

Written testimony of Nadine Strossen before Joint Hearing of the Subcommittee on Health Care, Benefits, and Administrative Rules and the Subcommittee on Intergovernmental Affairs of the Committee on Oversight and Government Reform, “Challenges to the Freedom of Speech on College Campuses” – July 27, 2017, 9:00 a.m., 2154 Rayburn House Office Building

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Introduction

I would like to thank Chairman Jordan and Ranking Member Krishnamoorthi of the Subcommittee on Health Care, Benefits and Administrative Rules, and Chairman Palmer and Ranking Member Demings of the Subcommittee on Intergovernmental Affairs, for convening this hearing on such a critically important topic and giving me the opportunity to participate.

Having consulted with Chairman Jordan and Committee staff members, we agreed that I could be most helpful to your deliberations by drawing upon my expertise as a constitutional law professor, who has specialized in First Amendment freedom of speech issues, including specifically campus free speech issues.

So let me start by saying a word about my longstanding engagement with these issues. My first major law review article on point was published in the *Duke Law Journal* way back in 1990, analyzing why the then-new so-called “hate speech”¹ codes on college campuses were unconstitutional, as well as unwise. (I attach a copy of this article as Appendix A to my testimony.) Despite the passage of time, the article’s analysis continues to be pertinent and accurate.

In fact, in the decades since then, the U.S. Supreme Court has steadily become even more protective of freedom of speech, including for controversial and unpopular speech. Notably, the Court’s speech-protective decisions have been joined by Justices from across the ideological spectrum, underscoring that the fundamental principles at stake should also unite all of us, regardless of our disagreements on particular policy issues.

The Court ringingly reaffirmed the First Amendment’s protection even for hateful and hated speech just last month. In *Matal v. Tam*, it unanimously struck down the federal law that denied registration to tradenames that “disparaged” particular individuals or groups. As the Court declared: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”

When campus “hate speech” codes were initially proposed in the late 1980s, the American Civil Liberties Union debated what position it should take. Throughout the ACLU’s history (going back to 1920), it steadfastly had defended freedom even for “the thought that we hate,” including even anti-civil liberties messages. The ACLU did this most prominently in “the Skokie case” in 1977-78, successfully defending First Amendment rights of neo-Nazis to demonstrate in Skokie, Illinois, a town with a large Jewish population, including many Holocaust survivors. Nonetheless, in light of new arguments that were advanced in support of campus speech codes in the late 1980s, the ACLU to its credit reexamined its longstanding past position. The new arguments, which are still being pressed on campus today,

¹ As I explain below, this term has no specific, accepted legal definition. To underscore that fact, I put it in quotation marks, as other commentators have done.

maintained that freedom of speech for racist and other “hate speech” on campus undermined the rights to equal educational opportunities that the ACLU also steadfastly championed. (In the past, including in the Skokie situation, the arguments in favor of censoring “hate speech” centered on that speech’s potential instigation of violence and emotional trauma.) After thorough consideration of the new equality-based arguments, the ACLU resoundingly reaffirmed its historic position that speech should never be censored solely because of its disfavored – even despised—message. Moreover, the ACLU concluded that the crucially important goals of promoting equality, diversity, and inclusivity on college campuses would be more effectively promoted through counterspeech and other non-censorial measures. The ACLU accordingly adopted a policy statement, entitled “Free Speech and Bias on College Campuses,” which opposed censoring racist or other discriminatory expression, and instead advocated multiple non-censorial alternative strategies to promote equality and inclusivity on campus. That policy is included at the end of my *Duke Law Journal* article, Appendix A to this testimony.

Increasing recent calls for campus censorship – potential causes

In the words of the ACLU’s principal founder, Roger Baldwin, “No fight for civil liberties ever stays won.” Accordingly, to quote that other sage, Yogi Berra, in the past couple of years, we have been seeing “déjà vu all over again,” with recent campus censorship – and calls for more such censorship – of not only racist speech and other “hate speech,” but even of any speech on any topic that offends a listener. The rhetoric we too often hear on campuses is that students should not be exposed to speech or speakers whose ideas make them “uncomfortable,” or that they find “unwelcome.” Most disturbingly, too many students – as well as faculty members -- ignore the vital distinction between words and conduct, claiming that words are tantamount to physical violence, and therefore seeking the same kind of punishment for words as for physical violence.

Psychologists, sociologists, and other social scientists have proffered various theories about the elements in the psyches of today’s college students, and in today’s culture, which might foster this climate of fear toward words and ideas with which one disagrees. Experts in the humanities have suggested that a contributing factor is post-modernism, with its rejection of traditional distinctions between speech and conduct.

Drawing upon my own expertise and experience, I would like to stress the following contributory factor to the “hostile environment” toward free speech on too many campuses: widespread ignorance about First Amendment freedom of speech principles -- both what they are, and why they are of such critical importance. In particular, too many of today’s campus activists on behalf of such essential goals as equality and justice wrongly believe that freedom of speech is antithetical to those goals; this could not be further from the truth. Throughout our history, freedom of speech has been the greatest engine for positive reform, including racial justice and women’s rights, whereas censorship has been a consistent impediment. In 2016, I wrote an article developing this theme, for a symposium sponsored by the *Brooklyn Journal of Law and Policy* (I attach a copy as Appendix B). I am now writing a book on point, whose title says it all: *HATE: Fighting it With Free Speech, Not Censorship* (Oxford University Press 2018).

The Woodward Report and the Chicago Principles

A classic statement of the governing principles concerning campus free speech and academic freedom was set out in Yale University’s 1974 “Woodward Report,” issued by a committee chaired by the

prominent historian C. Vann Woodward.² These enduring principles continue to apply fully to today's campus free speech controversies, including at Yale itself. Crucially important is the report's insistence on the university's central mission – “to discover and disseminate knowledge” –and its refusal to let other goals undermine that mission, no matter how worthy such goals might be. As the report stated:

[A] University ...is not primarily a fellowship [or] a replica of the civil society outside it. Without sacrificing its central purpose, it cannot make its primary ...value the fostering of ...solidarity, harmony, civility, or mutual respect. To be sure, these are important values; other institutions may properly assign them the highest...priority; and a good university will seek and may in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox.

In 2015, the University of Chicago also adopted a set of free speech principles, which concisely reaffirm the same speech-protective tenets in this current era when they are again under siege.³ On the key point about valuing learning and knowledge over civility and comfort, the Chicago principles declared:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

First Amendment protection for offensive, hateful speech

In the remainder of this statement, I would like to elaborate on the critically important free speech principles that protect even – indeed, especially – the speech that is deemed “offensive,” “unwelcome,” or even “hateful” and hated. These principles are essential in every context in our society, consistent with not only individual liberty, but also democratic legitimacy. Nowhere are they more important, though, than in our campus communities, given their dedication to discovering and disseminating knowledge and truth.

As a lifelong activist for civil liberties and civil rights, I am thrilled by the recent resurgence of student activism in support of social justice. I am also heartened by efforts to amplify and heed the voices of those who traditionally have been marginalized. I am disheartened, though, by the assumption that we can best promote these laudable goals by silencing other voices, including those whose ideas are deemed offensive or hateful. That assumption is reflected in many statements during recent campus debates, and also in opinion surveys. Based on history and my own experience, I firmly believe that robust freedom of speech is absolutely essential for promoting equality, and that this is true even for speech that offends even our most cherished beliefs.

These conclusions were eloquently endorsed by Ruth Simmons, who was Brown University's President from 2001-2012. The first African-American President of any Ivy League university, and Brown's first female President, she had faced much racial and gender discrimination. Yet, in her very

² <http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>

³ <https://freeexpression.uchicago.edu/page/statement-principles-free-expression>

first Convocation Address, President Simmons powerfully explained the unique importance of full free speech on campus, including for “hate speech.” I will quote a few highlights:

The protection of speech that is offensive or insulting to us is one of the most difficult things ...we do. But it is this same freedom that protects us when we are in turn powerless.... Of course, ...we hope that you will all use this freedom responsibly..., that you will not...deliberately assault, intimidate, [or] harass others under the guise of free speech.... However, ...you must not avoid expressing your opinion[s] and engaging those of others. I won't ask you to embrace someone who offends your humanity through...free speech. But I would ask you to understand that the price of your own freedom is permitting th[at] expression.... You know something that I hate? When people say, “That doesn't make me feel good about myself.” I say, “That's not what you're here for.”... I believe that learning at its best is the antithesis of comfort....[So,] [i]f you come to this [campus] for comfort, I would urge you to walk [through] yon iron gate....But if you seek betterment for yourself, for your community and posterity, stay and fight.

In this testimony, I am going to translate President Simmons' poetic oratory into legalistic prose, explaining how the ideals she champions are reflected in First Amendment principles. To start with, let me explain a couple terms. “Offensive speech” and “hate speech” are not legal terms of art, precisely because the Supreme Court has never recognized any general free speech exception for either kind of speech. Therefore, I am going to use both terms as they are usually used in everyday discourse. “Offensive speech” refers to speech that we consider wrong, dangerous, hurtful or harmful in any way, and “hate speech” or “hateful speech” refers to a specific type of offensive speech: namely, speech that conveys biased ideas about certain personal characteristics, including race, religion, gender, and sexual orientation.

Three basic points

Recent surveys show that too many people, including university students, are at best ignorant about free speech principles, and at worst hostile toward them. To me, this shows that free speech proponents have not done as good a job as we must to explain and champion our position. In particular, I think we must better explain three basic points.

First, we must clarify that in some circumstances, hateful, offensive speech may appropriately be regulated and punished, fully consistent with First Amendment principles. To be sure, we may not suppress any speech due to its offensive or hateful content alone. However, we may suppress such speech in particular contexts, when it directly, demonstrably, and imminently causes certain specific, objectively ascertainable serious harms, as the Supreme Court has defined them, including: a genuine threat; targeted harassing or bullying; inciting imminent violent or illegal conduct; and contributing to a “hate crime.” I will explain these contextual concepts below, but at this point, I am raising them to highlight the following important fact: when people call for changing U.S. law so we can suppress offensive speech or “hate speech,” some of the speech that they have in mind may well already be restricted.

Now I will turn to the second point that free speech proponents must explain more clearly: Just because one has the right to say something does not mean that it is right to do so. Therefore, when critics tell us that certain expressions we use are unnecessarily hurtful or insensitive, even unintentionally, then we should choose to rephrase our message whenever we can do so without altering its substance. When we opt to do that, we are exercising our free speech rights, in response to our critics' exercise of their free speech rights. Yes, that kind of criticism can well hurt our psyches and dignity, just as hateful, offensive speech also does. Accordingly, one understandable response to both kinds of hurtful speech

could well be to silence us altogether. We might well choose to remain silent, rather than to subject ourselves to hurtful speech that responds to what we say.

The price of robust freedom of speech is that we all have to bear the slings and arrows of speech that assails us, our ideas and our identities. Free speech proponents have traditionally told targets of hateful, offensive speech that they must bear the burden of that kind of hurtful speech, even though it assaults their self-esteem and their cherished beliefs. Correspondingly, all of us have to bear the burden of speech that charges us with being insensitive or implicitly biased. For all of us who are deeply committed to equality, such charges assault our self-esteem and our cherished beliefs. But that is a price worth paying for both of the great causes at stake, both free speech and equality: freedom of speech that extends equally to all speakers and ideas, including speakers and ideas that have been marginalized.

That brings me to the third point that we free speech proponents have not explained persuasively enough: Why we should not empower officials to suppress the important residual category of constitutionally protected offensive speech or “hate speech.” This protected category consists of all such speech that does not, in context, directly, demonstrably cause the kinds of objectively ascertainable harms I listed earlier.

To be sure, this speech may well cause palpable psychic harms. We protect speech precisely because of its great power to affect our hearts and minds, both negatively and positively. To explain why we do not punish “hate speech” or other offensive speech based solely on its psychic harm, let me quote an old saying: “The cure is worse than the disease.” Even worse than speech’s power to wound is government’s power to pick and choose which among the infinite array of wounding words it will punish. By so doing, government would strip us individuals of the power to choose which powerful words we will utter, and which we will listen to, as well as which ones we will ignore, reject, and answer back.

The Supreme Court strongly reaffirmed these core principles in 2011, in upholding the right to engage in extremely hurtful, hateful speech: picketing outside funerals of slain members of the U.S. military, with picket signs conveying offensive, insulting views toward members of our armed services, Catholics, the Pope, and gay men and lesbians. Over only one dissent, the Court held that this hurtful “hate speech” was constitutionally protected. As it explained:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Evidence indicates that the more people think about these challenging issues, the more they tend to support free speech. After all, it is counter-intuitive to support freedom to voice ideas we ourselves reject, so it is not surprising that our initial, instinctive reaction is that those ideas should be suppressed. This point was acknowledged by no less a free speech champion than former Supreme Court Justice Oliver Wendell Holmes, in his historic opinion declaring that the First Amendment protects “freedom for the thought that we hate.” Holmes recognized, though, our natural tendency to resist this notion. As he explained: “Persecution for the expression of opinions seems ... perfectly logical. If you have no doubt of your premises ... and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.” Holmes then goes on to explain why, on reflection, we must overcome that instinct:

But when [people] have realized that time has upset many fighting faiths, they may come to believe ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market.... [Therefore,] we should be eternally vigilant against attempts to

check the expression of opinions that we loathe and believe to be fraught with death, unless they...imminently threaten the country.

The critical “viewpoint neutrality” principle

As I noted earlier, contrary to much popular misunderstanding, there is no general exception to the First Amendment’s free speech guarantee for speech whose message is offensive or hateful. To the contrary, the Supreme Court has repeatedly reaffirmed that government may never suppress speech just because officials or members of the public disapprove of its message, even if the vast majority of us consider its message absolutely abhorrent. Instead, government must maintain “content neutrality” and “viewpoint neutrality” toward speech’s content, viewpoint, and message.

In support of this crucial principle, I would like to quote someone who speaks with special authority on point: former President Barack Obama. His expertise stems from not only his background as a constitutional law professor, but also his experience as the target of vicious, vile “hate speech.” Yet Obama has strongly endorsed the classic First Amendment view that “hate speech” should be strongly protected, not despite his commitment to combating discrimination but rather, precisely for that reason. In many forums during the last two years of his Presidency, Obama repeatedly stressed this point. For example, he championed campus free speech even for “language that is offensive to African Americans, or ... sends a demeaning signal towards women.” After all, as campus activists in the Black Lives Matter and anti-sexual assault movements remind us, meaningful reform requires candid in-depth conversations about race, sex and gender. Obama made precisely this point:

Being ... an activist, involves hearing the other side and ... engaging in a dialogue because that’s ... how change happens. The civil rights movement happened because ... the leadership ... consistently ... sought to understand the views of the other side, even views that were appalling to them.

Obama likewise has repeatedly championed the time-honored First Amendment precept that the appropriate response to ““hate speech”” is not to suppress it, but rather to refute it, through what is usually called “counterspeech.” As he said: “Anybody ... you disagree with, you should have an argument with them. But you shouldn’t silence them by saying, ‘I’m too sensitive to hear what you have to say.’” Obama has recognized that it may be especially burdensome to students who are targets of ““hate speech”” to answer back, but he also has recognized that this effort is an essential step toward the social reforms they champion: “[Y]es, this ...may put a slightly higher burden on minority students. But you’re not going to make the kinds of deep changes in society that those students want without taking on [their opponents] in a ...courageous way.”

Counterspeech

It is also essential for others to respond to “hate speech” -- not only its targets, but also, especially, other leaders in the pertinent community. On university campuses, the university President, as well as student government organizations and leaders, should also speak out strongly. In response to “hate speech,” they should defend the right to convey even hateful, hated ideas, but they should also denounce such ideas. I like to describe this approach as cen-SUR-ing speech, not cen-SOR-ing it. On this point, I will cite former Harvard President Derek Bok. During his Presidency, some students hung Confederate flags from their dormitory windows, which prompted other students to protest by hanging swastikas from their dormitory windows.

By the way, this incident illustrates the intractable problem of deciding what should count as “hate speech.” Of course, the swastika is deeply identified with Hitler’s anti-semitic and other egregiously hateful ideas, not to mention actual genocide. But the Harvard students who hung the swastika were trying to convey the opposite message; they were condemning the racism that the Confederate flag connoted to them by equating it with the swastika. So, should these swastika displays count as “hate speech,” or as *anti-* “hate speech”?

Harvard President Bok responded to both displays by swiftly issuing a thoughtful statement that strongly criticized them, but also strongly defended free speech both in principle and as the most effective vehicle for fostering an inclusive campus community. I will quote a portion:

The fact that speech is protected by the First Amendment does not necessarily mean that it is right, proper, or civil. [I agree with] the vast majority in this community ...that hanging a Confederate flag or Swastika in public view...is insensitive and unwise . . . because any satisfaction it gives to the students who display these symbols is far outweighed by the discomfort it causes to many others. No community can... become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult. Those who are not malicious but merely insensitive are not likely to learn by having their [displays] torn down...I fear that . . . the resulting publicity [would] eventually attract more attention to the offensive material than would ever have occurred otherwiseIn conclusion, ...our concern for free speech ...keep[s] the University from ...removing the offensive [symbols], but it should not prevent us from urging the students involved to take more account of the feelings and sensibilities of others. Most of the time, I suspect, we will succeed in this endeavor.

Undue vagueness

As the Supreme Court has recognized, freedom of speech is especially endangered whenever the government enforces such inherently vague, subjective concepts as “offensive” or “hateful.” Lacking any clear, objective guidelines, enforcing authorities necessarily exercise their unfettered discretion according to their own subjective tastes or those of politically powerful community members. Therefore, the enforcement patterns will be arbitrary at best, discriminatory at worst. At best, which particular expression will be deemed offensive or hateful, will be completely unpredictable. This causes a “chilling effect” because most people do not want to run the risk of investigation and prosecution, let alone punishment. Consequently, people self-censor, not engaging in expression that might possibly be deemed offensive or hateful by the powers that be.

The unfettered discretion that is required to enforce such vague concepts is also likely to be exercised in a discriminatory way, singling out expression that is produced by or appeals to individuals or groups who are relatively unpopular or powerless.

Constitutionally protected “hate speech”

I will now focus specifically on constitutionally protected “hate speech” because that is the particular type of offensive speech that students consider the most offensive of all. A 2015 Pew Research Center survey showed that 40% of U.S. Millennials supported censoring such speech.

Again, for the reasons that Justice Holmes described, I fully understand the innate appeal of suppressing such odious ideas. We fight against bias and discrimination, so why allow speech that even potentially reflects or promotes them?

My bottom-line answer is that censoring constitutionally protected “hate speech” will actually do more harm than good to the urgently important goals that I wholeheartedly share with proponents of such censorship: eradicating biased attitudes and discriminatory actions. I have already made several points to support this conclusion, including by quoting former Presidents Obama and Simmons. Below I will further explain these and other reasons for our shared conclusion.

Before I do that, though, I want to briefly explain, as I promised, the most important situations in which “hate speech” may be restricted because of some specific, objectively demonstrable serious harm that it directly causes in particular contexts, beyond its adverse mental or emotional impact resulting from its viewpoint alone.

“Hate speech” may be punished in certain specific contexts

First, if “hate speech” conveys a targeted threat to commit a violent or illegal act, which instills reasonable fear in its targets, that speech may be punished.

Second, “hate speech” that is directly targeted at a specific individual or small group of individuals may well also rise to the level of punishable harassment or bullying.

Third, speech that is objectively offensive and sufficiently severe, persistent, and pervasive to undermine equal opportunities at work or in education may constitute “hostile environment” harassment.

Fourth, we may punish any “hate speech” that intentionally incites imminent illegal or violent conduct, which is likely to happen imminently.

Finally, “hate speech” may be punished if it constitutes an element in a “hate crime,” such as assault or vandalism. Government may treat such a crime as more serious, and impose an increased punishment, when its target is singled out for hateful or discriminatory reasons.

In sum, notable instances of “hate speech” are already unprotected, because they directly cause the specific sorts of harm that many people have in mind when they say we should punish “hate speech.” In addition, again, we can and should reduce even constitutionally protected “hate speech” through the important non-coercive means at our disposal, including by engaging in counterspeech, and by sensitively phrasing our own speech to avoid unnecessary offense when we can do so without altering the idea or view we are conveying.

Censoring constitutionally protected “hate speech” will be ineffective in promoting equality

In contrast, though, we should not empower officials to censor constitutionally protected “hate speech.” I agree with former Presidents Obama and Simmons that such censorship is at best ineffective for promoting equality, and at worst counterproductive. Now I will list the most important reasons for that conclusion.

(1) Laws against constitutionally protected “hate speech” are inevitably enforced disproportionately against speech by, and on behalf of, whatever individuals and ideas are relatively marginalized in the particular community. Such dissident, minority perspectives should always be heard in our democracy, not only because of the speakers’ free speech rights, but also so the rest of us can be aware of their views and respond to them. Moreover, in some communities, the marginalized and hence silenced voices will include the very racial and other minority groups who are the intended beneficiaries of the speech-suppressive laws.

(2) Censoring constitutionally protected “hate speech” undermines a mainstay of equal rights movements, which have always been especially dependent on a robust concept of free speech, because

their views have been seen as offensive or even hateful by defenders of the status quo. After all, that's why Martin Luther King wrote his famous letter from the Birmingham *jail*.

(3) Censoring such speech increases attention to, and sympathy for, bigots.

(4) It drives bigoted expression and ideas underground, making it harder to identify who holds them, and harder to refute them.

(5) Censorship necessarily deals with only the crudest, most vulgar expressions of discrimination, leaving untouched the more subtle, insidious, and influential ones.

(6) It deprives those who reject hateful ideas of the opportunity to formulate and articulate responses, and it deprives everyone else of the opportunity to hear such responses. Such debates may well be more effective in repudiating hateful ideas than silencing them would be.

(7) Punishing hateful ideas deflects responsibility from those who actually commit discriminatory or violent acts, by attributing blame to speech.

(8) Likewise, censorship undermines human dignity, autonomy, and moral agency, by assuming that those who hear hateful speech will be negatively influenced by it, rather than critically considering it, rejecting it, and/or responding to it.

(9) In particular, punishing hateful ideas reinforces paternalistic stereotypes about members of minority groups, suggesting that they need special protection from offensive, hateful speech.

(10) Those who are subject to hateful speech will be conditioned to expect a higher authority to punish it, rather than experience the empowerment that comes from responding themselves.

(11) Censoring hateful speech curbs candid intergroup dialogue about racism and other forms of bias, which is an essential precondition for reducing discrimination.

(12) Positive intergroup relations are more likely to result from education and discussions about misunderstandings and insensitivity. By contrast, laws that target constitutionally protected "hate speech" will continue to generate controversy and litigation, and increase intergroup tensions.

(13) Censorship diverts us from more effective strategies for combating discrimination and violence.

Cost-benefit balance

Now I will sum up the balance of what we would gain and what we would lose by censoring constitutionally protected "hate speech." The plus side, from the perspective of those who seek suppression, is quite limited. That is because the new suppression would extend to only a subset of "hate speech," since we may already punish "hate speech" that, in context, directly causes specific serious imminent harms, as I have explained. Moreover, even of that newly suppressable subset, we could only punish yet another subset: the most blatant expressions. Yet, it is the more subtle expressions that are the most insidious. This was well-explained by Professor Henry Louis Gates, Director of Harvard University's Hutchins Center for African and African American Research:

[I]n American society today, the real power commanded by the racist is likely to vary inversely with the vulgarity with which it is expressed....The circles of power have long since switched to a vocabulary of indirection....[T]hose who [seek to restrict "hate speech"] invite us to spend more time worrying about speech codes than coded speech.

Now let's turn to the cost side. Censoring constitutionally protected "hate speech" would cause an incalculable chilling effect on any speech that challenges the prevailing orthodoxy in any community. Furthermore, we would incur the multiple costs to the equality goal that I summarized above. The net loss for both speech and equality were well summarized by Professor Gates:

[Hate] [s]peech codes are symbolic acts. They let a group of people say, “We...are not the sort of community where we would tolerate someone saying ...`rigger’ [sic]. Well, big deal. But there are other ...consequences, like ...the effect on freedom of inquiry. I think we’re all bigger and more secure than that. I think we have to allow people to say even unpopular ...and nasty things in order to protect [our] right to attack our government and say whatever’s on our minds.

Non-censorial alternatives for promoting campus equality

Those of us who champion equality, diversity, and inclusivity on campus have a special responsibility to promote other, non-censorial, approaches that are effective. The ACLU has consistently done that. When it adopted the 1990 policy statement opposing censorship of constitutionally protected “hate speech” on campus, it stressed alternative methods for countering discrimination and promoting equality. More than a quarter century later, that list is still pertinent, because we still have so much work to do on these fronts. I quote from it here:

Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities, the ACLU advocates the following actions by each college and university:

- (a) to utilize every opportunity to communicate ...its commitment to the elimination of all forms of bigotry on campus;
- (b) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any such further incidents;
- (c) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
- (d) to offer and perhaps require all students to take courses in the history and meaning of prejudice, including racism, sexism, and other forms of invidious discrimination;
- (e) to establish new-student orientation programs and continuing counseling programs that enable students of different races, sexes, religions, and sexual orientations to learn to live with each other outside the classroom;
- (f) to review and, where appropriate, revise course offerings as well as extracurricular programs in order to recognize the contributions of those whose art, music, literature and learning have been insufficiently reflected in the curriculum; [and]
- (g) to address the question of *de facto* segregation in dormitories and other university facilities....

The importance of these alternative, speech-respectful strategies, was recently endorsed by Shaun Harper, an African American Professor at the University of Pennsylvania, who is Executive Director of the Center for the Study of Race and Equity in Education. He wrote an op-ed in the *Washington Post* stressing that most Black Lives Matter campus activists are demanding precisely these kinds of non-censorial measures, and that almost none are seeking suppression of racist or other “hate speech:”

When [my institute asks] students of color ...what corrective actions they want administrators to take on their campuses, they say nothing about ...campus speech codes. They tell us they want to be heard, understood and taken seriously. They want white people to recognize the harmful effects of their words and actions. They want greater inclusion of culturally

diverse perspectives in the curriculum, more resources for ethnic studies programs and cultural centers, more people of color in professorships and senior administrative roles. They want educators on their campuses to be more highly skilled at teaching diverse student populations and fostering inclusive learning environments where every student feels respected. They want names of slave owners removed from buildings and statues of white supremacists taken down.

Conclusion

If all of us who are committed to equal justice for all would exercise our precious First Amendment rights, we would wield more positive power, for more positive change, than any censorship could ever do. As Dr. Martin Luther King declared: “In the end, we will remember not the words of our enemies, but the silence of our friends.”