8-10-2020

Charlottesville Three Years Later: The First Amendment Confronts Hate and Violence

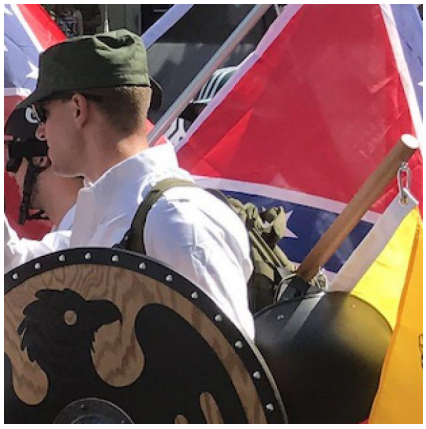
Stephen Rohde

Nadine Strossen

Charlottesville Three Years Later: The First Amendment Confronts Hate and Violence

By Stephen Rohde, Nadine Strossen

AUGUST 10, 2020



"JEWS WILL NOT replace us!" Three years ago, on Friday, August 11, and Saturday, August 12, 2017, the Ku Klux Klan, neo-Nazi organizations, and prominent white supremacists led two violent "Unite the Right" rallies in Charlottesville, Virginia. During the orchestrated melee, at least 30 people were seriously injured and Heather Heyer was killed.

Before the rallies, one federal judge ruled that, regardless of their hateful ideas, the white supremacists had a First Amendment right to proceed with their planned August 12 rally. Yet after the rallies turned out to be violent — and evidence later showed that that had been the clandestine plan all along — another federal judge ruled that the First Amendment did not preclude victims of that violence from suing the organizers for damages in a civil lawsuit.

As free speech advocates, we agree with both rulings. The First Amendment protects "the right of the people *peaceably* to assemble." The two decisions underscore that the First Amendment correctly distinguishes rhetoric laced with violent overtones, which is protected, from overt action furthering a conspiracy to commit violence, which is not.

The civil lawsuit *Sines v. Kessler* was developed by a nonprofit organization, Integrity First for America. It alleges that the 14 individuals and 10 organizations that orchestrated the rallies conspired to engage in violence against racial minorities and their allies in violation of the little-known, and rarely used, Ku Klux Klan Act of 1871. As the lawsuit alleges, "the violence in Charlottesville was no accident."

The KKK Act, prompted by lynchings and violent vigilante attacks against African Americans and their supporters during Reconstruction, was signed by President Ulysses S. Grant. It was designed to enforce the 13th and 14th Amendments, which abolished slavery and guaranteed equal rights. The Act provides a civil claim for damages to anyone injured as a result of two or more persons conspiring to deprive "either directly or indirectly, any person or class of persons of the equal protection of the laws" or "equal privileges and immunities under the law." The Charlottesville case is set to go to trial in October 2020.

The white supremacist defendants have argued that they were simply engaged in lawful, if unpopular, political protest, and thus the First Amendment protects their conduct. As former presidents of the ACLU of Southern California and the national ACLU, respectively — speaking here for ourselves and not for the ACLU — we champion robust protection of First Amendment rights. We have defended free speech rights for people and groups espousing hateful and odious ideologies. But the First Amendment right to "peaceably" assemble does not bar plaintiffs' recovery of compensatory damages for injuries that individuals and organizations deliberately conspired to inflict upon them. And such a conspiracy is exactly what the plaintiffs' 111-page complaint lays out through detailed factual allegations.

Two of the defendants are the primary rally organizers, white supremacists Richard Spencer and Jason Kessler. Defendant James Fields is the one who drove his car into a crowd of counterprotesters, killing Heyer and injuring many others. Many of the individual defendants who helped plan the events are members of white supremacist organizations that are themselves defendants, including The Daily Stormer website; Vanguard America; Identity Evropa; Traditionalist Worker Party; League of the South; Fraternal Order of Alt-Knights, which is the military wing of the "Western chauvinist" group "Proud Boys"; Loyal White Knights of the Ku Klux Klan; East Coast Knights of the Ku Klux Klan; National Socialist Movement, and the Nationalist Front, an umbrella organization that includes many of the other defendant organizations.

I. Based on Kessler's Sworn Promise of a "Peaceful Rally," the ACLU of Virginia Defended His Free Speech Rights, and a Federal Judge Upheld Them.

In February 2017, the City of Charlottesville voted to remove a statue of General Robert E. Lee from Lee Park, a small park in downtown Charlottesville. The new name is Emancipation Park.

In May 2017, white supremacist groups, including some of the defendants, led a torchlight march around the Lee statue to protest the proposals to remove it. Capitalizing on the perceived success of that event, Kessler submitted an application for a follow-up rally to take place in the park on August 12. On June 13, the city granted the permit. In the following weeks, the City also granted permits for two planned counterdemonstrations opposing Kessler's messages in other public parks a few blocks away from Emancipation Park.

But on August 7, just five days before the event, the city revoked Kessler's permit and told him he could only protest at McIntire Park, which is a mile away from the Lee statue. The City claimed that "many thousands of individuals are likely to attend the demonstration" — referring to anticipated counterdemonstrators, as well as Unite the Right supporters — and that it would be "unable to accommodate" such a large crowd in Emancipation Park, which is smaller than McIntire Park.

The next day, Kessler asked the ACLU of Virginia and the Rutherford Institute to represent him in challenging the City's action. On August 10 and 11, respectively, the groups filed a complaint and an expedited motion for preliminary injunction on Kessler's behalf. The complaint, which Kessler verified under penalty of perjury, reaffirmed what he had told CBS19News on July 12: that he "absolutely intends to have a peaceful rally" and that his supporters would "avoid violence."

On the afternoon of August 11, US District Judge Glen Conrad held an emergency hearing. Later that evening, he issued a six-page opinion granting Kessler's motion. The judge stressed the "eleventh-hour" nature of the City's decision to relocate the Unite the Right protesters, but not the counterprotesters. Likewise, he emphasized that his decision was necessarily "based on the current record," which was "scant" and "circumstantial," given the rapid pace of the proceedings triggered by the City's last-minute action.

In terms of the tragic violence that would unfold on August 11 and 12, the most noteworthy aspect of the City's effort to relocate the scheduled August 12 Unite the Right rally was — as Judge Conrad's opinion noted — that the City did not allege any specific safety risks or planned violence, let alone provide any evidence. While the City cited unspecified "safety concerns" associated with the large number of anticipated demonstrators and counterdemonstrators, the judge stressed that the City "cited no source for those concerns and provided no explanation for why the concerns only resulted in adverse action being taken on Kessler's permit." Nor did the City explain why it would be unable to safely manage the expected large crowd at Emancipation Park, where many events drawing large crowds had previously taken place with no problem.

Far from adducing evidence of a genuine safety rationale for the attempted relocation, City Attorney S. Craig Brown conceded that the City's general concerns about risks of violence were the same at both Emancipation and McIntire parks. Indeed, he acknowledged that the City's police chief "never cites as a reason" for supporting the relocation "that the risk of violence will be less at McIntire."

In contrast to specifying safety concerns for the attempted relocation, the City — as well as some downtown merchants who supported the City's position — primarily relied on general

concerns about the total crowd size: the difficulties of accommodating a large crowd in the relatively small Emancipation Park, and of keeping the City's streets and walkways open to traffic; and the potential adverse impact on the merchants' property and business interests.

While the City maintained that its rationales for seeking to relocate the Unite the Right demonstrators were viewpoint-neutral concerns about crowd size, Judge Conrad concluded that the relocation actually reflected disapproval of the Unite the Right messages. This raised a strong presumption of unconstitutionality. As the Supreme Court declared, in a much-quoted opinion by Justice Thurgood Marshall, the legendary civil rights champion:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. […] [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. […] There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.

In the context of Charlottesville, Judge Conrad held that the City directly violated this core First Amendment edict. Although the crowding problem was caused at least as much by the large number of counterdemonstrators as by Kessler's supporters, the City sought to relocate only the latter. Moreover, Emancipation Park was an especially important venue for the Unite the Right ralliers to express their messages: opposing the removal of the Robert E. Lee statue. Therefore, by seeking to relocate these demonstrators, the City was undermining the *content* of their message.

Reinforcing the conclusion that the City's major motive for seeking to relocate the Unite the Right demonstration was to mute their message, Judge Conrad cited statements that various City Council members had made on social media "indicating that [they] oppose Kessler's political viewpoint."

Based on the record before Judge Conrad, not only would the proposed relocation fail to avert any general public safety risk posed by large groups of demonstrators and counterdemonstrators, but worse yet, that relocation could well undermine public safety, by requiring a dispersal of law enforcement personnel at two different locations. As Judge Conrad explained:

> As both sides acknowledged during the hearing, critics of Kessler and his beliefs would likely follow him to McIntire Park if his rally is relocated there. Thus, changing the location of Kessler's demonstration will not separate the two opposing groups. Moreover, given the timing of the City's decision and the relationship between Kessler's message and Emancipation Park, supporters of Kessler are likely to still appear at the Park, even if the location of Kessler's demonstration is moved elsewhere. Thus, a change in the location […] would necessitate having [law enforcement] personnel present at two locations in the City.

All told, Judge Conrad concluded that "an injunction protecting the plaintiff's rights under the First Amendment is in the public interest."

II. The Civil Lawsuit Details the Secret Violent Conspiracy Behind the Unite the Right Rallies.

Notwithstanding Kessler's repeated public and sworn pledges to act in a peaceful, orderly manner, and notwithstanding the City's pre-rally failure even to contest those pledges, let alone to identify any contrary evidence, Integrity First for America subsequently uncovered damning evidence demonstrating that the pledges were blatantly false. The Verified Complaint in *Sines v. Kessler*describes in detail how Kessler and the other organizers carefully planned the Unite the Right rallies with the specific intent of causing violence. Key defendants met in person several times in advance. According to *Sines v. Kessler*, two organizers met in Charlottesville on August 9 and again with KKK leader David Duke on August 11 — the very day Judge Conrad was considering Kessler's sworn statement that he "absolutely intends to have a peaceful rally" and would "avoid violence."

The plaintiffs obtained hundreds of leaked screenshots from multiple chat threads revealing the defendants' meticulous planning, most of which occurred online, often using a program called Discord, an "invite only" platform. Two defendants moderated and managed Discord, while many others participated on the platform. Organizational defendants were able to maintain private sub-forums for their own members. Conversations on Discord included not only mundane planning details, such as information about shuttle services, lodging, and carpools, but also racist "jokes." One defendant posted "General Orders" for "Operation Unite the Right Charlottesville 2.0."

Other corners of Discord were significantly darker. One user posted a fake advertisement for a pepper-spray-look-alike called "Nig-Away," described as "a no-fuss, no muss 'nigger killer,'" which promised to "kill[] on contact" in order to "rid the area of niggers." Another frequent Discord user asked whether it was "legal to run over protesters blocking roadways?" He confirmed he was not joking: "I'm NOT just shitposting. I would like clarification. I know it's legal in [North Carolina] and a few other states. I'm legitimately curious for the answer." Other Discord users made similar references to running over counterprotesters.

Elsewhere on Discord, users clearly conveyed their intent to act violently at the events, saying things like, "I'm ready to crack skulls." Plaintiffs allege that Kessler coyly told users: "I recommend you bring picket sign posts, shields, and other self-defense implements which can be turned from a free speech tool to a self-defense weapon should things turn ugly." Vanguard America told its members "to arrive at the rally in matching khaki pants and white polos." One member even went so far as to say it was "a good fighting uniform." One defendant wrote in a League of the South Facebook group that he wanted "no fewer than 150 League warriors, dressed and ready for action, in Charlottesville, Virginia, on 12 August." Kessler posted the names of counterprotesters over Discord, allegedly to threaten them. Likewise, several defendants shared the names and addresses of stores in Charlottesville that had put up signs supporting diversity and equality, allegedly in an attempt to have attendees intimidate them. In fact, some of these businesses did receive threats.

III. Just as They Intended, The Unite the Right Organizers Wreaked Havoc and Death on Charlottesville.

On the night of Friday, August 11, several defendants organized a non-permitted torchlight march at the University of Virginia. The plaintiffs allege that defendants' intended their torches to evoke the torches that historically have been associated with the Ku Klux Klan and the Nazis. The marchers proceeded two-by-two "up the Lawn, around the Rotunda, and towards the Thomas Jefferson statue" — all of which are at the heart of the UVA campus. As they marched, they chanted various racist slogans and gave Nazi salutes. Approximately 30 counterprotesters, including three plaintiffs, linked arms and surrounded the statue, facing away from it. As they rounded the Rotunda, the white supremacists charged toward the statue and surrounded the counterprotesters.

Fighting erupted, with marchers kicking and punching the counterprotesters. Someone in the crowd threw an unidentified fluid at counterprotesters, which three plaintiffs feared was fuel and that they would be burned. One defendant shouted, "The heat here is nothing compared to what you're going to get in the ovens!" A photo shows one defendant spraying a counterprotester with pepper spray. The night ended with "Kessler, Spencer, and other Unite the Right organizers celebrating the evening's events and encouraging their followers to come to the following day's rally."

Almost all of the defendants attended Saturday's Unite the Right rally. They entered Emancipation Park in military formations, armed like paramilitary forces. The Complaint alleges they "brought with them semi-automatic weapons, pistols, mace, rods, armor, shields, and torches." Organizations marched with "matching uniforms, coordinated shields, and regimental flags." As the military formations entered the park, they assaulted and knocked over various counterprotesters, including two plaintiffs, with shields, flags, and fists.

Once the Unite the Right marchers entered the park, the violence escalated. One defendant ordered League of the South members to "charge," and the group streamed past him to attack counterprotesters. Some marchers also yelled antisemitic and Nazi slogans while passing a synagogue. Another defendant carried a banner that read, "Gas the kikes, race war now!" An anonymous demonstrator threatened to "torch those Jewish monsters." One plaintiff and her son were counterprotesting outside the park. Wearing a Star of David and carrying a rainbow flag, she was harassed by a rally attendee who shouted, "Oh good, they are marking themselves for us." Another rally attendee threw an open bottle with a "foul liquid," hitting the woman.

At 11:22 a.m., Charlottesville authorities declared the gathering an unlawful assembly. Several defendants moved to McIntire Park, and violence continued there as well as on Charlottesville's downtown mall. At 1:40 p.m., Fields drove his car into the downtown crowd, killing Heyer and injuring at least 19 others.

After the event, several defendants posted messages approving of Fields's car attack. One said it was an honor "to stand" with his allies at the rally and referred to them as "true warriors." Spencer celebrated the rallies as a "huge moral victory." Many defendants stated they would like to return to Charlottesville for a similar event in the future. Meanwhile, President Donald Trump infamously observed that there were "some very fine people on both sides."

IV. Federal Court Rejects Unite the Right Organizers' Move to Dismiss the Civil Lawsuit on First Amendment Grounds.

Several of the defendants moved to dismiss the civil lawsuit, primarily on First Amendment grounds. On July 9, 2018, in a comprehensive 62-page opinion, US District Judge Norman K. Moon found that while "ultimate resolution of what happened at the rallies awaits another day, […] the Plaintiffs have plausibly alleged the Defendants formed a conspiracy to commit the racial violence that led to the Plaintiffs' varied injuries," thus violating the KKK Act. Furthermore, the judge held that the First Amendment affords no defense for plaintiffs' conspiratorial conduct, even though that conduct also conveyed a message. After all, even conduct that clearly constitutes a heinous crime — such as assassinating a political leader — conveys important messages, it is not therefore immune from punishment.

As Judge Moon pointed out, "No Defendant seriously disputes that Plaintiffs have adequately alleged Defendants possessed racial animus against black and Jewish individuals; the complaint is replete with racist statements made and affirmed by Defendants." The court added that "the Thirteenth Amendment provides plaintiffs an underlying right to be free from racial violence." He then held that the plaintiffs had "adequately pled specific factual allegations" that each defendant, with one exception (discussed below), was "part of a conspiracy to engage in racially motivated violence at the 'Unite the Right' events."

All the plaintiffs allege they suffered injuries at the rallies on Friday or Saturday. One plaintiff was surrounded and assaulted by various marchers who hurled torches at him and others, sprayed him with pepper spray, and threw other liquids on him. He later suffered a "trauma-induced stroke" and related injuries. Two UVA students, one of whom is African American, were harassed and assaulted at one of the marches. Others were injured when Fields drove his car into the crowd of counterprotesters. Two plaintiffs witnessed the car attack or narrowly escaped being hit by the car and consequently suffered severe emotional distress and shock. Plaintiff Seth Wispelwey, a minister who led an ecumenical organization called "Congregate," was confronted by one of the defendants and assaulted while engaging in nonviolent counterprotesting on Saturday.

Based on plaintiffs' detailed factual allegations, Judge Moon rejected the defendants' argument that their conduct was protected by the First Amendment. Of course, he acknowledged that peaceful picketing and marching constitute expressive activities that contribute to the "marketplace for the clash of different views and conflicting ideas," which the First Amendment clearly protects. In contrast, as the Amendment's plain language underscores, it does not protect violence. Accordingly, the Supreme Court has held that if defendants "have formed or are engaged in a conspiracy against the public peace and order," that "transcends the bounds of the freedom of speech which the Constitution protects."

The Supreme Court has also noted that speech that would have been protected in other circumstances may be used as evidence of specific instructions and plans to carry out violent acts or threats. This principle applies to the vicious racist and antisemitic epithets the *Sines v. Kessler* defendants used in planning and carrying out the rallies. Standing alone, these offensive

remarks are protected by the First Amendment, but in the context of the civil damages lawsuit, they constitute evidence of the defendants' racial animus underlying their planned and actual violence.

It is particularly noteworthy that Judge Moon dismissed the case against one defendant, Michael Peinovich. Peinovich hosted a racist podcast, promoted the rallies, referred to the counterprotesters as "savages," set up a legal defense fund before the rallies, and helped raise money for the events. Yet in Judge Moon's careful examination of the facts alleged in the complaint, he pointed out that there were no allegations that Peinovich participated in any violent acts, and he "cannot be held liable simply for his associations."

Judge Moon stressed that when a conspiracy is alleged in the context of activity that would otherwise be constitutionally protected, "precision of regulation" is demanded. He relied on an important 1982 Supreme Court case that arose in Alabama in 1966, when the NAACP organized a boycott against white merchants who engaged in racial discrimination. Although some NAACP members had committed violent acts while enforcing the boycott, others had only exercised their right to peacefully express views that were controversial and unpopular with many listeners. As the Court ruled, "[c]ivil liability may not be imposed" on an individual "merely because [that] individual belonged to a group, some members of which committed acts of violence."

Conspiracy law originated in the infamous Star Chamber established in 1487 in the reign of King Henry VII. During World War I, the McCarthy era, and the Vietnam War, the conspiracy doctrine was wielded to criminalize political dissent, which had nothing to do with violence. As First Amendment scholar Geoffrey R. Stone put it, the "crime of conspiracy has routinely been used by prosecutors to 'get' union organizers, political dissenters, radicals, and other 'dangerous' individuals who could not otherwise be convicted of an offense." In contrast, Judge Moon's careful ruling expressly acknowledged "the weighty First Amendment interests" at stake. It did not indiscriminately lump all of the defendants together, but instead judged their alleged expressions and conduct individually, to ensure that each one exceeded First Amendment bounds.

In the same vein, Judge Moon emphasized that the complaint "is replete with specific allegations that extend beyond mere 'abstract' advocacy" of violence, which the First Amendment protects. Likewise, he explained, the physical assaults that the complaint alleged are "not by any stretch of the imagination expressive conduct protected by the First Amendment."

In sum, Judge Moon's decision rejecting the defendants' First Amendment defense, based on the detailed allegations in the Verified Complaint, was well grounded in law and fact.

V. Independent Investigation Found That Law Enforcement in Charlottesville "Protected Neither Free Expression nor Public Safety."

The extent of the violence spawned by the Unite the Right organizers might have been mitigated (but not excused) had law enforcement in Charlottesville effectively prepared for the rallies. On

November 24, 2017, three months after the events, a private law firm retained by the City issued a 219-page report documenting what happened and making a series of recommendations based on 150 interviews, 545,000 documents, 300 hours of videotape, and 2,000 still images.

The report's most significant conclusion is that the Charlottesville Police Department's (CPD) planning "for August 12 was inadequate and disconnected." Commanders "did not reach out to officials in other jurisdictions where these groups had clashed previously to seek information and advice." Further, "CPD supervisors did not provide adequate training or information to line officers, leaving them uncertain and unprepared for a challenging enforcement environment." CPD command staff "received inadequate legal advice and did not implement a prohibition of certain items that could be used as weapons." The report also found that "CPD devised a flawed Operational Plan for the Unite The Right rally" on August 12, which "did not ensure adequate separation between conflicting groups." Officers "were inadequately equipped to respond to disorders, and tactical gear was not accessible to officers when they needed it."

The report further found that "CPD commanders did not sufficiently coordinate with the Virginia State Police ['VSP'] in a unified command on or before August 12." For example, "VSP never shared its formal planning document with CPD, a crucial failure that prevented CPD from recognizing the limits of VSP's intended engagement." CPD and VSP personnel "were unable to communicate via radio, as their respective systems were not connected despite plans to ensure they were." In particular, the report found that the CPD chief "did not exercise functional control of VSP forces despite his role as overall incident commander," which "undercut cohesion and operational effectiveness."

The report also found that University of Virginia officials were aware of the non-permitted torch light march on Friday, August 11, "for hours before it began but took no action to enforce separation between groups or otherwise prevent violence." Therefore, they "were unprepared when hundreds of white nationalists walked through the University grounds." The tenor of this event set "an ominous tone for the following day," according to the report. The "relative passivity of law enforcement" on August 11, with its "failure to anticipate violence and prevent disorders would be repeated on Saturday at Emancipation Park."

The breakdown of planning and coordination prior to August 12 produced "disastrous results," the report concluded. The "officers failed to intervene in physical altercations that took place in areas adjacent to Emancipation Park." Neither CPD nor VSP "deployed available field forces or other units to protect public safety at the locations where violence took place." Once the unlawful assembly was declared on August 12, the report found, "law enforcement efforts to disperse the crowd generated more violence as Alt-Right protesters were pushed back toward the counter-protesters with whom they had been in conflict." The result was "a period of lawlessness and tension that threatened the safety of the entire community."

The report concluded:

> [T]he City of Charlottesville protected neither free expression nor public safety on August 12. The City was unable to protect the right of free expression and facilitate the permit holder's offensive speech. This represents a failure of one of government's core functions

> — the protection of fundamental rights. Law enforcement also failed to maintain order and protect citizens from harm, injury, and death. Charlottesville preserved neither of those principles on August 12, which has led to deep distrust of government within this community.

In short, as the report underscores, the conduct of the City and law enforcement officials in handling the rallies was the worst of both worlds; they protected neither liberty nor security, neither law nor order.

VI. "Your Right to Swing Your Fist Ends Just Where My Nose Begins."

Two weeks after the bloody rallies, stung by accusations that the ACLU bore some blame for the violence because it represented Kessler, Claire Guthrie Gastañaga and Steve Levinson, the executive director and president of the ACLU of Virginia, defended their actions. They explained that the decision to represent Kessler

> wasn't an affirmation of his views — which we abhor — any more than our advocacy for due process rights for sex offenders is an endorsement of child abuse; any more than our advocacy for freedom of religion signals support for the use of religion as a justification for discrimination; or any more than our opposition to the death penalty indicates support for capital murder.

The ACLU leaders in Virginia clarified that they agreed to represent Kessler based on the facts available at that time and on the condition that he swear in court papers that "he intended the rally to be 'peaceful' and 'avoid violence.'" They were concerned about the "hecklers' veto" that the First Amendment rightly forbids: when "the voices opposing a person's speech can be preferred by government and allowed to drive out speech that is deeply offensive to others." They emphasized that "[f]ederal, state, and local law enforcement (including campus police) need to be able to protect events where there is protest and risk of violence and withstand the criticism that comes with affording constitutionally required protection to those with odious ideas."

Gastañaga and Levinson acknowledged that the August 12 event presented a general risk of violence, given the anticipated large crowds of protesters and counterprotesters, but they "did not know, nor could […] have forecast, how law enforcement from the city, county, and state would act to protect the public from that risk." Additionally, they asked "why weapons of any kind (even sticks on signs) have been allowed to be carried into demonstrations in Virginia when they are not allowed at presidential inaugurations, congressional town halls, sporting events, or concerts or other large gatherings."

When the ACLU opposed the City's effort to relocate the August 12 rally, it had relied on evidence demonstrating the City's "ability over many years to manage large crowds at various events in [Emancipation Park] and at other downtown locations without incident." Moreover, the ACLU expressly asked the court to order the City "to provide such security as may be necessary to protect the rights of the demonstrators and the public." Therefore, it is not

surprising that no one — including the City and Judge Conrad — predicted the kind of law enforcement failures that the subsequent report documented.

The Virginia ACLU leaders called history "an unforgiving tutor" and assured their members and the general public that they would learn from the tragic events of August 12. "After what happened in Charlottesville, no one can dispute that white supremacists, Nazis, and their compatriots present a real and present danger to our democracy," they wrote.

> Nonetheless, without a safe, secure, and nonviolent space for the free expression of ideas there can be no true freedom in academic, artistic, scientific, or political affairs. The decisions we make in this moment should not be ones that empower future leaders to use them as precedent in the pursuit of tyranny.

As an organization with finite resources, the ACLU necessarily must selectively decide whether or not to handle any particular case. In the wake of Charlottesville, the national ACLU, in consultation with ACLU leaders from all over the country, adopted a nuanced set of "Case Selection Guidelines" for carefully evaluating whether to accept or decline any case that presents "conflicts between competing values or priorities." Such conflicts are not uncommon, since the ACLU champions the full spectrum of civil liberties and civil rights.

The guidelines do not alter the ACLU's longstanding commitment, going back to its earliest days, to defending freedom of speech for individuals and groups that advocate views antithetical to the ACLU's own civil libertarian ideals. To the contrary, the guidelines reaffirm this commitment but spell out the procedural steps and multiple, context-specific factors to be weighed when it is asked to handle such cases. The guidelines recognize that representing a white supremacist group may well have costs to the ACLU, and more broadly to society, but they likewise recognize that not doing so may well undermine freedom of speech and the ACLU itself. The guidelines note that no single factor is determinative, stressing that "[b]ecause we are committed to the principle that free speech protects everyone, the speaker's viewpoint should not be the decisive factor."

Among the considerations that the guidelines lay out, two are directly pertinent to the Charlottesville situation: "[w]hether the speaker seeks to engage in or promote violence" and "[w]hether the speakers seek to carry weapons." The guidelines specify that "[w]hen we have reason to believe that individuals purportedly seeking to exercise their First Amendment rights are in fact intending to engage in unlawful incitement, violence, true threats, physical obstruction, or destruction of property, we should decline representation." And the ACLU "generally will not represent protesters who seek to march while armed," though it does not absolutely bar such representation. Notably, in light of the factual record at the time the ACLU of Virginia decided to defend Kessler's First Amendment rights in August 2017, it could well have reached the same conclusion if these guidelines had been in place.

The right of the people to peacefully assemble and protest deserves full protection by all levels of government, the courts, and the public, regardless of whether we agree or disagree with the cause or grievance involved. It's the Golden Rule of the First Amendment: protect the rights of others as you would have them protect your rights. But there is also an old legal saying: "Your

right to swing your fist ends just where my nose begins." The First Amendment protects peaceful, not violent, protest. At the trial in October in Charlottesville, a jury will have the chance to hold accountable the white supremacists and hate groups who carefully planned and carried out the violent and deadly rallies three years ago.

¤

Stephen Rohde, author of American Words of Freedom*, is a former president of the ACLU of Southern California.*

Nadine Strossen, author of HATE: Why We Should Resist It with Free Speech*, is a former president of the national ACLU.*

¤

Featured image: "Charlottesville 'Unite the Right' Rally" by Anthony Crider is licensed under CC BY 2.0.

Banner image: "Charlottesville 'Unite the Right' Rally" by Anthony Crider is licensed underCC BY 2.0.