Resisting Hate with Free Speech

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Resisting Hate

Why the ACLU supports free speech — even when that speech is repugnant

As the media have extensively covered, since the Charlottesville catastrophe in 2017, the ACLU has faced increased pressure to abandon its always-controversial support of free speech when that speech is used to express views that are repugnant to our own human rights principles.

Next year will mark our 100th birthday, and our free-speech position dates back to our beginnings. To be sure, we must always be willing to re-examine even longstanding principles and strategies. Indeed, as an organization dedicated to open inquiry, debate and dissent, we should always welcome such re-examination. Likewise, throughout my career, I have personally wrestled with these important questions about defending freedom even for “the thought that we hate,” to quote Justices Holmes’ famous phrase.

Even beyond my lifelong commitment to civil rights, these questions arise from my personal family history, as the daughter of a German Jew who barely survived his enslavement at the Buchenwald concentration camp.

Most recently, I have been grappling with these issues while working on my 2018 book, HATE: Why We Should Resist It with Free Speech, Not Censorship, and in my ongoing nonstop talks and interviews about it. As the book’s title underscores, my main focus and goal is resisting hate, and stereotyping and discrimination.

Through the research I did for the book, and my constant ongoing research since then, I have been mounting evidence that restricting “hate speech” does more harm than good specifically to the goals that such restrictions are hoped to promote. These are goals to which I am completely committed: equality, dignity, diversity, inclusivity, societal harmony and individual well-being.

I have reached this conclusion by examining the actual track record of hate speech laws in other countries, including many developed democracies that are comparable to our own. More importantly, I have learned that this same conclusion has been reached by many human rights activists in many other countries, as well as by regional and international human rights organizations and agencies, ranging from Human Rights Watch, to the European Commission Against Racism and Intolerance, to UNESCO.
Having assessed the actual operation of hate speech laws and the actual state of discriminatory attitudes and actions around the world, these on-the-ground experts have concluded that hate speech laws are at best ineffective, and at worst counterproductive, in promoting our shared goals. Their observations have convinced them that counter-speech and other non-censorial measures are encouragingly effective.

While doing the research for my book, I asked myself, as always, a question that is the title of a forthcoming book by philosopher Jeffrey Glotzbach (the President of Skidmore College), What Would It Take to Change Your Mind? Accordingly, even though 1, and the ACLU, had repeatedly re-examined and reaffirmed our traditional defense of freedom “even for the thought that we hate,” still further re-examination was yet again warranted by the renewed questioning in the wake of Charlottesville. This re-examination included questions being raised from within the ACLU itself.

Moreover, the First Amendment likewise invites such re-examination. After all, the First Amendment does not absolutely, always protect free speech. And free speech does not and should not automatically prevail over other fundamental rights, including equality, if there are tensions among them.

Thus, if evidence showed that a restriction on hate speech was necessary to promote equality, I would not oppose that restriction. Likewise, under such circumstances, courts should uphold it as satisfying the strict scrutiny standard.

**Free Speech and the Court of Public Opinion**

This same conclusion was reached in terms of general logical principles by a distinguished non-lawyer, Aryeh Neier, who was the ACLU’s Executive Director in 1977-78, when we controversially did in Skokie, Illinois what we did 40 years later in Charlottesville, Virginia. In Skokie we defended the free speech rights of white supremacists, whose messages were diametrically opposed to our own egalitarian values. The Nazis provocatively chose Skokie for their demonstration because it had not only a large Jewish population, but also, at that time, a large population of Holocaust survivors.

While we easily won the case in the courts of law, including the United States Supreme Court, we had a much tougher time in the court of public opinion. Indeed, the ACLU’s staunch defense of free speech in Skokie went too far even for many people who identified as such die-hard free speech defenders that they had become “card-carrying” ACLU members. Many ACLU members urged us to make “just one” exception to our neutral defense of free speech for this speech that was especially repugnant to the most fundamental civil liberties values. In fact, a full 15 percent of ACLU members resigned in protest over our handling of the Skokie case.

By the way, I regularly remind people of this number in response to claims that today’s college students are supposedly unusually hostile to free speech, because surveys show that they don’t support freedom for racist or other hate speech. But as the Skokie situation illustrates, throughout my adult lifetime, most people have instinctively supported supressing ideas that they hate — even many ACLU members.

That has been true for people of all ages and ideologies. Journalist Nat Hentoff well captured this general pattern in the title of a book he wrote way back in 1992 — which is still apt today: Freedom of Speech for Me, but Not for thee: How the Left and Right Relentlessly Censor Each Other.

The attacks against the ACLU’s position in the Skokie case were especially pointed against our then-Executive Director Aryeh Neier, who was himself a Holocaust survivor. He had been born in Berlin and his entire extended family was assassinated by the Nazis. Ultimately, Aryeh and his immediate family managed to escape Nazi Germany, after severe ordeals and suffering. You can just imagine the horrific hate mail he received during the protracted Skokie litigation. Ironically, some of the hate mail came from vicious anti-Semites, and some from Jews and other opponents of anti-Semitism.

In fact, a major reason the neo-Nazis sought to demonstrate in Skokie in particular, with its large Jewish population, was because the Nazis “blamed” Jews for supporting the Civil Rights Movement and racial integration. So they lumped together as their hated enemies not only African Americans and other racial minorities, but also Jews and civil libertarians.

Ironically, this shows that the enemies of liberty and justice for all also share the ACLU’s view that all rights for all people are indivisible. But they see it from the other end of the looking glass.

Recall last fall’s Pittsburgh synagogue massacre. The perpetrator linked his hatred of Jews to the fact that Jewish organizations and individuals were leading supporters of rights for refugees and other immigrants.

I and the ACLU are also regularly assailed by anti-Semitic invective, and also even by the “N-word.” I vividly recall the first time I was personally subjected to this type of hate speech, shortly after I became ACLU President. During a radio call-in show, a listener addressed me as the leader of [quote] “the [N-word]-loving ACL-Jew.” And believe me, he used the whole nasty word, unapologetically.

**Suppressing Speech, Suppressing Freedom**

Shortly after the Skokie case ended, Aryeh wrote a powerful book about it, called Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom. Aryeh went on to become one of the most renowned, respected leaders of the global international human rights movement, and he has continued to strongly defend the same neutral free speech stance as in Skokie. Therefore,
many people are surprised to learn of the following statement, from his book about the Skokie case:

I am unwilling to put anything, even love of free speech, ahead of detestation of the Nazis...I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted. Freedom has its risks. Suppression of freedom, I believe, is a sure prescription for disaster.

Supporting the same conclusion, I would also like to quote another former ACLU leader: the remarkable human rights hero Pauli Murray, who was an influential member of the ACLU’s National Board of Directors during the mid-20th century.

Until recently Murray’s pioneering life and work weren’t nearly as well-known as they should be, so I’m glad that a couple of biographies have documented her achievements, and that Yale recently named a residential college after her. Murray was a prominent human rights activist and lawyer, who was also a published poet and an Episcopal priest.

Murray was the granddaughter of an enslaved woman. She transcended conventional boundaries of gender and sexual orientation, long before there were organized movements for LGBTQ and/or gender identity rights.

While Murray was pursuing her doctorate in jurisprudence at Yale, in 1963, Yale’s student-run debate organization, the Yale Political Union, extended a speaking invitation to an arch-segregationist, Alabama Governor George Wallace. To add fuel to the fire of this controversial invitation, just a few weeks earlier, Klansmen had bombed the 16th Street Baptist Church in Birmingham, Alabama, killing four African American schoolgirls and wounding 22 others.

Under these circumstances, Yale’s Acting President, Kingman Brewster, advised the students to withdraw their invitation. But Pauli Murray wrote an eloquent letter to Brewster arguing that Wallace should have a platform at Yale. Murray made this argument not despite her civil rights activism, but rather directly because of it. As she wrote:

This controversy affects me in a dual sense, for I am both a lawyer committed to civil rights including civil liberties and a Negro who has suffered from the evils of racial segregation... The possibility of violence is not sufficient reason...to prevent an individual from exercising his constitutional right[s]. This has been the principle behind the enforcement of the rights of the Little Rock Nine...and others to attend desegregated schools in the face of a hostile community and threats of violence. It must operate equally in the case of Governor Wallace.

Further on this essential theme of the indivisibility of human rights, Murray wrote the following in a 1945 magazine article, from her perspective as a young civil rights lawyer and activist:

I intend to destroy segregation by positive and embracing methods. When my brothers try to draw a circle to exclude me, I shall draw a larger circle to include them. Where they speak out for the privileges of a puny group, I shall shout for the rights of all mankind.

The Ultimate Client Was the First Amendment Itself

On this same theme, I would like to quote recent comments by another remarkable African American woman lawyer who was also an ACLU leader, and who also championed free speech rights even for the odious racist views of Alabama Governor George Wallace, among others — namely, Eleanor Holmes Norton. Eleanor has for many years been the District of Columbia representative in Congress, and before that, she was the first African American woman to head the federal Equal Employment Opportunity Commission. Eleanor began her illustrious career as a lawyer in the ACLU’s national Legal Department. In that capacity, she defended free speech rights for Wallace, when New York’s Mayor John Lindsay denied him a permit to speak at Shea Stadium.

Eleanor also defended freedom of speech for other racists, including Clarence Brandenburg, the Ohio KKK leader at the heart of the landmark 1969 Supreme Court case, Brandenburg v. Ohio. That was an ACLU case, and Eleanor was on the brief.

The immediate beneficiaries of the Court’s historic speech-protective ruling were Brandenburg and other hooded, cross-burning racists. But that ruling soon came to the aid of speech from diametrically different activists, including the NAACP and its leaders. Eleanor recently said the following about her work on these ACLU cases: “My direct clients were...proselytizing racists with whom I had nothing in common. Yet...the ultimate client was the First Amendment itself.”

Last year, Eleanor delivered the commencement address at Georgetown Law School. In light of current questions by students and others about whether racial justice and other progressive change can still best be promoted by neutrally defending free speech even for opponents of such change, she emphatically answered “yes.” Moreover, she urged law students and young lawyers in particular to convey that message to other young activists, given “disquieting evidence” that too many of them don’t support freedom for ideas they reject. Let me quote her:

Given our...increasingly polarized country, [positive] [c]hange will only occur if we make the highest, best and most peaceful use of the First Amendment.... Will the generation that is using protest so preciously for issues they favor...also exercise the tolerance that allows those who favor the opposite side to be heard?...[Your] education equips [you] to explain in terms [your] generation can understand that the First Amendment right to speak must be reciprocal. Those who have brought [positive] change to our country did not win it by shutting down the other side. They won change the hard [way, which is the] only way that ensures it will be lasting.... [As you learn in law school, lawyers sharpen their own cases best when they have heard the other side. And we all know that allowing the other side to speak... earns respect from the public, the actual party we need to accept the change we are after.]

Before I conclude, let me cite just one more respected law professor and civil
rights advocate for the proposition that robust equal rights for all depend on robust freedom of speech for all: Harvard Law School Professor Randall Kennedy. His recent writings remind us that the 20th-century movement for racial justice depended on strong protection of students’ free speech rights, shielding ideas that were widely viewed as deeply damaging to individuals and society. Kennedy wrote, “[I]n order to more militantly battle Jim Crow segregation, black high school and college student activists...initiated the lawsuits that prompted judges to recognize students’...constitutional rights to free speech.” He also has observed that “ardent champions of racial justice have typically been ardent champions of civil liberties,” recognizing the symbiotic relationship between the two.

This insight certainly was true of the Supreme Court Justice for whom Randy Kennedy clerked — Thurgood Marshall, who was often called “Mr. Civil Rights.” In addition to serving as the NAACP leader who argued Brown v. Board of Education in the Supreme Court, Thurgood Marshall also served on the ACLU National Board of Directors. And in addition to writing Supreme Court opinions in major civil rights cases, he also wrote the Court’s opinions in major First Amendment cases. As Professor Kennedy wrote, in a very kind review of my book, Justice Marshall earned the title “Mr. Civil Liberties” to complement that of “Mr. Civil Rights.”

I end with a passage from a poem by Edwin Markham, which was included in the Norton Anthology of American Literature, required reading for my 10th grade English course at my public high school in Hopkins, Minnesota. This was also the poem that Paul Murray paraphrased in her stirring article that I quoted above. It has special personal resonance for me, for in high school I was being painfully ostracized by certain important people in my school and my community, due to my Jewish background and my unpopular beliefs and expression. Markham’s poem provided great solace, and no doubt helped to launch me on the path toward human rights work. More recently, this poem has epitomized for me the most promising — non-censorial — means for resisting “hate.” In his poem “Outwitted,” Markham wrote:

He drew a circle that shut me out—
Heretic, rebel, a thing to flout.
But Love and I had the wit to win:
We drew a circle that took him in!

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