



Monday Morning Thoughts: Has the ACLU Lost Its Way in Protecting Speech They Hate?

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On Sunday, the NY Times ran a provocative story: “Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis.” In it, they argued, “An organization that has defended the First Amendment rights of Nazis and the Ku Klux Klan is split by an internal debate over whether supporting progressive causes is more important.”

In his own piece, ACLU Legal Director David Cole responds: “Has the ACLU lost its way? This appears to be a perennial question.” His answer: “But the answer remains the same. The ACLU is committed to the principle of free speech today, just as it was in the 1990s, 1970s, and long before that. And we are specifically committed to the proposition that the First Amendment’s guarantees (like those of the rest of the Constitution) apply to all, not just to those with whom we agree.”

But, he says, “At the same time, the ACLU also remains devoted to defending other fundamental civil rights and civil liberties, including equal protection of the law — as we always have been. Addressing the tensions that sometimes arise between these commitments is not easy. But we seek to do so, today as always, not by abandoning any of our core commitments, but by acknowledging and confronting the conflicts in as forthright, inclusive, and principled a way as we can.”

The NY Times notes that 79-year-old longtime lawyer, David Goldberger, who argued the Skoki, Illinois, case defending the free speech rights of Nazis in the 1970s was recently honored in a luncheon (actually in 2017), where “he listened to one speaker after another and felt a growing unease.”

He heard: “A law professor argued that the free speech rights of the far right were not worthy of defense by the A.C.L.U. and that Black people experienced offensive speech far more viscerally than white allies. In the hallway outside, an A.C.L.U. official argued it was perfectly legitimate for his lawyers to decline to defend hate speech.”

“I got the sense it was more important for A.C.L.U. staff to identify with clients and progressive causes than to stand on principle,” he said in a recent interview. “Liberals are leaving the First Amendment behind.”

The Times writes: “The A.C.L.U., America’s high temple of free speech and civil liberties, has emerged as a muscular and richly funded progressive powerhouse in recent years, taking on the Trump administration in more than 400 lawsuits. But the organization finds itself riven with internal tensions over whether it has stepped away from a founding principle — unwavering devotion to the First Amendment.”

It’s an interesting question.

Then again, it is one we are all facing.

George Washington Law Professor Jonathan Turley, for example, yesterday pointed out: “This week is the one-year anniversary of one of the lowest points in the history of modern American journalism. During the week of June 6, 2020, the New York Times forced out an opinion editor and apologized for publishing the editorial of Sen. Tom Cotton (R., Ark.) calling for the use of the troops to restore order in Washington after days of rioting around the White House.”

Turley points out: “While Congress would ‘call in the troops’ six months later to quell the rioting at the Capitol on January 6th, New York Times reporters and columnists called the column historically inaccurate and politically inciteful. Reporters insisted that Cotton was even endangering them by suggesting the use of troops and insisted that the newspaper cannot feature people who advocate political violence. One year later, the New York Times published a column by an academic who has previously declared that there is nothing wrong with murdering conservatives and Republicans.”

The Times points out these debates “mirror those of the larger culture, where a belief in the centrality of free speech to American democracy contends with ever more forceful progressive arguments that hate speech is a form of psychological and even physical violence. These conflicts are unsettling to many of the crusading lawyers who helped build the A.C.L.U.”

“There are a lot of organizations fighting eloquently for racial justice and immigrant rights,” Ira Glasser, former ACLU president, said. “But there’s only one A.C.L.U. that is a content-neutral defender of free speech. I fear we’re in danger of losing that.”

David Cole defended their policy, arguing: “Some of our critics argue that by considering the content and impact of the speech in assessing how to proceed, we are walking away from a commitment to all free speech. That’s an ahistorical and overly simplistic analysis of our free speech work: One must consider the content of the speech and the nature of any regulations to assess whether a First Amendment claim is likely to prevail.”

He argued instead, “One thing we rejected was any abandonment defending those with whom we disagree. Yet a small number of disgruntled voices continue to charge that we have done just that. But the record demonstrates otherwise.”

He notes for the record: “Since 2017, we have supported the constitutional rights of the NRA, the Koch-funded Americans for Prosperity Foundation, anti-Semitic protesters, Trump supporters, Trump himself, Republican challengers to a Democratic gerrymander, right-wing provocateur Milo Yiannopoulos, and conservative and anti-gay student groups, to name but a few. We have

filed multiple Supreme Court briefs with the Cato Institute, the American Conservative Union, and the Institute for Justice.”

I feel their dilemma. I have long been a free speech advocate. I argued for instance that Milo Yiannopoulos should have been allowed to speak on the UC Davis campus. In fact, not only did I write a number of columns to that effect, but I also gave a number of guest lectures on campus—often opposed by progressive voices.

For me, while Milo is offensive and perhaps even threatening to people of color, it was a fairly easy call. However, I have noted with growing alarm the large amount of false information posted on social media.

A much more difficult call for me is whether private social media companies can pull demonstrably false content from their feed and whether they were justified in the ban on Donald Trump.

The Times noted, “Some A.C.L.U. lawyers and staff members argue that the First Amendment, which guarantees freedom of speech and the press — as well as freedom of religion, assembly and petitioning the government — is more often a tool of the powerful than the oppressed.”

“First Amendment protections are disproportionately enjoyed by people of power and privilege,” said Dennis Parker, who directed the organization’s Racial Justice Program until he left in late 2018.

David Cole responded, “Everything that Black Lives Matter does is possible because of the First Amendment.”

He later argued, “In our view, the First Amendment protects everyone, whether you are on the left, the right, or somewhere in between. For a century, the ACLU has not only defended that right on behalf of others, but has exercised the right in all that we do. It’s the First Amendment that protects our organization’s rights to speak out, to organize, to demonstrate, and to petition for a redress of grievances. It’s the lifeblood of democracy, and the oxygen of a civil society. And most important, the First Amendment is what ensures that those without political power can work to demand justice.

“We should recognize the cost to our allies but we are committed to represent those whose views we regard as repugnant,” Mr. Cole said in an interview with The New York Times.

But Floyd Abrams, one of the leading private First Amendment attorneys in the country, thinks the ACLU has compromised itself.

“The last thing they should be thinking about in a case is which ideological side profits,” he said. “The A.C.L.U. that used to exist would have said exactly the opposite.”

From my perspective this is an interesting debate. Then again, there is blood on everyone’s hands. Turley can point to the NY Times. I would also point out that the same people up in arms over Trump being banned by Twitter have no problem when Colin Kaepernick is blacklisted by the NFL, or are all too happy to boycott the NFL and others over allegations of “Cancel Culture.”

This debate is healthy, but we live in times of turmoil that are upsetting traditional norms and values. Check in again in a few years and see where we are

