THE INTERDEPENDENCE OF RACIAL JUSTICE AND FREE SPEECH FOR RACISTS

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> The ACLU is committed to the fundamental rights to equality and justice embodied in the Fourteenth Amendment and civil rights laws. . . . We are determined to fight racism in all its forms. . . . We are also firmly committed to fighting bigotry and oppression against other marginalized groups. . . . And the ACLU understands that speech that denigrates such groups can inflict serious harms and is intended to and often will impede progress toward equality.
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> At the same time, the ACLU is also committed to freedom of speech and peaceful protest. . . . As human rights, these rights extend to all, even the most repugnant speakers—including white supremacists—and . . . we will continue our longstanding practice of representing such groups in appropriate circumstances to prevent unlawful government censorship of speech.
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> — ACLU Case Selection Guidelines (2018)[1]

INTRODUCTION

Michael Powell's June 7, 2021 *New York Times* article—"Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis"[2]—raised a perennial issue that has roiled not only the ACLU, but also society in general, throughout my adult lifetime: do we have to choose between freedom of speech and other aspects of the civil liberties/human rights agenda?[3] Since the ACLU's founding, more than a century

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[1] ACLU Case Selection Guidelines: Conflicts Between Competing Values or Priorities 2, https://perma.cc/QVU5-B95E.

[2] Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES, June 6, 2021.

[3] The ACLU's original mission statement, published in 1921, stressed both free speech and

ago, it has defended all fundamental freedoms for all people, including free speech and equality, especially for people and groups that have traditionally been subject to discrimination.[4] Some ACLU critics charge that its vigorous advocacy of equality rights is somehow antithetical to its free speech advocacy. Conversely, other ACLU critics charge that its ongoing defense of free speech rights even for those who convey anti-civil-liberties messages is somehow antithetical to its equal justice advocacy.

The ACLU's mission closely parallels government's responsibility: to uphold all rights for everyone, neither privileging particular rights over others, nor privileging the rights of particular people or groups over others. Therefore, debates about the ACLU's efforts to promote our interlocking national aspirations of "liberty and justice for all" has resonance for government policy as well. The ACLU-focused debates mirror more general debates about the appropriate prioritization of racial justice and free speech in our public sphere—for example, in public schools and universities.

I. THE SYMBIOTIC RELATIONSHIP BETWEEN LIBERTY AND EQUALITY

As a champion of the full spectrum of civil liberties and human rights—including freedom of speech and equality—I continue to be convinced that these rights are essentially mutually reinforcing, rather than at odds with each other. My conclusion is based on observing how these rights have actually operated in practice, both in the United States and around the world, and correspondingly how restrictions on these rights have actually operated.[5]

On the one hand, freedom of speech cannot be fully realized until and unless it

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equal rights concerns, describing its organizational enemy as "the suppression of opinion and of traditional minority and individual rights." ACLU, *The Fight For Free Speech: A Brief Statement of the Present Conditions in the United States, and of the Work of the American Civil Liberties Union Against the Forces of Suppression* 4 (1921). The statement pledged to "demand . . . the rights of those minorities and individuals attacked by the forces of reaction." *Id.* at 5.

[4] For example, in light of pervasive debates about these issues in the early 1990s, the *Harvard Civil Rights-Civil Liberties Law Review* invited me to submit an essay on point. *See* Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143 (1994).

[5] *See* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018) (discussing evidence from the U.S. and many other countries indicating that freedom of speech has been essential for promoting equal justice causes, and that censorship—including of "hate speech"—has undermined those causes).

can be exercised by everyone in our society, including those who traditionally have been denied equal access to the educational, technological, and other resources that facilitate speech. On the other hand, equal liberty and justice for all cannot be fully realized without robust free speech rights, which are especially essential for advocating the rights of racial, ethnic, and other minority groups, including political dissidents. For these reasons, the ACLU's advocacy of equality rights is an essential aspect of its work for free speech, and the ACLU's advocacy of free speech is an essential aspect of its work for equality rights.

As far back as 1975, constitutional law scholar Kenneth Karst explained the symbiotic relationship between liberty and equality:

> [T]he constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty. This link is reflected in the language of egalitarian movements. The civil rights movement of the 1960s, for example, marched under the banner of "Freedom" even though its chief objective was equal access—to the vote, to education, to housing, even to lunch counters. "Liberation" is today a theme of more than rhetorical significance in egalitarian causes such as the women's movement.[6]

Regarding free speech, the ACLU's goal—paralleling our nation's goal—must be to empower all members of our society to have meaningful opportunities to speak, no matter who they are, and no matter what they believe. University of Pennsylvania Professor Sigal Ben-Porath has aptly labeled this concept "inclusive freedom."[7] Focusing on the overarching goal of inclusive freedom of speech, the ACLU's work to promote equal justice is not only *consistent with* its free speech agenda, but also *an essential element of* its free speech agenda.

One dramatic illustration of the integral interrelationship between free speech and racial justice—and between censorship and racial oppression—is what Harvard Law School Professor Randall Kennedy has powerfully described as the most extreme example of censorship in U.S. history: the antebellum laws that made it a crime to teach enslaved African Americans (and in some cases even freed Blacks) to read or write.[8] As a *Harpers Weekly* article commented in 1867, referring

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[6] Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43–44 (1975).

[7] SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 29–46 (2017).

[8] Randall Kennedy, Interview at New-York Historical Society Museum & Library (May 4, 2021), https://www.nyhistory.org/programs/race-and-freedom-expression.

to the pre-Civil-War South: "The alphabet is an abolitionist. If you would keep a people enslaved refuse to teach them to read."[9] The legacy of these laws that silenced and subjected African Americans has been perpetuated through segregated and unequal school systems that continue to deprive Black students of the equal and adequate public educations to which they are legally entitled. Therefore, when the ACLU continues to fight for educational equity, it is simultaneously fighting for both racial justice and meaningful, equal free speech rights.

Correspondingly, when the ACLU fights battles that focus on free speech, they also are essential for promoting racial justice and other equal rights and social justice causes. In 1947, journalist A.J. Liebling famously quipped that "Freedom of the press is guaranteed only to those who own one."[10] The ACLU has been working to change that impoverished free speech reality in multiple ways, including by leading the fight for a free and open Internet, which can potentially make everyone the functional equivalent of a printing press owner. When the Internet first burst onto the political and public radar screen, in the 1990s, the ACLU lobbied and litigated against censorial federal and state laws, which would have vastly reduced the Internet's availability as a platform for free-flowing communications by any individual or group. Thanks to the Supreme Court's landmark 1997 ruling in *Reno v. ACLU,*[11] the Internet has empowered grassroots groups, including Black Lives Matter and Me Too, to mobilize for multiple progressive causes that could not have gained such traction through the vastly more expensive, exclusionary pre-Internet communications tools.

When Donald Trump was deplatformed by Twitter and Facebook, the ACLU expressed its concern about the unchecked power that such dominant tech giants wield over individual speech and civic discourse, stressing the special adverse impacts on traditionally marginalized voices. Kate Ruane, an ACLU Senior Legislative Counsel, stated: "President Trump can turn to his press team or Fox News to communicate with the public, but others—like many Black, Brown, and LGTBQ activists who have been censored by social media companies—will not have that luxury."[12]

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[9] *Education in the Southern States*, HARPER'S WEEKLY, Nov. 9, 1867, at 706.

[10] A.J. LIEBLING, THE WAYWARD PRESSMAN 265 (1947).

[11] 521 U.S. 844 (1997).

[12] Natalie Colarossi, *ACLU Counsel Warns of 'Unchecked Power' of Twitter, Facebook After*

The most recent Supreme Court term (2020–21) affords further examples of noteworthy ACLU free speech cases that are especially important for amplifying the voices of traditionally disempowered and marginalized individuals and groups, as well as equal justice advocates. One of these cases, *Mahanoy School District v. B.L.*,[13] has been widely hailed as a landmark ruling, the Court's first decision upholding public school students' free speech rights since its 1969 landmark case that also did this: *Tinker v. Des Moines School District*,[14] which was also an ACLU case. Since most public school students, including the ACLU's client in the *Mahanoy* case, are under the age of majority, they do not exercise the basic right to vote, and they also are barred from exercising many other rights and opportunities that are available only to adults. Therefore, freedom of speech is especially significant for such students, as their major vehicle for influencing the school policies that have such a great impact on their lives and futures, and also for influencing broader societal policies.

In the ACLU's other notable free speech case on the high Court's docket this past term, it represented Black Lives Matter leader DeRay Mckesson, challenging a ruling by the Fifth U.S. Circuit Court of Appeals that "poses an existential threat to the exercise of . . . First Amendment rights" by "would-be protesters, . . . particularly . . . those who espouse unpopular opinions."[15] The Fifth Circuit rejected Mckesson's First Amendment defense to a police officer's tort lawsuit seeking damages for injuries he suffered after being struck by a rock that was thrown by an unknown participant in a demonstration that Mckesson organized. It was undisputed that Mckesson neither intended, authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind.[16] As noted by Judge Don R. Willett, in dissenting from the Fifth Circuit's ruling, its imposition of "'negligent protest' liability against a protest leader for the violent act of a rogue assailant . . . would have enfeebled America's . . . civil rights movement, imposing ruinous financial

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Trump Suspension, NEWSWEEK (June 29, 2021), https://perma.cc/6AFH-PFV8.

[13] 141 S. Ct. 2038 (2021).

[14] 393 U.S. 503 (1969).

[15] Petition for Writ of Certiorari, McKesson v. Doe, 141 S. Ct. 48 (2020), at 15.

[16] The lawsuit had been brought against Black Lives Matter, as well as Mckesson. However, the lower court concluded that "'Black Lives Matter' is a 'social movement,' not the sort of entity that may be sued in federal court." *Id.* at 7.

liability against citizens for exercising core First Amendment freedoms."[17]

In November, 2020, the Supreme Court granted the ACLU's petition seeking the Court's review of the Fifth Circuit's decision, vacated the Fifth Circuit's judgment, and remanded the case to the Fifth Circuit, directing it to seek guidance on potentially controlling Louisiana tort law from the Louisiana Supreme Court.[18] Stressing that the case is "fraught with implications for First Amendment rights,"[19] the high Court suggested that Mckesson might not even be liable under Louisiana tort law principles, hence obviating the need to address the constitutional issues.

A friend of the court brief that a group of First Amendment scholars submitted to the high Court supporting the ACLU's cert. petition well captured this case's significance for equal rights and other social justice advocates. What is at stake, it explained, is preserving "civil demonstration as a primary mechanism through which ordinary citizens can change the world," referring to the "countless . . . Americans who prodded, provoked, and pushed the United States to actually be the nation it imagined itself to be."[20]

Just as freedom of speech cannot be fully realized without robust equality rights, the converse is also true. By definition, members of any minority group lack majoritarian political power. Therefore, minority groups must rely on the power of persuasion: raising their voices, individually and collectively, to persuade other members of the community and elected officials. Over and over again, throughout U.S. history (and in other countries), equal rights and social justice movements have gained momentum through forceful exercise of free speech rights to advocate and demonstrate, litigate and lobby. Correspondingly, censorship is consistently wielded in an effort to stymie these causes. Throughout U.S. history, prime targets of censorship have included proponents of progressive causes that were deeply opposed by the majority of the public, including: abolitionists, women's suffragists,

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[17] Doe v. Mckesson, 945 F.3d 818, 846 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

[18] Mckesson v. Doe, 141 S. Ct. 48, 208 (2020) (per curiam). On June 25, 2021, the Fifth Circuit panel certified "determinative questions of law to the Supreme Court of Louisiana," consistent with the U.S. Supreme Court's remand order. Doe v. McKesson, 945 F.3d 818 (5th Cir. 2021).

[19] *Id.* at 5.

[20] Brief of Floyd Abrams, *et al.* as *Amici Curiae* in Support of Petitioner, Mckesson v. Doe, 141 S. Ct. 48 (2020), at 3 (quoting RALPH YOUNG, DISSENT: THE HISTORY OF AN AMERICAN IDEA 1 (2015)).

birth control advocates, labor union organizers, anti-war activists, socialists, Communists, and civil rights demonstrators.

Thanks to the robust free speech principles that the Supreme Court began consistently to enforce during the civil rights movement—including in many cases that directly struck down a range of measures seeking to stifle the expression of civil rights demonstrators and their supporters—what had originally been "voices in the wilderness" were able to gain popular and political support. Hosea Williams, who was one of Martin Luther King's chief lieutenants, observed: "The problem with the black struggle in American [was] that black leaders like King didn't [initially] have the ability to communicate with the masses. Once they had that ability . . . , things changed."[21] In short, it is the disempowered, not the powerful, who have the most to gain from strong free speech protection, and the most to lose from its weakening.

To this day, state and local governments around the country have been disproportionately enforcing existing laws, and enacting new ones, to stifle protesters for progressive causes including racial justice and police reform.[22] There also has been a recent spate of state laws that simultaneously stifle free speech and equal justice (as well as academic freedom) by outlawing the teaching of "divisive" concepts concerning matters including race and gender, and by constraining discussions of diversity, equity, and inclusion.[23] Let me cite yet another example of censorial tools being wielded to suppress progressive activism, which the ACLU has been challenging: Customs and Border Patrol agents' targeted surveillance of immigrant rights activists at the U.S.-Mexico border and journalists covering them, which predictably has a chilling effect on critics of government immigration policy.[24]

Fortunately, the strong speech-protective principles under current First

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[21] "Mighty Ira" documentary by FIRE, the Foundation for Individual Rights in Education, minute 48:30. (With thanks to Jonathan Rauch for this citation.)

[22] *See, e.g.,* PEN America, *Arresting Dissent: Legislative Restrictions on the Right to Protest* (May 1, 2020), https://perma.cc/W5FE-QPB5.

[23] *See, e.g.,* Lauren Camera, *Bills Banning Critical Race Theory Advance in States Despite Its Absence in Many Classrooms*, U.S. NEWS & WORLD REPORT (June 23, 2021, 7:00 PM), https://perma.cc/EH6B-DSA2.

[24] Emerson Sykes, *Free Speech For Student Activists: A First Amendment Workshop for Campus Leaders*, UNIVERSITY OF CALIFORNIA: NATIONAL CENTER FOR FREE SPEECH AND CIVIC ENGAGEMENT, at 5 (2020), https://perma.cc/4JU5-P6WU.

Amendment law will ultimately defeat the foregoing measures. But if those speech-protective principles were to be eviscerated—ostensibly to reduce the power of entrenched elites, as free speech critics contend—these suppressive measures could well survive; that would be an ironic, albeit predictable, result. In sum, the ACLU's multi-pronged efforts to defeat all of these initiatives promote both free speech and equal justice.

II. WHY EQUAL JUSTICE CHAMPIONS HAVE SUPPORTED THE ACLU'S DEFENSE OF FREE SPEECH RIGHTS EVEN FOR RACISTS

Even though most progressive critics of the ACLU's free speech work would probably support such work where the primary direct beneficiaries include progressive speakers and causes, these critics object to the ACLU's advocacy of free speech principles in cases where the immediate beneficiaries are white supremacists and other opponents of human rights.[25] Having wrestled with these issues since the ACLU's historic defense of the right of a group of neo-Nazis to demonstrate in Skokie, Illinois, in 1977–78, and having respectfully listened to arguments by ACLU members and others about the downsides of such advocacy, I continue to conclude that continuing such advocacy is ultimately the better course for the ACLU's overall civil liberties/human rights mission. This conclusion is based on concerns about both free speech and equal justice, and on considerations of both principle and strategy. This conclusion also has been supported by prominent crusaders for racial justice and other equal justice causes.

The cardinal free speech principle that was resoundingly vindicated by the multiple federal and state courts that upheld the ACLU's position in the Skokie case, including the U.S. Supreme Court,[26] is usually referred to as "viewpoint neutrality"

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[25] *See, e.g.,* Ned Oliver, *Board Member of Va. ACLU Resigns in Protest of Group's Stance on Charlottesville Rally*, RICHMOND TIMES-DISPATCH, Aug. 13, 2017; Dara Lind, *Why the ACLU Is Adjusting Its Approach to "Free Speech" After Charlottesville*, Vox (Aug. 21, 2017, 10:06 AM), https://perma.cc/GVZ6-6FUD; Aryeh Neier, Letter to the Editor, *Conflicts Within the A.C.L.U. Over Free Speech and Racial Justice*, N.Y. TIMES, June 19, 2021; *The ACLU's 'Identity Crisis'*, BRYAN LEHRER SHOW, WNYC (June 10, 2021), https://perma.cc/34BJ-FV4W.

[26] For the judicial opinions rejecting arguments that Skokie residents, who included many Holocaust survivors, should be protected from the neo-Nazis' odious expression, *see* Collin v. Smith, 578 F.2d 1197, 1205–07 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party, 373 N.E.2d 21, 23–25 (Ill. 1978). An excellent account of both the specific Skokie controversy and the general issues it raised was authored promptly after the case by the ACLU's then-Executive Director, Aryeh Neier (himself a Holocaust survivor). ARYEH NEIER, DEFENDING MY

or "content neutrality." This principle, which the Court has hailed as "the bedrock"[27] of our free speech system, bars government from restricting speech solely because of disapproval of its viewpoint, content, message, or idea. No matter how deeply or broadly despised, or generally feared, the speech's content might be, that will not justify restricting it. Rather, we must use alternative means to counter the speech's message, including education, persuasion, and other forms of counter-speech. As the Court has explained, any viewpoint-based regulation would subvert not only individual liberty, but also our democratic self-government, because it "pose[s] the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[28]

In contrast, government may restrict speech for other reasons, which are not based solely on disapproval of the speech's content, "such that there is no realistic possibility that official suppression of ideas is afoot."[29] For example, government may restrict speech consistent with the "emergency" principle: when, under the facts and circumstances, the speech directly threatens certain specific, serious, imminent harms, including intentional incitement of imminent violence. While speech that doesn't pose an emergency might well also cause harm, experience has taught us that even more harm results from vesting government with power to punish speech based on a more indirect, speculative connection to potential harm.

Expanding government latitude to suppress speech beyond emergency situations enables officials to single out speech and speakers specifically because of disapproval of their viewpoint. This discretionary censorship predictably inures to the benefit of the most powerful individuals and groups, and to the disadvantage of political and other minorities.

That is why, before the Supreme Court adopted the current speech-protective standards, the speech of progressive activists was constantly targeted in the U.S. And that is why human rights activists in many other countries critique their countries' censorship laws, including those that were intended to suppress hate speech,

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ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979).

[27] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[28] Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994).

[29] R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992).

dis/misinformation, and extremist speech. For example, in 2016, a "Joint Declaration" issued by Special Rapporteurs of the U.N., the Organization for Security and Cooperation in Europe, and the Organization of American States reported that "In many countries," anti-hate-speech laws "are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues."[30] Two members of the U.N. Human Rights Committee added that "[h]ate speech . . . laws ironically are often employed to suppress the very minorities they purportedly are designed to protect."[31]

Because minority speakers and advocates of minority causes are especially dependent on the viewpoint neutrality principle, they have a special vested interest in its strong enforcement. For this reason, leaders of minority groups and advocates of their causes have opposed censoring racist hate speech.

One important example is Eleanor Holmes Norton, the first African American woman to serve as Chair of the Equal Employment Opportunity Commission, and the long-time District of Columbia representative in Congress. As a young ACLU staff lawyer, Norton successfully defended freedom of speech for several prominent racists, including KKK leader Clarence Brandenburg,[32] the segregationist Alabama

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[30] Ambeyi Ligabo et al., *International Mechanisms for Promoting Freedom of Expression* (Dec. 19, 2006), https://perma.cc/RNT9-4DKL.

[31] Rabbae v. Netherlands, ICCPR, CCPR/C/117/D/2124/2011, 6 (Dec. 3, 2016), annex IV (Cleveland & Politi, Members, concurring), https://juris.ohchr.org/Search/Details/2153,.

[32] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam). This landmark decision strictly limited government's power to punish speech on the rationale that it might induce violent or lawless conduct, insisting that government could punish such speech only if the speaker intentionally incited imminent violent or lawless conduct, which was actually likely to happen imminently.

Governor George Wallace,[33] and Joseph Carroll, head of the white supremacist National States Rights Party.[34]

In a stirring commencement address to the Georgetown Law School Class of 2018, Norton praised these rulings and described her advocacy with justifiable pride, explaining: "My direct clients were a minority in American society, proselytizing racists with whom I had nothing in common. Yet it was clear that the ultimate client was the First Amendment itself."[35] Norton further explained that this selfsame First Amendment—not censorship—enabled civil rights activists to defeat the racist policies advocated by the likes of Brandenburg, Wallace, and Carroll: "Those who brought change to our country did not win it by shutting down the other side. They won change the hard and only way that ensures it will be lasting. They persisted against their adversaries until they persuaded the country that they should prevail."[36]

More than half a century earlier, this same point was made by another African American woman, who was also an ACLU leader, serving on the ACLU's National Board of Directors: the lawyer and human rights activist Pauli Murray. In 1963, when the Yale Political Union invited George Wallace to speak, Yale and New Haven officials pressured this student debate society to rescind its invitation.

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[33] *See* Rupp v. Lindsay, 293 N.Y.S. 2d 812, 813–14 (Sup. Ct. 1968) (ordering New York City to rent Shea Stadium to the Wallace Presidential Campaign for a campaign rally, in response to the ACLU's arguments that the city's refusal to do so violated both state law and First Amendment principles). Notably, the court stressed the public's right to hear the candidate, as well as the candidate's right to speak: "Whether one agrees or disagrees with the candidate's views, it is inescapable that those views on the vital issues of our day . . . are certainly of . . . general public interest. To deny a major presidential candidate the use of this publicly-owned facility . . . is . . . a denial to the public of its rightful opportunity to . . . participate in an . . . event specifically authorized by the [applicable] statute."

[34] *See* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968). Norton argued this case in the Supreme Court, winning a unanimous ruling upholding an important procedural due process right that government officials may not bar a planned demonstration without giving the demonstration's organizers notice and an opportunity to oppose the bar.

[35] Eleanor Holmes Norton, *Georgetown Law Commencement Address Delivered by Congresswoman Eleanor Holmes Norton (D-DC)*, GEORGETOWN LAW (May 21, 2018), https://perma.cc/F77W-NJL8.

[36] *Id.*

Murray, who was then pursuing her legal doctorate at Yale, wrote to Yale's acting President, urging him to let Wallace speak. Noting that "The possibility of violence is not sufficient reason in law to prevent an individual from exercising his constitutional right" to speak, she stressed that this principle had redounded to the benefit of civil rights activists: "This has been the principle behind the enforcement of the rights of the Little Rock Nine, James Meredith 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." [37]

III. While Hateful Speech May Silence Minority Voices, Censorship Will Certainly Do So

Proponents of restricting hateful speech even when it does not satisfy the emergency principle have stressed the important point that such speech nonetheless may well have harmful impacts, including chilling members of targeted groups from exercising their free speech rights and otherwise participating as full equals in society. The ACLU certainly recognizes this harmful potential, as expressly noted in its case selection guidelines quoted in this essay's epigram: "[T]he ACLU understands that speech that denigrates [racial minorities and other marginalized] groups can inflict serious harms and is intended to and often will impede progress toward equality."

Opposition to government power to impose non-emergency speech restrictions does not at all reflect lack of concern about the potential negative impact of hateful speech or other constitutionally protected speech. Rather, as noted above, such opposition reflects the conclusion that an even greater danger is posed by endowing government with discretion to punish speech absent a tight and direct causal connection between the speech and imminent harm—a danger that is magnified by the inherently subjective concept of "hate speech." Politicians and others

[37] Peter Salovey, *Free Speech Personified,* N.Y. Times, Nov. 26, 2017.

have been invoking this vague, value-laden term to castigate speech of all ideological stripes, ranging from Black Lives Matter advocacy[38]—which government officials also have denounced as "extremist" and "terrorist" speech[39]—to the slogans "Blue Lives Matter"[40] and "All Lives Matter."[41]

Many government officials, of both major parties, have acknowledged the overwhelming evidence that many laws[42]—from those governing traffic and vehicle violations,[43] to the anti-drug laws[44]—are consistently enforced disproportionately against members of racial minorities. Why should we entrust the legal system with the essentially unfettered discretion to make the inevitably subjective determination of which hate speech should be punished in a non-emergency situation? Instead of censorship, the ACLU has advocated and pursued other measures to ensure everyone's full and equal participation in the marketplace

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[38] Rudy Giuliani, *Face Facts: 'Black Lives Matter' Is All About Hate*, N.Y. POST, Sept. 24, 2020 ("From the start, both the organization and the movement—BLM writ large—have been about hatred and violence that extends beyond police and includes all white people, all blacks who are conservative and the United States of America."); Kevin Liptak & Kristen Holmes, *Trump Calls Black Lives Matter A 'Symbol Of Hate' As He Digs In On Race*, CNN (July 1, 2020, 4:32 PM), https://perma.cc/MS9U-S8EU.

[39] Ryan J. Foley, *Police Guide That Calls BLM a Terrorist Group Draws Outrage*, AP (Dec. 2, 2020), perma.cc/6M4Y-W8B7.

[40] Fionnuala O'Leary, *BLM Backlash: What is Blue Lives Matter and why do some people consider it racist?*, THE SUN (Aug. 19, 2020), https://perma.cc/H7DL-4RAB (explaining that the Blue Lives Matter flag—which "replaces the red of a traditional American flag with black and incorporates a blue band"—is considered to "have racist connotations after being spotted alongside Confederate flags at the deadly white supremacist rally in Charlottesville, Virginia, in 2017"); *id.* ("Despite Blue Lives Matter supporters claiming the 'Thin Blue Line' stands for professional pride, some consider the countermovement [to Black Lives Matter] to be racist because its flag has been flown by white supremacists.").

[41] Karen Stollznow, *Why Is It So Offensive to Say 'All Lives Matter'?*, CONVERSATION (Jan. 13, 2021, 12:26 AM), https://perma.cc/7FKU-E9PG ("'all lives matter' can be understood as a racist dog whistle—a direct push-back against the Black Lives Matter movement").

[42] Shaila Dewan, *Here's One Issue That Could Actually Break the Partisan Gridlock,* N.Y. TIMES, Nov. 24, 2020.

[43] Sarah A. Seo, *Why We Can—And Must—Create a Fairer System of Traffic Enforcement,* WASH. POST, May 15, 2019.

[44] Betsy Pearl, *Ending the War on Drugs: By the Numbers,* CENTER FOR AMERICAN PROGRESS (June 27, 2018), https://perma.cc/2EP5-RHAT.

of ideas and in society more generally; that is precisely why the ACLU long has prioritized programs to promote racial justice and other equal justice causes, including in the crucial citizen-empowering arenas of education and voting.[45]

Many minority group leaders have advocated educational measures to empower individuals who are targeted by hateful speech to encounter it with self-confidence and resilience. African American members of the ACLU National Board of Directors espoused this position when they urged the ACLU to oppose campus hate speech codes; they rejected the rationale that these codes would protect minority students from the potentially traumatizing, chilling impacts of hateful speech.

For example, Gwen Thomas, who was a professor as well as Dean and Vice President at Metropolitan State University of Denver, said: "We have to teach our young people how to deal with adversarial situations. They have to learn how to survive with offensive speech they find wounding and hurtful."[46] Likewise, civil rights advocate Michael Meyers stated: "As a former student activist, and as a current black militant, I believe that. . . paternalism and censorship offer the college student a tranquilizer as the antidote to campus and societal racism. What we need is an alarm clock. . . . What we need is free speech. . . and more free speech!"[47] In his 2021 book, Brookings Institution Senior Fellow and longtime gay rights activist Jonathan Rauch memorably vocalized these empowering attitudes, which we should all strive to internalize, and also to instill in others: "If someone calls me a 'fucking faggot,' I interpret her as telling me that she needs counseling, not that that I am a fucking faggot."[48]

Of course, not everyone has the inner resources that Jonathan Rauch admirably exhibits in this statement, at least not in every situation. I vividly recall an instance when someone hurled a hateful anti-Semitic epithet at me, and it stunned me into humiliated silence. Yes, all of us who support civil liberties and human rights should strive to assist each other to encounter such hateful speech with our dignity, self-

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[45] *See, e.g.*, ACLU Case Selection Guidelines, *supra* note 1, at 3 (quoting ACLU Policy #312b: "Each [ACLU state-based] affiliate should give the empowerment of all people of color within their community the highest priority.").

[46] Natalie Hentoff, *Battling the Speech Police*, WASH. POST, Oct. 27, 1990.

[47] Michael Meyers, *Banning Racist and Other Kinds of "Hate" Speech on the College Campus* (outline for a debate with john a. powell at Hofstra University, Hempstead, Long Island, Jan. 25, 1990.)

[48] JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH (2021).

confidence, and responsive voices intact. In addition, though, all of us must constantly, proactively raise our voices to promote equality, dignity, diversity, and inclusion; we must also consistently counter any disparaging messages, and support the targeted individuals and groups. Counterspeech is not the responsibility of such targeted individuals and groups.

The recurrent argument by some progressives that the ACLU should not continue to defend free speech for those who reject key aspects of the ACLU's human rights work was made in a 1989 article by the feminist anti-pornography leader, Andrea Dworkin.[49] I co-authored a responsive article with Whittier College School of Law Professor Mary Ellen Gale, who then was also (along with me) a female, feminist member of the ACLU National Board of Directors. We explained why the ACLU's defense of free speech even for racists and misogynists is warranted specifically from a feminist perspective, despite the harms that such speech can do. That explanation continues to be relevant today:

> [C]ontrary to Dworkin's contention, the ACLU does not justify the defense of racist or sexist speech on the grounds that the speakers present no "real threat" to their chosen victims. We know that they do. We know that free speech poses great personal and societal risks, and that the risks are borne, unfairly and disproportionately, by individuals and groups that any just and humane society would single out instead for respect, compassion, help, and even reparation for past wrongs. But we also know that racism, sexism, and silence have combined too often to form an unholy trinity in the history of oppression in the United States.[50]

Noting that "Feminists as well as civil rights activists, political, religious, moral, and aesthetic dissidents, all have sheltered in [free expression's] embrace," we concluded that "We risk the harms of free expression because we have found no other way to ensure its benefits."[51]

IV. WHY THE ACLU'S EQUAL JUSTICE ADVOCACY IS ENHANCED BY ITS EVEN-HANDED FREE SPEECH ADVOCACY

The above-quoted statements by the distinguished former ACLU leaders Eleanor Holmes Norton and Pauli Murray highlight both principled and strategic reasons for the ACLU's ongoing defense of crucial free speech principles even when

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[49] Andrea Dworkin, *The ACLU: Bait and Switch*, 1 YALE J.L. & FEMINISM 37 (1989).

[50] Mary Ellen Gale & Nadine Strossen, *The Real ACLU*, 2 YALE J.L. & FEMINISM 161, 171 (1989).

[51] *Id.* at 186; *see also id.* at 175–76 (citing many specific examples of censorship of racial minorities and women, and advocates of their equal rights).

the immediate beneficiary is someone whose ideas are diametrically opposed to the ACLU's own human rights values.

For one thing, regardless of the identity of the immediate beneficiary of such advocacy—*i.e.*, the party in the particular case—every case constitutes a precedent, which inevitably redounds to the benefit of others, including others with diametrically opposed views. For example, in *Brandenburg v. Ohio*,[52] the immediate beneficiary of the Court's speech-protective ruling (and the ACLU's speech-protective advocacy, in representing Clarence Brandenburg) was a KKK leader. Yet in one of the Court's next decisions enforcing *Brandenburg*'s speech-protective standard, the beneficiary was an NAACP leader.[53] To this day, the ACLU relies on the *Brandenburg* standard to defend free speech rights for social justice activists, including Black Lives Matter leaders and "indigenous, environmental, and civil rights protesters who oppose the Keystone XL pipeline and other extractive industry projects."[54] *Brandenburg* is also important for shielding critics of police officers from asserted liability for violence that others commit against officers, as in the Mckesson case discussed above.[55]

Norton's and Murray's observations underscore another key strategic benefit of the ACLU's neutral defense of robust free speech principles: the ACLU's credibility and effectiveness in advocating any civil liberties cause is enhanced by its consistent support of the pertinent principles, including when the immediate beneficiary is someone who opposes civil liberties.[56] As an across-the-board advocate of

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[52] 395 U.S. 444 (1969) *(*per curiam*)*.

[53] NAACP v. Claiborne Hardware Co., 458 U.S. 856 (1982) (arising from events dating back to 1966, concerning an NAACP-organized boycott of certain white merchants). *See also* Hess v. Indiana, 414 U.S. 105 (1973) (enforcing the *Brandenburg* standard to protect the speech of an anti-Vietnam War protest leader).

[54] Emerson Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOKLYN L. REV. 15, 28–29 (2019) (describing the ACLU's successful 2019 challenge to South Dakota's "riot boosting" laws).

[55] *See also, e.g.*, Davidson v. Time Warner, Inc., No. CIV. A. V-94-006, 1997 WL 405907, *19–20 (S.D. Tex. 1997) (relying on *Brandenburg* to dismiss a lawsuit by a state trooper's widow against the company that produced rapper Tupac Shakur's album *2Pocalypse Now;* the widow alleged that a man had killed her husband after listening to the album, which contained at least one song with strong anti-police lyrics).

[56] See ACLU Case Selection Guidelines, *supra* note 1, at 3: "If the ACLU avoids the defense of controversial speakers, and defends only those with whom it agrees, both the freedom of speech and

the same free speech rights for all speakers and messages, the ACLU's arguments have additional legitimacy, beyond the arguments made by defenders of the particular speakers and messages.

For this reason, even when individuals whose civil liberties are violated have their own excellent lawyers, they and their lawyers regularly beseech the ACLU to file a supporting brief; they understand that the ACLU's advocacy signals support for the principles that are at stake, not simply a lawyer's ethically mandated "zealous advocacy" on behalf of a specific client. The ACLU's even-handedness in this regard constitutes precious organizational capital, which enhances the ACLU's advocacy of any cause, including both free speech and equal justice. Conversely, should this institutional capital be reduced, that would undermine the ACLU's effective advocacy of all causes, including both free speech and equal justice.

The ACLU's vigorous advocacy of equal justice causes should persuade fair observers that its advocacy of free speech rights even for opponents of those causes reflects a considered judgment—now based on more than a century of effective work for inclusive freedom—that such advocacy ultimately promotes equal justice. That certainly continues to be Eleanor Holmes Norton's considered judgment. In a 2019 interview, reflecting on her work on the Brandenburg, Wallace, and Carroll cases, Norton said:

> I relished those cases, because I knew that the left and civil rights activists were the primary users of free speech, so the racist cases made our principled arguments even stronger. My friends at SNCC, the Student Nonviolent Coordinating Committee, were not always convinced by this approach because "what's sauce for the goose would not have the same flavor for the gander." But I knew we were winning all those cases because we were winning for both sides.[57]

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the ACLU itself may suffer. The organization may lose credibility with allies, supporters, and other communities." To be sure, these Guidelines also recognize countervailing costs to defending speakers with anti-civil liberties views: "For example, a decision by the ACLU to represent a white supremacist group may well undermine relationships with allies or coalition partners, create distrust with particular communities, . . . make it more difficult to recruit and retain a diverse staff and board . . . , and in some circumstances, directly further an agenda that is antithetical to our mission." This portion of the Guidelines concludes: "Thus, there are often costs both from defending a given speaker and not defending that speaker. *Because we are committed to the principle that free speech protects everyone, the speaker's viewpoint should not be the decisive factor in our decision*" (emphasis added).

[57] Telephone Interview of Eleanor Holmes Norton by Emerson Sykes, June 6, 2019, quoted in Sykes, *supra* note 54, at 17. "[T]he ACLU took on . . . Brandenburg's case" in 1968, "at the height

One pioneering crusader for equal rights "voted with her feet" in endorsing the ACLU's particularly effective advocacy of equal justice, resulting from its overall human rights advocacy, including of free speech for everyone: Ruth Bader Ginsburg. She has explained that she deliberately chose the ACLU, rather than an organization with a more narrowly focused agenda, as the vehicle for her pathbreaking activism on behalf of women's rights in large part because she believed that the ACLU's broader civil liberties advocacy would enhance the credibility of the women's rights cause. In the same vein, Justice Ginsburg explained that she chose the ACLU because of the integral interconnection between civil liberties and civil rights, including women's rights: "I wanted to be a part of a general human rights agenda . . . [promoting] the equality of all people and the ability to be free."[58]

This overall mission—championing freedom and equality for everyone—reflected Ruth Bader Ginsburg's own principles. In addition to directing the ACLU's Women's Rights Project in particular, she was also a member of the ACLU's National Board of Directors and one of its National General Counsel, thus serving as a key ACLU leader on the organization's entire broad civil liberties agenda. Therefore, I wasn't surprised to read, in a 2018 interview, at the height of the MeToo movement, that Justice Ginsburg strongly spoke up for due process rights of men accused of sexual assault, in an interview conducted by George Washington Law Professor Jeffrey Rosen, who also heads the National Constitution Center. Justice Ginsburg noted that campus sexual assault policies have been criticized for violating due process rights of the accused, and she said that she agreed with this criticism. Jeff Rosen pressed her to elaborate, saying: "I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality." Her answer: "It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field [sexual assault] what we have applied generally."[59]

The ACLU's—and the First Amendment's—support of free speech rights even

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of the civil rights movement, . . . because it presented an opportunity to limit incitement doctrine and protect unpopular and fiery rhetoric," which was key to that movement. *Id.* at 16.

[58] ACLU, *ACLU History: A Driving Force for Change: The ACLU Women's Rights Project* (Sept. 1, 2010), https://perma.cc/U5MM-27B9; ACLU, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, https://perma.cc/V4LR-9PE6.

[59] National Constitution Center, *A Conversation with Justice Ruth Bader Ginsburg*, (Feb. 12, 2018), https://perma.cc/W64D-4JVR.

for white supremacists has been eloquently defended by an especially significant anti-racism campaigner: Susan Bro, the mother of Heather Heyer, the counter-demonstrator who was brutally murdered by one of the Unite the Right demonstrators in Charlottesville in August 2017. During a 2019 interview, Susan Bro was asked whether she thought that the white supremacist protesters should have had the right to demonstrate in 2017 (as the ACLU successfully argued, in opposing the city's last-minute effort to revoke its previously issued permit),[60] and whether they should have that right in the future, notwithstanding the fatal violence. She answered:

> I do. . . . [O]nce we take away the right to free speech, we may never get it back. . . I think that we walk into the room blindly if we don't take the time to know what the other side is thinking. . . . [H]ate groups very often crave silence or violence. They want a violent reaction or they want no one to oppose them at all. I think neither approach is effective. I think the effective approach is to show up in even larger numbers, without violence, to assertively say, "we see you, we don't like you, we don't like what you're saying, you have the right to say it, but we don't like it." And we saw this in the second Unite the Right rally in Washington when actually they showed up in very small numbers and they were met with counter-protesters who were in a very large number, saying "go home, go away." . . . My big concern with losing free speech is, who makes the decision what speech is allowable and what speech is not?[61]

Conclusion

My favorite line in the recent *New York Times* piece was ACLU Executive Director Anthony Romero's answer to the question: "Is the ACLU a free speech or a racial justice organization?" His answer: "Yes. We are a domestic human rights organization."[62] That answer reflects our country's grandest aspirations, and the ACLU's parallel mission to bring our nation's actual reality closer to those founding ideals: both "liberty" and "justice" not only for some, but "for all."

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[60] Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 3474071, *1, *3 (W.D. Va. Aug. 11, 2017).

[61] WithTheEconomist, *Open Future Festival Chicago*, at 3:12:23 (Oct. 5, 2019), https://www.youtube.com/watch?v=_4t12rS6_jo&t=11486s.

[62] Powell, *supra* note 2.