the contrary, precisely because women and minorities are relatively powerless, it makes no sense to hand the power structure yet another tool that it can and will use to further suppress them, in two senses of the word "suppress"—both stifling their expression and repressing their efforts to enjoy full and equal human rights.

Consistent with the analysis of the censorship advocates themselves, the government is likely to wield this tool, along with all others, to the particular disadvantage of already disempowered groups. Laws censoring hate speech are inevitably enforced disproportionately against speech by and on behalf of groups who lack political power, including government critics, and even members of the very minority groups who are the laws' intended beneficiaries. As I previously noted, this was precisely the conclusion reached by the respected international human rights organizations, Human Rights Watch and Article 19, citing examples ranging from South Africa to the former Soviet Union.

Other illustrations abound. For example, the Turkish government has invoked its law against inciting racial hatred to bring thousands of prosecutions against Turkish writers, journalists, academicians, and scientists

62. *Able v. United States*, 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998). Although the appellate court ultimately overturned our lower court victory, it stressed that it was simply following a long line of Supreme Court precedents requiring extreme judicial deference to the military; accordingly, the appellate court essentially rubber-stamped the 'Don't Ask, Don't Tell' rule, without subjecting it to any meaningful constitutional scrutiny. *Id.* at 633. Given these precedents, the ACLU and Lambda decided not to seek Supreme Court review.

who have criticized the government's war against Kurdish separatists. In 1995, the Turkish government prosecuted a United States journalist accused of "inciting hatred" by writing an article on that same topic.⁶³ Likewise, Singapore's authoritarian, long-time governing party has sued the main opposition party, the Workers' Party, for inciting racial hatred.⁶⁴ Just as this article was going to press, on February 19, 2001, Britain launched a prosecution for racist abuse against a longtime anti-nuclear activist because she had dragged a United States flag on the ground during a demonstration against the controversial "Son of Star Wars" missile defense system at the United States military base in North Yorkshire, England. The prosecution charged that this action was motivated by "racist hatred" of the American people and caused "harassment, alarm and distress" to United States personnel who drove out of the base during the demonstration.

These examples are consistent with a worldwide pattern throughout history. That pattern prompted a trenchant comment from former United States Supreme Court Justice Hugo Black, dissenting from a 1952 decision that upheld a hate speech law from right here in Illinois. Fortunately, that ruling since has been implicitly overturned by later Supreme Court decisions,⁶⁵ thus vindicating Justice Black's prescient dissent. That dissent warned, invoking the concept of a pyrrhic victory: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: Another such victory and I am undone."⁶⁶ Recall the episode from Arizona State University that I described earlier, in which the African-American student leader, Rossie Turman, explained why punishing students who engaged in hate speech would have been an ineffective strategy, as well as an unprincipled one. In his words: "It would have been a momentary victory, but we would have lost the war."

Consistent with the general historical pattern, the first individuals prosecuted under the British Race Relations Act of 1965, which criminalized the incitement of racial hatred, were black power leaders. Their overtly racist messages undoubtedly expressed legitimate anger at real discrimination, yet the statute drew no such fine lines, nor could any similar law possibly do so. Rather than curbing speech offensive to minorities, this British law instead has been used regularly to curb the speech of blacks, trade unionists, and anti-

63. Kelly Couturier, *U.S. Reporter Caught Up in Turkey's Crackdown on Press*, SAN FRANCISCO CHRONICLE, Oct. 11, 1995, at A8.

64. *Singapore Leaders Seek Nine Million Dollars from Opponent*, AGENCE FRANCE PRESSE, May 7, 1997 at C1.

65. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

66. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, H., dissenting).

nuclear activists. Perhaps the ultimate irony of this law, intended to restrain the National Front, a neo-Nazi group, is that it instead has barred expression by the Anti-Nazi League.

The British experience is typical. None of the anti-Semites who were responsible for arousing France against Captain Alfred Dreyfus was ever prosecuted for group libel. But Emile Zola was prosecuted for libeling the French clergy and military in his classic letter "J'Accuse," and he had to flee to England to escape punishment.

Similarly, University of Michigan Law School professor Eric Stein has documented that although the German Criminal Code of 1871 punished offenses against personal honor, "The German Supreme Court . . . consistently refused to apply this article to insults against Jews as a group—although it gave the benefit of its protection to such groups as Germans living in Prussian provinces, large landowners, all Christian clerics, German officers, and Prussian troops who fought in Belgium and Northern France."⁶⁷

Canada's recently adopted anti-hate-speech law also has led to the suppression of expression by members of minority groups. In one of their first enforcement actions under this law, Canadian Customs officials seized 1,500 copies of a book that various Canadian universities had tried to import from the United States. What was this dangerous racist, sexist book? None other than *Black Looks: Race and Representation* by the African-American feminist scholar, Bell Hooks, who is a professor at Oberlin.⁶⁸ And this incident was not an aberration. Other such perverse applications of the law were cited by the dissenting opinion in the Canadian Supreme Court decision upholding this law—by a narrow 5–4 vote—under Canada's Charter of Rights and Freedom. The dissent noted:

Although [the law] is of relatively recent origin, it has provoked many questionable actions on the part of the authorities Intemperate statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvement or calls for police action. Novels such as Leon Uris' pro-Zionist novel *The Haj*, face calls for banning. Other works, such as Salman Rushdie's *Satanic Verses*, are stopped at the border on the ground that they violate the law. Films may be temporarily kept out, as happened to a film entitled *Nelson Mandela*, ordered as an educational film by Ryerson Polytechnical Institute Arrests are even made for distributing pamphlets containing the words "Yankee Go Home."⁶⁹

67. Eric Stein, *History against Free Speech: The New German Law against the 'Auschwitz'—and Other—Lies*, 85 MICH. L. REV. 277, 286 (1986).

68. BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (South End Press 1992).

69. *R. v. Keegstra*, Supreme Court of Canada, 11 W.C.B. 2d 352; 61 C.C.C. 3d 1 (Dec. 13, 1990).

This general international and historic pattern also holds true in the specific, localized, context on which you asked me to focus—namely, on university and college campuses that enforce hate speech codes. Again, the British experience is instructive. In 1974, in a move aimed at the National Front, the British National Union of Students (NUS) adopted a resolution that representatives of “openly racist and fascist organizations” were to be prevented from speaking on college campuses “by whatever means necessary (including disruption of the meeting).”⁷⁰ The rule had been designed in large part to stem an increase in campus anti-Semitism. But following the United Nations’ cue, some British students deemed Zionism a form of racism beyond the bounds of permitted discussion, and in 1975 British students invoked the NUS resolution to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to Great Britain. The intended target of the NUS resolution, the National Front, applauded this result. The NUS itself, in contrast, became disenchanted by this and other unintended consequences of its resolution and repealed it in 1977.

The British experience parallels what has happened in the United States, as evidenced by the campus hate speech codes for which enforcement information is available.⁷¹ One such code was in effect at the University of Michigan from April 1988 until October 1989. Because the ACLU brought a lawsuit to challenge the code (which resulted in a ruling that the code was unconstitutional),⁷² the university was forced to disclose information that otherwise would have been unavailable to the public about how it had been enforced. This enforcement record, while not surprising to anyone familiar with the consistent history of censorship measures, should come as a rude awakening to any who believes that anti-hate-speech laws will protect or benefit racial minorities, women, or any other group that traditionally has suffered discrimination.

Even during the short time that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech. More importantly, there were only two instances in which the rule punished speech on the ground that it was racist—rather than conveying some other type of bias—and both involved the punishment of speech by or on

70. ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* 155–57 (E.P. Dutton Univ. Press, 1979).

71. See Nadine Strossen, *Frontiers of Legal Thought II The New First Amendment: Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 554–58.

72. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The ACLU also successfully challenged a hate speech code at the University of Wisconsin. *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

behalf of black students. Let me underscore that: 100% of the speech punished as racist was by or on behalf of African-Americans. Moreover, the only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was an African-American student accused of homophobic and sexist expression. In seeking clemency from the punishment that was imposed on him after this hearing, the student asserted that he had been singled out because of his race and his political views.⁷³

Others who were punished at the University of Michigan included several Jewish students accused of engaging in anti-Semitic expression (they wrote graffiti, including a swastika, on a classroom blackboard; saying they intended it as a practical joke) and an Asian-American student accused of making an anti-black comment (his allegedly "hateful" remark was to ask why black people feel discriminated against; he said he raised this question because the black students in his dormitory tended to socialize together, making him feel isolated).

Likewise, the student who in 1989 challenged the University of Connecticut's hate speech policy, under which she had been penalized for an allegedly homophobic remark, was Asian-American. She claimed that other students had engaged in similar expression, but that she had been singled out for punishment because of her ethnic background. Representing this student, the ACLU persuaded the university to drop the challenged policy.⁷⁴

Following the same pattern, the first complaint filed under Trinity College's then-new policy prohibiting racial harassment, in 1989, was against an African-American speaker who had been sponsored by a black student organization, Black-Power Serves itself.

Again, I stress that these examples are not just aberrational. Rather, they flow from the very premises of those who advocate hate speech codes. As they rightly note, discrimination and prejudice is, unfortunately, endemic in United States society—including on campus and in our legal system. Indeed, exhaustive studies of state and federal courts throughout our country

73. Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction at 1, *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (No. 89-CV-71683-DT) (black student used term 'white trash' in conversation with white student); Plaintiff's Exhibit at 5, *Doe* (No. 89-CV-71683-DT) (at the beginning of a preclinical dentistry course, recognized as difficult, faculty member led small group discussion, designed to identify concerns of students; dental student said that he had heard, from his minority roommate, that minorities have a difficult time in the course and were not treated fairly; the faculty member, who was black, complained that the student was accusing her of racism).

74. *Wu v. University of Conn.*, No. Civ. H-89-649 PCD (D. Conn. Jan. 25, 1990).

consistently show entrenched patterns of racial and gender bias.⁷⁵ So, for those of us who are committed to eradicating discrimination, the last thing we should want to do is to hand over to discriminatory officials and institutions power to enforce necessarily vague hate speech codes that inevitably call for subjective, discretionary decisions. This discretionary power predictably will be used in a way that is hardly helpful to disempowered groups.

E. Censorship is Diversionary

Now I will comment on yet another reason why censoring hate speech may well undermine, rather than advance, equality causes: its diversionary nature. Focusing on biased expression diverts us from both the root causes of prejudice—of which the expression is merely one symptom—and from actual acts of discrimination.

The track record of campus hate speech codes highlights this problem, too, just as it highlighted the previous problem I discussed, of discriminatory enforcement. Too many universities have adopted hate speech codes at the expense of other policies that would constructively combat bias and promote tolerance. In fact, some former advocates of campus hate speech codes have become disillusioned for this very reason. One example is the minority student who was initially a leading advocate of one of the earliest campus hate speech codes, at the University of Wisconsin, Victor DeJesus. After the ACLU successfully challenged that code under the First Amendment, Mr. DeJesus opposed the University's efforts to rewrite the code in the hope of coming up with something that would pass constitutional muster. As the *New York Times* reported:

Victor DeJesus, co-president of the Wisconsin Student Association, said that he initially supported the hate speech rule, but that he had changed his mind because he felt the regents were using it as an excuse to avoid the real problems of minority students. "Now they can finally start putting their efforts into some of our major concerns like financial aid, student awareness, and recruitment retention," Mr. DeJesus said.⁷⁶

75. Hon. Sharon E. Grubin & Hon. John M. Walker, *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, N.Y.U. 1997 ANN. SURV. AM. L. 11.

76. *U. of Wisconsin Repeals Ban on 'Hate Speech'*, N. Y. TIMES, Sept. 14, 1992, at A10.

F. The Less Restrictive Alternatives Are Also More Effective

Recognizing the diversionary nature of campus hate speech codes, the ACLU policy on this subject expressly urges colleges and universities to respond to bias through a range of constructive alternatives. These alternative approaches, all of which could be implemented in the non-campus context as well, not only are consistent with free speech rights, but also would make a more meaningful contribution toward reducing intergroup prejudice, discrimination, and violence.

These recommended approaches embody the “less restrictive alternative” concept that is so central to the Supreme Court’s standards for protecting free speech and other constitutional rights. The Court consistently has held that even when government asserts a concern of compelling importance in an attempt to justify restricting a constitutional right, the restriction is still unjustified if there is any “less restrictive alternative”—another measure, less restrictive of the right, that would adequately promote the government’s interest.⁷⁷

In the hate speech context, advocates of restrictions assert countervailing interests of great importance—reducing discrimination and promoting equality. However, those interests can be advanced effectively through measures that are less restrictive of free speech. Indeed, these alternative approaches may well be not only less restrictive of speech, but also more effective in reducing discrimination and promoting equality. Above, I argued that censoring hate speech is doubly-flawed, both violating free speech rights and also ineffective in advancing equality. The argument I make here is the complement of this earlier one: that non-censorial responses to hate speech are doubly desirable, since they both honor free speech rights and also effectively advance equality. Let me quote the pertinent portion of the ACLU policy:

All students have the right to participate fully in the educational process on a nondiscriminatory basis. Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities, the ACLU advocates the following actions by colleges and universities:

(a) to utilize every opportunity to communicate through its administrators, faculty, and students its commitment to the elimination of all forms of bigotry on campus;

77. See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Last Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1212 (1988).

- (b) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any such further incidents;
- (c) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
- (d) to offer and consider whether to require all students to take courses in the history and meaning of prejudice, including racism, sexism, and other forms of invidious discrimination;
- (e) to establish new-student orientation programs and continuing counseling programs that enable students of different races, sexes, religions, and sexual orientations to learn to live with each other outside the classroom;
- (f) to review and, where appropriate, revise course offerings as well as extracurricular programs in order to recognize the contributions of those whose art, music, literature and learning have been insufficiently reflected in the curriculum of many American colleges and universities;
- (g) to address the question of *de facto* segregation in dormitories and other university facilities; and
- (h) to take such other steps as are consistent with the goal of ensuring that all students have an equal opportunity to do their best work and to participate fully in campus life.⁷⁸

I would like to comment on a few of these non-censorial strategies for addressing bias and discrimination, to underscore their efficacy. First, it is important for people in leadership positions in any community in which hate speech occurs to denounce and dissociate their institutions from the discriminatory attitudes that such expression reflects. One good example of this kind of statement was provided in 1985 by the then-President of Harvard University, Derek Bok, who circulated a letter to the entire Harvard community, in response to a sexist flyer that an undergraduate fraternity had distributed. He wrote:

The wording of the letter was so extreme and derogatory to women that I wanted to communicate my disapproval publicly, if only to make sure that no one could gain the false impression that the Harvard administration harbored any sympathy or complacency toward the tone and substance of the letter. Such action does not infringe on free speech. Indeed, statements of disagreement are part and parcel of the open debate that freedom of speech is meant to encourage; the right to condemn a point of view is as protected

78. Free Speech and Bias on College Campuses, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, at Policy No. 72a (adopted by the ACLU National Board of Directors, without dissent, on October 13, 1990).

as the right to express it. Of course, I recognize that even verbal disapproval by persons in positions of authority may have inhibiting effects on students. Nevertheless, this possibility is not sufficient to outweigh the need for officials to speak out on matters of significance to the community—provided, of course, that they take no action to penalize the speech of others.⁷⁹

Likewise, six years later, when some Harvard students displayed Confederate flags—usually viewed as a racist symbol, particularly offensive to African-Americans—and another displayed a swastika in response, Harvard President Bok responded with another thoughtful statement strongly criticizing the displays but equally strongly defending free speech principles. He wrote, in part:

To begin with, it is important to distinguish clearly between the appropriateness of such communications and their status under the First Amendment. The fact that speech is protected by the First Amendment does not necessarily mean that it is right, proper, or civil. In this case, I believe that the vast majority in this community believes that hanging a Confederate flag in public view—or displaying a swastika in response—is insensitive and unwise . . . because any satisfaction it gives to the students who display these symbols is far outweighed by the discomfort it causes to many others. I agree with this view and regret that the Harvard students involved saw fit to behave in this fashion

One reason why the power of censorship is so dangerous is that it is extremely difficult to decide when a particular communication is offensive enough to warrant prohibition or to weigh the degree of offensiveness against the potential value of the communication. If we begin to forbid flags, it is only a short step to prohibiting offensive speakers. Do we really want Harvard officials (or anyone else) to begin deciding whether Louis Farrakhan or Yasser Arafat or David Duke or anyone else should be allowed to speak on this campus? Those who are still unconvinced should remember the long, sorry history of preventing Dick Gregory and other civil rights activists from speaking at Southern universities on grounds that they might prove “disruptive” or “offensive” to the campus community, not to mention the earlier exclusion of suspected communists for fear that they would corrupt students' minds.

In addition, I suspect that no community can expect to become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult. Those who are not malicious but merely insensitive are not likely to learn by having their flags or their

79. Derek Bok, *Reflections on Free Speech: An Open Letter to the Harvard Community*, EDUC. REC., Winter 1985, at 4, 6.

posters torn down. Once we start to declare certain things "offensive," with all the excitement and attention that will follow, I fear that . . . the resulting publicity will eventually attract more attention to the offensive material than would ever have occurred otherwise

In conclusion, then, our concern for free speech may keep the University from forcibly removing the offensive flags, but it should not prevent us from urging the students involved to take more account of the feelings and sensibilities of others. Most of the time, I suspect, we will succeed in this endeavor. By so doing, I believe that we will have acted in the manner most consistent with our ideals as an educational institution and most likely to help us create a truly understanding, supportive community.⁸⁰

Moving from the university campus to the larger community, the same counterspeech strategy was followed by President Bill Clinton in response to what is frequently termed "hate radio"—call-in talk shows in which the hosts and listeners harshly criticize the government, government officials, and particular groups in our society—immediately after the tragic bombing of the federal building in Oklahoma City in April 1995. Clinton, along with many others, believed that the anti-government rantings on such radio programs had fanned the type of sentiments that could well have motivated those responsible for the bombing. Accordingly, Clinton condemned the ideas conveyed by "hate radio," while stressing that he was not calling for any kind of censorial reaction to it. Instead, he exercised his own free speech rights, from his "bully pulpit," to send a very powerful message against bias and violence, explaining:

Yes, stand up for freedom of speech. Yes, stand up for all our freedoms, including the freedom of assembly and the freedom to bear arms But remember this: with freedom . . . comes responsibility. And that means that even as others discharge their freedom of speech, if we think they are being irresponsible, then we have the duty to stand up and say so to protect our own freedom of speech.⁸¹

A study that was done by a professor at Smith College in Massachusetts demonstrated the effectiveness of this kind of counterspeech in combating bias and prejudice. It showed that when a student who hears a statement conveying discriminatory attitudes also promptly hears a rebuttal to that statement—especially from someone in a leadership position—then the student will probably not be persuaded by the initial statement. Dr. Fletcher

80. *Bok Issues Free Speech Statement*, HARVARD UNIVERSITY GAZETTE, Mar. 15, 1991, at 1, 4.

81. Remarks to Students at Iowa State University in Ames, 31 WEEKLY COMP. PRES. DOC. 710 (April 25, 1995).

Blanchard, a psychologist at the college who conducted the experiment, concluded that "A few outspoken people who are vigorously anti-racist can establish the kind of social climate that discourages racist acts."⁸² Thus, this study provides empirical social scientific support for the free speech maxim, discussed above, that the appropriate response to any speech with which one disagrees is not suppression but rather counterspeech.

Social scientific studies also underscore the efficacy of another non-censorial alternative to suppressing hate speech: affirmative action measures to increase the participation of members of minority groups in the relevant communities. The most pertinent studies have been done on countering homophobia, but they have implications for redressing other forms of bias as well. These studies show that the most constructive way to decrease people's negative attitudes toward lesbians and gay men is to give them an opportunity to get to know and interact with lesbians and gay men in settings such as school and work, where they are collaborating on common endeavors.⁸³ Accordingly, by helping to ensure that members of various minority or disempowered groups are represented on campus and in the workplace, affirmative action measures can play a positive role in reducing present and future prejudice and discrimination.

Human Rights Watch recently issued a report on discriminatory violence against ethnic minorities and immigrants in Germany, which tracks the same approach the ACLU has advocated for United States college campuses.⁸⁴ Like the ACLU, Human Rights Watch opposes restrictions on hate speech, as I have already explained. Also like the ACLU, Human Rights Watch endorses alternative non-censorial measures, including punishing actual violent or discriminatory conduct. In Germany, as in too many other countries and contexts, speech and association of bigots are too often suppressed while their violent or discriminatory conduct are too often not effectively curbed. Of course, though, the appropriate and effective response should be precisely the opposite.

Paralleling the ACLU's recommendations in the American campus hate speech context, Human Rights Watch urges the German government, at national and local levels, to undertake affirmative action efforts. It urges the

82. Daniel Goleman, *New Way to Battle Bias: Fight Acts, Not Feelings*, N.Y. TIMES, July 16, 1991, at C1; Fletcher A. Blanchard et al, *Reducing the Expression of Racial Prejudice*, PSYCHOL. SCI. 101, 105 (1991).

83. Lori Soderlind, *Rapid Growth of Gay Groups is Sign of Change*, N.Y. TIMES, Sept. 20, 1992, at 13NJ C1.

84. *Germany for Germans: Xenophobia and Racist Violence in Germany*, Human Rights Watch/Helsinki, 1995.

government to hire members of the embattled minority groups to police forces and other agencies that deal both with these groups themselves and with the public at large.⁸⁵ The Human Rights Watch report on Germany also endorses another of the alternative measures urged by the ACLU in the United States campus context: passing and vigorously enforcing laws that punish actual violent or discriminatory conduct. Here is an excerpt from the Human Rights Watch report:

This report focuses on acts of violence by right-wing extremists and the response of the German state. While viewing extremist violence with great concern, Human Rights Watch at the same time opposes laws that prohibit the expression of anti-foreigner or anti-Semitic sentiments, as well as laws that prohibit groups that hold such views from forming associations and holding public gatherings, so long as that speech, association or assembly does not rise to the level of incitement to or participation in violence

While such measures may be popular politically and may even appear to be effective in the short-run, Human Rights Watch is concerned that over the long run such measures are not only not effective to counter bigotry, but they may even be counterproductive. Draconian bans turn bigots into victims, driving them underground and creating a more attractive home for the unstable and insecure people who are drawn to such groups

The exercise of these rights in a hateful fashion short of incitement to violence can best be countered by other forms of speech, association, and assembly, such as anti-racist demonstrations and anti-racism educational efforts, without infringing the rights themselves. Furthermore, while prohibitions on these rights may be adopted to protect minorities, they are often used by majoritarian governments against minority groups.⁸⁶

The theme that censoring hate speech is not effective—and may well be counterproductive—in responding to discrimination in Germany goes back to pre-Hitler Germany, during the Weimar Republic. The problem was not that the Nazis enjoyed too much free speech, as I have often heard asserted. Rather, the problem was that the Nazis got away with murder—literally. They therefore deprived everyone else—including anti-Nazis, Jews, and other minorities—of free speech.

This point was forcefully made by Aryeh Neier, a German Jew who escaped from Nazi Germany to the United States with his immediate family, but whose extended family was exterminated in the Holocaust. In the late 1970s, Aryeh Neier was Executive Director of the ACLU. In that capacity,

85. *Id.* at 11.

86. *Id.* at 5, 70–71.

he led the ACLU's controversial support of the free speech rights at stake in the Skokie case, which I described above.

To my mind, the single most powerful, eloquent explanation of the importance of defending freedom for hate speech even from the perspective of embattled minority groups—indeed, especially from their perspective—is the book that Aryeh Neier wrote about this case. His theme is well-summed-up by the book's title: *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom*.⁸⁷

Neier's eloquent book refutes common misperceptions about free speech and the rise of Nazism in Weimar Germany as follows:

The impression that Weimar was a free society is fostered by the great flowering of arts, music, and theater that took place in Berlin in the 1920s. But lacking a government with the will and the strength to enforce the provisions of the constitution and the laws against politically motivated violence, Weimar did not safeguard the liberties of Germans. The constitution itself was so lightly regarded that the Nazis didn't bother to repeal it when they took over. They left it in place but ignored it.

The Nazis did not defeat their political opponents of the 1920s through the free and open encounter of ideas. They won by terrorizing and murdering those who opposed them

The history of the Weimar Republic . . . does not support the views of those who say that the Nazis must be forbidden to express their views. The lesson of Germany in the 1920s is that a free society cannot be established and maintained if it will not act vigorously and forcefully to punish political violence. It is as if no effort had been made in the United States to punish the murderers of Medgar Evers, Martin Luther King, Jr. . . . and the other victims of the effort in the 1960s to desegregate the Deep South. There would have been hundreds of additional murders if the federal government of the United States had not stepped in to bring prosecutions where local law-enforcement agencies evaded their duty.⁸⁸

Prosecutions of those who commit political violence are an essential part of the duty the government owes its citizens to protect their freedom to speak. Violence is the antithesis of speech. Through speech, we try to persuade others with the force of our ideas. Violence, on the other hand, terrorizes with the force of arms. It shuts off opposing points of view.

87. ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (E.P. Dutton Univ. Press, 1979).

88. *Id.* at 164, 167.

IV. CONCLUSION

In concluding, I will continue to focus on the Nazi situation, because it provides such a strong case study of the misguided nature of the call to suppress hateful expression as an alleged antidote to hateful attitudes and conduct. Given the unique horror of the Holocaust, it is not surprising that even many individuals who support free speech in general want to make an exception for Nazi expression.

This is true not only in Europe—to wit, the laws that expressly ban Nazi speech, symbols, publications, and meetings—but also in the United States. Thus, while the ACLU prevailed in the courts of law in defending free speech rights for the neo-Nazis in Skokie,⁸⁹ consistent with the traditional First Amendment positions described above, the ACLU's position was controversial and unpopular in the court of public opinion. Even many ACLU members—stalwart First Amendment champions in general—resigned from the organization in protest over this position.

The example of Nazi hate speech is powerful for me not only because it involved the landmark ACLU case from Skokie, but also for personal reasons, as I have indicated. My father, who was born in Germany in 1922, was what the Nazis called “a half-Jew,” who barely survived the forced labor camp at Buchenwald. He was liberated by American soldiers and came to this country as a refugee after the War. Along with Aryeh Neier, I also have immediate family members who were tortured and murdered during the Holocaust. Yet, along with Aryeh Neier and many other American Jews, I support free speech for Nazis and other anti-Semites not *despite* my background and my first-hand experience with the evils of anti-Semitism, but rather, precisely *because of* that fact.

I would like to close with two powerful statements explaining this perspective from two American Jews, both of whom lived in Nazi Germany as children but escaped to the United States. The first is Gerald Gunther, now a distinguished emeritus professor of law at Stanford University. Gunther was the leading opponent of the hate speech code that Stanford ultimately adopted. It was subsequently struck in a lawsuit that was brought by several Stanford law students. The students successfully argued that the code violated a

89. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (1978).

California state statute that protects student free speech even in private educational institutions.⁹⁰

Professor Gunther explained that his opposition to censoring hate speech did not reflect insensitivity to the pain it caused, but to the contrary. Here is a portion of his powerful plea:

Lest it be said that I unduly slight the pain imposed by expressions of racial or religious hatred let me add that I have suffered that pain. I empathize with others who have, and I rest my deep belief in the principles of the First Amendment in part on my own experiences.

I received my elementary education in a public school in a very small town in Nazi Germany. I was subjected to vehement anti-Semitic remarks, from my teacher, my classmates and others. "Judensau" (Jew pig) was far from the harshest.

My own experiences certainly have not led me to be insensitive to the myriad pains offensive speech can and often does impose. But the lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigots' hateful ideas with all my power yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.⁹¹

The second such statement comes from Aryeh Neier, in his superb book about the ACLU's Skokie case:

The most frequently repeated line of all in the many letters about Skokie that I received was: "How can you, a Jew, defend freedom for Nazis?" . . . The response I made most often began with a question: "How can I, a Jew, refuse to defend freedom, even for Nazis?" Because we Jews are uniquely vulnerable, I believe we can only win brief respite from persecution in a society in which encounters are settled by power. As a Jew, therefore, I want restraints placed on power. I want restraints which prohibit those in power from interfering with my right to speak, my right to publish, or my right to gather with others who also feel threatened. To defend myself, I must restrain power with freedom, even if the temporary beneficiaries are the enemies of freedom.⁹²

90. Preliminary Order, *Corry v. Stanford*, No. 740309, Cal. Super. Ct. Santa Clara County Feb. 27, 1995., copy on file with Southern Illinois University Law Journal.

91. Letter from Gerald Gunther to George Parker, chair of the Student Conduct Legislative Council, Stanford University (Mar. 10, 1989), reprinted in *STANFORD UNIV. CAMPUS REP.*, Mar. 15, 1989, at 17.

92. ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* 4-5 (E.P. Dutton Univ. Press, 1979).