

The Real ACLU†

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INTRODUCTION

Andrea Dworkin's polemic against the American Civil Liberties Union¹ is appropriately entitled "Bait and Switch." While ostensibly attacking the ACLU as anti-feminist and inimical to the rights and needs of women and other disadvantaged groups, Dworkin in fact seeks to discredit an organization that doesn't exist. The real ACLU is and has been for many years something quite different from the white-male-dominated² monolith she first imagines and then condemns, primarily for its alleged monomaniacal devotion to disembodied principles in callous disregard of real harms to real people.³ The real ACLU—the one with which the authors of this essay have been associated for more than fifteen years—was infiltrated and transformed by women, feminists, and feminist ideas, long ago. The real ACLU celebrates and defends the importance of first amendment values, especially unfettered speech,⁴ but it also proclaims, nurtures, and struggles to secure for women and historically disempowered minorities⁵

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1. Dworkin, *The ACLU: Bait and Switch*, 1 *YALE J.L. & FEMINISM* 37 (1989). We might have subtitled this article "A Reply to Andrea Dworkin," but we believe it goes beyond that.

2. *Id.* at 38. Dworkin focuses on male rather than white male domination. However, since she criticizes ACLU representation of groups organized to further white as well as male supremacy, *id.* at 38-39, adding the racial adjective seems true to her purpose.

3. *Id.* at 39.

4. See generally Policy Guide of the American Civil Liberties Union, Policy No. 1-40, at 1-84 (rev. ed. 1989) [hereinafter *National ACLU Policy Guide*]. The word "unfettered" is used to avoid any confusion about the connotation of the word "free." Cf. Dworkin, *supra* note 1, at 37 ("Speech is what I do; it ain't free; it costs a lot.") (italics deleted).

5. We generally use the term "minorities" rather than "people of color" because the groups we intend to signify include those differentiated by characteristics other than race or ethnicity, such as religion, sexual orientation, or physical disability. We recognize, however, that the term may "impl[y]

the fourteenth amendment's enduring promises of equality and nondiscrimination.⁶

In trying to illuminate the real ACLU—and to dispel some of the shadows that Dworkin purports to cast over it—we have not organized this article on a purely linear basis. Some of it provides facts about the ACLU. Some of it is written as an explicit or implicit, imagined dialogue with Dworkin. Sometimes our answers go beyond her arguments. Our purpose throughout is to provide a feminist perspective on the ACLU, to explain why we consider it a feminist (though not exclusively feminist) organization, to examine our doubts and differences, and to construct a (perhaps imperfect and incomplete) resolution. Part I provides a feminist history of the ACLU. Part II refutes some of Dworkin's assertions of fact and theory. Part III explores and explains the ACLU's continued pursuit of both freedom of speech and equality of rights.

I. A FEMINIST HISTORY OF THE ACLU

The real ACLU works to defend and extend civil liberties and civil rights in the real world, in places and times (such as here and now) of trouble, complexity, ambiguity, and contradiction. We try to transcend the limitations of our era and of our collective wisdom, but sometimes we fail. The sexism that has pervaded and distorted American democracy and law for two hundred years has not passed us by.

The ACLU was created in 1920 to combat the repression of civil liberties in the industrial struggle after World War I.⁷ Its primary founder was Roger Baldwin, an astute visionary who remained the ACLU's national director for nearly thirty years.⁸ Baldwin was an outspoken liberal and a friend and colleague of the political radical Emma Goldman.⁹ He strongly empathized with the powerless and the despised. He believed fiercely that free speech provides the matrix for all other rights and liberties. He insisted on the evenhanded application of civil liberties to all groups, no matter how powerful or pernicious, though he did not always live up to his own ideal of impartiality.¹⁰ He stressed political nonparti-

a certain delegitimacy in a majoritarian system" and in fact describes groups that in the aggregate are a majority. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987).

6. See generally National ACLU Policy Guide, *supra* note 4, Policy No. 301-31, at 370-428.

7. See S. WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 42-47 (1990).

8. See generally P. LAMSON, ROGER BALDWIN: FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION (1976).

9. See *id.* at x (Baldwin's "public life . . . is also the history of liberal thought during nearly three-quarters of a century . . .").

10. Most notably, he acquiesced in the ACLU's 1940 resolution denying membership to supporters of totalitarian principles or governments, S. WALKER, *supra* note 7, at 130-32, and played an important role in the ACLU's expulsion that same year of Communist party members, including ACLU national board member Elizabeth Gurley Flynn. The ACLU finally repented, retracting Flynn's expulsion in 1976. P. LAMSON, *supra* note 8, at 223-36.

sanship as an organizational imperative. These basic tenets still shape the ACLU today.¹¹ Nonetheless, Baldwin could also be described as a white male elitist who controlled the organization for many years and stamped his image upon its program and its structure.¹² Although he encouraged others to join the civil libertarian cause, he trusted no one but himself to lead the way.¹³ While he appreciated the contribution of women to the ACLU, his praise sometimes sounded like condescension.¹⁴ The ACLU has come a long way since then, but from a feminist perspective, we know that we still have some distance to go.

And yet women and women's issues have always played a bigger role in the ACLU than Dworkin surmises. The ACLU's founders and early leaders included prominent feminists such as Jane Addams, Sophonisba Breckenridge, Mary Ware Dennett, Crystal Eastman, Elizabeth Gurley Flynn, and Jeannette Rankin.¹⁵ The ACLU took on feminist cases and causes as early as the 1930's. It opposed laws that forced pregnant schoolteachers out of their jobs and kept them out even after childbirth. It was an early advocate of equal pay for equal work. Perhaps most crucial, the ACLU acknowledged the direct link between open discussion of contraception, actual control over reproduction, and full autonomy for women. It lobbied against federal and state laws banning birth control information and contraceptives. It defended pioneers like Dennett, who was prosecuted for distributing information about sex education, and Margaret Sanger, whose speeches were banned not only in Boston but also in New York and other cities.¹⁶ In the 1940's the ACLU established a Committee on Women's Rights to guide its efforts. In the 1950's it lobbied for tax deductions for child care. In a combined assault on sex and race discrimina-

11. Interview with Norman Dorsen, president of the national ACLU, Nov. 3, 1989. Other Baldwin legacies include a stress on lay (as opposed to staff) leadership, a recognition of the need for local ACLU affiliates throughout the country (despite his preference for centralized authority), and a deployment of multiple strategies, including political action and public persuasion as well as litigation. *Id.* See also S. WALKER, *supra* note 7, at 47 (Baldwin originally preferred militant, direct action to litigation); National ACLU Policy Guide, *supra* note 4, Policy No. 1, at 1 (ACLU opposes "any official determination that deprives any form of expression of the protection of the First Amendment."); *id.*, Policy No. 519, at 505 (ACLU "does not endorse or oppose candidates for elective or appointive office" except nominees for United States Supreme Court whose appointment would "fundamentally jeopardize the Court's historic and critical role in protecting civil liberties").

12. See P. LAMSON, *supra* note 8, at 136, 265; S. WALKER, *supra* note 7, at 204, 267.

13. See S. WALKER, *supra* note 7, at 46, 67, 69.

14. See ACLU, WOMEN'S RIGHTS PROJECT, ACLU WOMEN'S RIGHTS REPORT 2 (Spring 1980). Baldwin affirms that in building the ACLU, "Women played a very active and useful role all over the country, mostly on our local committees. . . . [I]t was for the most part women who raised the money, organized the affiliates and staffed the committees. They did the day-to-day, nuts and bolts work to build the ACLU." *Id.* at 11.

15. The information in this and the following paragraph is drawn in part from ACLU, WOMEN'S RIGHTS PROJECT, WITH LIBERTY AND JUSTICE FOR WOMEN (1989) and ACLU WOMEN'S RIGHTS REPORT, *supra* note 14. See also P. LAMSON, *supra* note 8, at 127-31; S. WALKER, *supra* note 7, at 84.

16. S. WALKER, *supra* note 7, at 61-62, 84-85.

tion, the ACLU successfully challenged state laws making it a crime for a white woman to bear a child she had conceived with a black father.

During this era the ACLU, along with almost every major feminist organization,¹⁷ opposed the Equal Rights Amendment on the basis that it would nullify protective labor legislation for women workers. In this stance the ACLU was true to its roots in the social reform and labor movements of the early 1900's. But the rise of a new feminist consciousness in the 1960's transformed the ACLU's approach to women's issues. Women lawyers, scholars, and activists within and without the ACLU explored new issues as well as new perspectives on old issues.¹⁸ In 1970, with almost no dissent, the ACLU National Board reversed its stand on the ERA, criticizing the Supreme Court of the United States for failing to apply the fourteenth amendment to sex discrimination.¹⁹ Since then the ACLU has opposed protective laws applicable only to women because they lead to "the denial of desirable employment, the promotion of occupational segregation, the furtherance of women's economic dependence, and perpetuation of the notion that childbearing and childrearing are women's most important roles."²⁰

In the 1960's the ACLU was the first organization to argue in the Supreme Court for the abortion rights of all women. In the early 1970's the ACLU declared women's rights its top priority and created both the Women's Rights Project to seek constitutional equality through litigation and the Reproductive Freedom Project to enforce and expand contraception and abortion rights it had helped secure through such major decisions as *Griswold v. Connecticut*²¹ and *Doe v. Bolton*,²² the companion case to

17. The primary exception was Alice Paul's National Woman's Party, comprised mostly of professional and upper-middle-class women, which originally proposed the ERA. See J. MANSBRIDGE, *WHY WE LOST THE ERA* 8 (1986); S. WALKER, *supra* note 7, at 166-67. However, beginning in the 1930's with the National Association of Women Lawyers and the National Federation of Business and Professional Women's Clubs, support for the ERA widened; by the 1950's, leaders of both major political parties supported the ERA. J. MANSBRIDGE, *supra*, at 9. By 1970, when the ACLU reversed its position, the invalidation of women-only protective labor laws by judicial interpretation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982), had largely mooted union opposition to the ERA. J. MANSBRIDGE, *supra*, at 10. See also *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* 3-35 (J. Hoff-Wilson ed. 1986)(discussing origins of and early disagreement over the ERA).

18. Among the most important advocates of change within the ACLU were Ruth Bader Ginsburg, now Judge of the United States Court of Appeals for the District of Columbia Circuit, who served as ACLU general counsel, argued several women's rights cases before the Supreme Court, and was a primary founder of the Women's Rights Project; and feminist lawyers and leaders Dorothy Kenyon, Pauli Murray, and Harriet Pilpel, all of whom served for many years on the ACLU National Board and led committees working to establish women's rights. See S. WALKER, *supra* note 7, at 301-02, 304-05. Kenyon was the first ACLU activist to support abortion rights. *Id.* at 167. Pilpel, general counsel for both the ACLU and Planned Parenthood, prodded the ACLU to take an early stand against laws criminalizing abortion and homosexual relationships. *Id.* at 301-02.

19. *ACLU's 36 Year Fight for Women's Rights*, ACLU WOMEN'S RIGHTS REPORT, *supra* note 14, at 2, 4.

20. National ACLU Policy Guide, *supra* note 4, Policy No. 315, at 395.

21. 381 U.S. 479 (1965) (constitutionally protected "zone of privacy" forbids state punishment of married couple for using contraceptives). ACLU involvement is documented in ACLU WOMEN'S

Roe v. Wade.²³ After Congress restricted federal funding of abortions for indigents, the ACLU National Board resolved in 1977 that a primary goal was to establish abortion rights for all women. In recent years the ACLU has litigated extensively to protect women's reproductive self-determination, participating in almost every major Supreme Court case²⁴ and handling eighty percent of all such cases nationwide.²⁵ Two of the

RIGHTS REPORT, *supra* note 14, at 3.

22. 410 U.S. 179 (1973) (state may not require all abortions to be performed in hospitals or only after approval of a doctor or committee other than the woman's physician). ACLU involvement is documented in ACLU WOMEN'S RIGHTS REPORT, *supra* note 14, at 6.

23. 410 U.S. 113 (1973) (constitutional right of privacy encompasses woman's decision whether or not to terminate her pregnancy).

24. According to Reproductive Freedom Project dockets and annual reports (sources available with authors), among the major Supreme Court abortion cases in which the ACLU provided direct representation for women and/or abortion providers are: *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989) (state may ban use of public employees, facilities, and resources to aid abortions and may require medical tests of fetal viability); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (state statute requiring doctor to use abortion technique that maximizes chance of fetal survival except where it poses significantly greater risk to life or health of pregnant woman is unconstitutional); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (state may neither require abortion providers to inform pregnant women of details of fetal development, risks of abortion, or available social services nor impose 24-hour waiting period after patient signs consent form; mature minor or one who can show abortion is in her best interests must have opportunity to obtain it through judicial proceeding as well as through parental consent); *H.L. v. Matheson*, 450 U.S. 398 (1981) (state may require doctor to notify, if possible, parents of immature minor seeking abortion who has made no showing that abortion or waiver of notice would serve her best interests); *Harris v. McRae*, 448 U.S. 297 (1980) (government may refuse to pay for indigent women's medically necessary abortions even though it pays for medical costs of childbirth); *Bellotti v. Baird*, 443 U.S. 622 (1979) (state may protect immature minors by requiring some parental involvement in abortion decision); *Colautti v. Franklin*, 439 U.S. 379 (1979) (state may not require doctor to maximize fetal survival chances at cost of greater risk to woman's life and health); *Maher v. Roe*, 432 U.S. 464 (1977) (government may refuse to pay for indigent women's elective abortions even though it pays for medical costs of childbirth); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state may not ban medically safe abortion techniques, require burdensome or privacy-invasive recordkeeping on abortions, or give husband or parents absolute veto over abortion, but may require woman's written informed consent); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (state may not ban advertising by abortion clinics); *Doe v. Bolton*, 410 U.S. 179 (1973) (state may not require all abortions to be performed in hospitals); *United States v. Vuitch*, 402 U.S. 62 (1971) (law criminalizing doctor's performance of abortion unless necessary to preserve pregnant woman's life or health requires prosecution to prove abortion physically and psychologically unnecessary).

25. The percentage figure is based on a nationwide study conducted by the ACLU's Reproductive Freedom Project in 1989.

For example, the ACLU affiliates in Northern and Southern California have actively litigated and lobbied for abortion rights in that state for twenty years. Cases litigated by those affiliates include: *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (where state provides funds for medical treatment of indigents, including costs of childbirth, state refusal to pay for poor women's elective abortions violates state constitutional rights of privacy and procreative choice); *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (state constitution guarantees women's fundamental right to decide whether or not to bear a child). For documentation of ACLU involvement, see S. WALKER, *supra* note 7, at 303. In 1989, for the twelfth year in a row, the ACLU's California affiliates blocked severe legislative restrictions that would have denied state funding for approximately 90% of abortions performed for indigent women under Medi-Cal (Medicaid). See *Committee to Defend Reproductive Rights v. Kizer*, No. A046516 (Cal. App. 1st Dist., Aug. 16, 1989) (enjoining restrictions in 1989 Budget Act), *hearing denied*, No. S012194 (Cal., Nov. 16, 1989). See L.A. Times, Nov. 17, 1989, at A3, col. 1 (reporting California Supreme Court's denial of review and explaining restrictions); L.A. Times, July 13, 1989, § 1, at 3, col. 6 (Cal.App. 1st Dist.) (reporting July 12, 1989 issuance of preliminary injunction).

three abortion cases originally scheduled for hearing by the Supreme Court during the 1989-90 Term are ACLU cases.²⁶

The first Women's Rights Project case to reach the Supreme Court was *Reed v. Reed*,²⁷ a landmark that established gender discrimination as a violation of the fourteenth amendment's equal protection clause. In *Frontiero v. Richardson*²⁸ in 1973, the ACLU persuaded four Justices to declare sex a suspect classification comparable to race²⁹—as close as the Court has yet come to acknowledging the true power and intransigence of sex discrimination in our society. The ACLU also has won Supreme Court decisions prohibiting the systematic exclusion of women from juries,³⁰ equalizing social security benefits for women workers,³¹ rejecting sex-segregated higher education,³² protecting equal employment rights and opportunities for women,³³ and ensuring women's equal access to business and professional organizations that traditionally were exclusively male.³⁴ A study published in 1983 concluded that the ACLU was the single most effective representative of women's rights in the courts nation-

26. They are *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (upholding as constitutional a state statute requiring a minor seeking an abortion either to obtain a court order or to notify both of her biological parents, even if they are absent, divorced, or never married), *cert. granted*, 109 S. Ct. 3240 (1989) (Nos. 88-1125, 88-1309); and *Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988) (invalidating as unconstitutional state statutes requiring doctors to perform all abortions in hospitals or stringently regulated surgical centers instead of outpatient clinics or doctors' offices), *cert. granted*, 109 S. Ct. 3239 (1989) (No. 88-790). As this article was prepared for publication, *Ragsdale* apparently was settled, subject to Court approval. *L.A. Times*, Nov. 23, 1989, at A1, col. 5. ACLU involvement is documented in ACLU, *REPRODUCTIVE FREEDOM PROJECT 6-8* (Annual Report 1988).

27. 404 U.S. 71 (1971) (state may not provide mandatory preference for male over female applicants to administer decedent's estate). ACLU involvement is documented in ACLU *WOMEN'S RIGHTS REPORT*, *supra* note 14, at 5.

28. 411 U.S. 677 (1973) (fifth amendment due process clause forbids federal government to provide automatic dependent's benefits to spouses of male members of the armed services while denying such benefits to spouses of female members unless the male spouses actually received over half their support from their military wives). ACLU involvement is documented in ACLU *WOMEN'S RIGHTS REPORT*, *supra* note 14, at 7.

29. *Id.* at 682 (plurality opinion).

30. *Duren v. Missouri*, 439 U.S. 357 (1979) (invalidating state law that provided automatic jury exemption for women who so requested); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating, under sixth amendment, jury selection system that operated to exclude women). ACLU involvement is documented respectively in ACLU *WOMEN'S RIGHTS REPORT*, *supra* note 14, at 9, 7.

31. *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating social security provision awarding automatic widow's benefits but denying widower's benefits unless the male spouse received at least half his support from his deceased wife); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating social security provision awarding benefits to widows but not widowers responsible for dependent children). ACLU involvement is documented in ACLU *WOMEN'S RIGHTS REPORT*, *supra* note 14, at 8.

32. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating state's maintenance of female-only nursing school partly because it perpetuated stereotype of nursing as women's work).

33. *Turner v. Department of Employment Sec. of Utah*, 423 U.S. 44 (1975) (invalidating denial of unemployment benefits to pregnant women). ACLU involvement is documented in ACLU *WOMEN'S RIGHTS REPORT*, *supra* note 14, at 8.

34. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) (men's business and professional club cannot assert first amendment rights of association to avoid compliance with California statute banning discrimination against women).

wide, and credited the ACLU for much of the "high success rate" of sex discrimination cases in the Supreme Court.³⁵

Within the ACLU, power is no longer concentrated in the hands and minds of white males. In 1970, the national ACLU adopted an affirmative action policy "to increase significantly the representation of women on all policy-making bodies and committees of the organization" and "to open up to women all executive and policy-making staff positions." In 1980, it established a goal of twenty percent racial or ethnic minorities and fifty percent women at every level of staff employment. Shortly thereafter the same percentage goals were set for membership on the ACLU National Board.³⁶ Women and racial minorities now act in leadership roles throughout the organization. Women occupy more than a third of the positions on the national board of directors.³⁷ Two of the four lawyers who serve as national general counsel are women; another is a black male.³⁸ Although national ACLU presidents and executive directors to date have all been white males, two of the five top national ACLU staff members are women; two, including the legal director, are black (one male, one female). Women direct six of the ACLU's eleven major national projects, those concerned with children's rights, gay and lesbian rights, national security litigation, reproductive freedom, women's rights, and the civil liberties of persons with AIDS. Women and minorities have also played increasingly prominent roles within the ACLU affiliates.³⁹

35. "[T]he ACLU's presence in a case increased the chances of success for a gender-based claim by 16 per cent." O'Connor & Epstein, *Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134, 142 (1983). See also K. O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 123-27 (1980); Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373 (1976).

36. National ACLU Policy Guide, *supra* note 4, Policy No. 526, at 515-22.

37. As of April 1989, the 31 ACLU national board members who had been elected at-large included 14 women (45%) and seven minorities (23%). The 51 national board members who represented ACLU affiliates (generally state-wide organizations, although California has three separate affiliates) included 16 women (31%) and four minorities (8%). ACLU Nominating Committee Memorandum at 3, 7, (June 4, 1989). In 1970, when the ACLU first endorsed internal affirmative action, only five (8%) of its 66 national board members were women. S. WALKER, *supra* note 7, at 305.

38. They are Professor Strossen, Professor Vivian Berger of Columbia Law School, and Professor Leroy Clark of Catholic University School of Law.

39. For example, since 1977 the presidents of the Southern California ACLU affiliate have been three women and two minorities (both Latino males). Women have served as executive directors of the Southern California affiliate since 1972, the Northern California affiliate since 1978, and the San Diego affiliate since it was created in 1988. The Southern California affiliate's affirmative action policy for staff employment sets minimum goals of one-half women and one-third racial or ethnic minorities. Policy Guide of the ACLU of Southern California, Policy No. 526, at 106-16 (rev. ed. 1987). The affiliate's bylaws require that of its 45 directors elected at-large, at least one-half shall be women and one-third shall be racial or ethnic minorities. Bylaws of the American Civil Liberties Union of Southern California, art. ix, § 6, at 19-20 (1988).

II. SOME REFUTATIONS OF DWORKIN'S CRITICISMS

Of course, such examples of good works and good will do not prove that the ACLU is a feminist organization as Dworkin defines that term. She accuses the ACLU of "working both sides of the street"⁴⁰ because it promotes freedom of speech for everyone, regardless of content or form, regardless of politics or ideology, and even (in some circumstances) regardless of the harms that may follow. By thus easing the way for racist and misogynist hate groups, Dworkin charges, the ACLU forfeits any claim to respect as a champion of equal rights for the people those groups condemn. Her arguments deserve a genuine reply. But her attack bristles with inaccuracies, distortions, quarter-truths, and intemperate language that combine to skew the framework for discussion. They must be answered first, to provide a context that is closer to the complex and multifaceted truth.

Dworkin incorrectly contends that in 1975 the ACLU "rope[d] in feminists" to pretend that it was a "strong feminist organization" when it was not.⁴¹ Yet by then both the Women's Rights Project and the Reproductive Freedom Project were actively lobbying and litigating on behalf of a wide variety of feminist causes. The feminists who supported the ACLU then and who support it now have never been deceived. They chose and choose to support its program because they recognize that it benefits women.

In addition, Dworkin asserts that "[t]he ACLU is immune to criticism because virtually none gets published—none on the Left."⁴² She thus imagines the ACLU as an integral link in a liberal power structure that chains and gags dissent, especially female dissent,⁴³ though she inconsistently personifies the ACLU as a single-minded, strong-armed, strident-voiced (and presumably male) bully for the first amendment. But the facts don't fit her theory. Over the years the ACLU has repeatedly and publicly been censured by rightists, centrists, and leftists. Its outspoken critics include conservative scholar William A. Donohue,⁴⁴ President George Bush and former Attorney General Edwin Meese III,⁴⁵ Harvard law professor Alan M. Dershowitz,⁴⁶ liberal activists and columnists,⁴⁷ prominent

40. Dworkin, *supra* note 1, at 39.

41. *Id.*

42. *Id.* at 37.

43. *See id.* at 39 (an example of using strong language to distort the facts and to distract the reader's attention from the distortion: "The symbol of free speech ACLU-style might well be a woman tied, chained, strung up, and gagged.").

44. *See generally* W. DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* (1985) (charging that the ACLU has a left-wing agenda).

45. *See* Ledbetter, *After Bush's A.C.L.U. Smear New Members, New Problems*, 248 *THE NATION* 442 (Apr. 3, 1989); Leeds, *The A.C.L.U.: Impeccable Judgments or Tainted Policies?*, *N.Y. Times*, Sept. 10, 1989, § 6 (Magazine), at 72.

46. *See* Dershowitz, *ACLU Takes a Wrong Turn*, in A. DERSHOWITZ, *TAKING LIBERTIES: A DECADE OF HARD CASES, BAD LAWS, AND BUM RAPS* 139-41 (1988). Dershowitz launches an attack almost exactly opposite to Dworkin's, contending that "[t]he ACLU and many of its local affiliates have increasingly become the captive of feminists and leftists in recent years. Women's issues,

members of the National Lawyers Guild (who condemned the ACLU for “poisonous evenhandedness” in defending the free speech rights of groups that oppose free speech),⁴⁸ and Victor S. Navasky, editor of *The Nation* magazine.⁴⁹ The authors of three profiles of the ACLU, published in 1966, 1978, and 1989 in *The New York Times Magazine*, discovered and rediscovered, and quoted at length, detractors whose dissatisfaction with the ACLU prefigured (though in different rhetorical style) the charges that Dworkin makes.⁵⁰

In arguing that “[t]he ACLU, in philosophy and practice, makes no distinction between Right and Left,”⁵¹ and that the ACLU’s “fight is not against the Right in any form,”⁵² Dworkin takes a quarter-truth and bends it to mislead. In reality, the ACLU makes no distinction between the constitutional rights and liberties (free speech, due process, privacy, equal protection) of the political right and left; but ACLU policies recognize, and its programs act to remedy, the differences between historically dominant and oppressed groups. The ACLU endorses affirmative action to redress racial, sexual, and sexual-orientation discrimination in employment, education, and housing.⁵³ It asserts the rights of privacy and intimate association on behalf of gays and lesbians.⁵⁴ It advocates governmental neutrality on religious matters.⁵⁵ It opposes military conscription and

particularly the right to have an abortion, have dominated the agenda.” *Id.* at 140–41.

Professor Dershowitz’s nationally syndicated column has frequently criticized the ACLU for straying from his view of civil liberties. *See, e.g.*, A. DERSHOWITZ *supra*, at 90–91, 96, 141–43, 264–65 (reprinting columns).

47. *See, e.g.*, Crawford, *A Republican Reviews the Case for ACLU*, *L.A. Times*, Oct. 2, 1988, § 5, at 1, col. 1 (quoting remarks by, among others, John P. Roche, former chairman of the Americans for Democratic Action, left-of-center columnist Michael Kinsley, and liberal columnist Mary McGrory); Hentoff, *Chicago Shows Us Yokels How to Leash a Red Squad*, *The Village Voice*, June 24–30, 1981, at 8 (praising ACLU settlement of Chicago police spying case but criticizing less restrictive ACLU settlement of New York police spying case); Ledbetter, *supra* note 45.

48. *See* A. NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* 86–87 (1979) (quoting National Lawyers Guild attack on the ACLU for defending civil liberties of Ku Klux Klan members and Nazis); Lukas, *The A.C.L.U. Against Itself*, *N.Y. Times*, July 9, 1978, § 6 (*Magazine*), at 9, 11 (same).

49. *See* V. NAVASKY, *NAMING NAMES* 48–51 (1980) (criticizing ACLU leaders for compromising civil liberties by actions during 1940’s and ’50’s including expulsion of Communists, refusal to represent Communists, and secret collaboration with FBI).

50. Leeds, *supra* note 45; Lukas, *supra* note 48; Samuels, *The Fight for Civil Liberties Never Stays Won*, *N.Y. Times*, June 19, 1966, § 6, at 14, 66. Internal and external criticism of the ACLU’s defense of free speech for Nazis extends back at least to 1934. *See* S. WALKER, *supra* note 7, at 116.

51. Dworkin, *supra* note 1, at 38.

52. *Id.* at 38–39.

53. National ACLU Policy Guide, *supra* note 4, *id.*, Policy No. 301, at 370, 372; Policy No. 306, at 380–82.

54. *Id.*, Policy No. 264, at 349–50.

55. *Id.*, Policy No. 80–84, at 159–66. In the Scopes trial of 1925, perhaps the ACLU’s most famous trial court loss, Clarence Darrow argued for evolutionary theory and academic freedom against the religious right. *See, e.g.*, S. WALKER, *supra* note 7, at 72–75. The ACLU defended religious neutrality—this time successfully—again six decades later in response to Louisiana and Arkansas statutes that required public schools to teach biblical “creation science” as well as evolution. *See* *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute violates first amendment prohibition on establishment of religion); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982) (same); S. WALKER, *supra* note 7, at 342–43, 439. ACLU cases challenging the display of religious symbols on

compulsory draft registration, and supports conscientious objection to military service.⁵⁶ It upholds workers' rights to organize and to strike.⁵⁷ All of these ACLU positions—in addition to its support for women's reproductive freedom and equal rights—have long been associated with the political left. All of them have time and again brought the ACLU into conflict with the conservative and reactionary right.

Contrary to Dworkin's contention, the ACLU does not expend significant resources in defending the freedom to denounce racial minorities or to demean women through pornographic stereotypes.⁵⁸ Such cases represent a tiny fraction of its docket and its budget.⁵⁹ The ACLU does expend significant resources to combat all forms of discrimination against traditionally—or newly—oppressed groups, through projects devoted to furthering the rights not only of women, but also of children, gays and lesbians, workers, immigrants, prisoners, and persons with AIDS. For the past several years, the ACLU's national legal department has focused on civil liberties issues related to race and poverty. The ACLU supported racial equality and backed the civil rights movement in its early years, publishing its own study of legalized racism in 1931 and working with NAACP lawyers to begin planning the attack on segregation.⁶⁰ It provided funds and lawyers to defend civil rights activists in the 1960's and has lobbied extensively on behalf of civil rights legislation, including most recently the Civil Rights Restoration Act of 1987.⁶¹ The ACLU's Voting Rights Pro-

public property include *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989) (creche display in county courthouse violates first amendment bar on establishment of religion; menorah display next to Christmas tree outside city and county building is permissible recognition of cultural diversity).

56. National ACLU Policy Guide, *supra* note 4, Policy No. 120-21, at 222-26. The ACLU also brought the first case challenging racial segregation in the military, *S. WALKER*, *supra* note 7, at 165-66, and litigated and lobbied against United States involvement in the Vietnam war, *id.* at 286. A recent ACLU case unsuccessfully challenged, on first amendment grounds, the military practice of prosecuting only those draft nonregistrants who publicly opposed compulsory registration. *Wayte v. United States*, 470 U.S. 598 (1985).

57. National ACLU Policy Guide, *supra* note 4, Policy No. 48-49, at 97-99. In 1924, the ACLU won its first free speech case in court by defending the rights of striking workers to congregate and picket. *S. WALKER*, *supra* note 7, at 77-78. One of its best-known early Supreme Court victories came in a similar case, *Hague v. CIO*, 307 U.S. 496 (1939). ACLU involvement is documented in *S. WALKER*, *supra* at 110-11, 400.

58. See Dworkin, *supra* note 1, at 39 (ACLU resources are "depleted by defenses of the violent Right.").

59. Recently, out of a total annual caseload of more than 6,000, the ACLU has handled about five or six cases a year involving racist speech. N. Strossen, Remarks responding to the paper presented by Professor Charles Lawrence at the 1989 ACLU Biennial Conference plenary session, "Racism on the Rise" 7 (June 15, 1989) (available from national ACLU) (revised version forthcoming in DUKE L.J.). Pornography cases handled by the ACLU are also small in number. Because neither type of case typically involves disputed facts, they are not expensive to litigate.

60. *S. WALKER*, *supra* note 7, at 88-90. Although the ACLU was not initially involved in the infamous Scottboro cases, in which nine young black men were convicted of raping two white women after sham trials before an all-white jury, ACLU attorney Walter Pollak argued and won the first of the cases to reach the Supreme Court. *Id.* at 91. See *Powell v. Alabama*, 287 U.S. 45 (1932) (conviction reversed because of denial of adequate counsel).

61. See *S. WALKER*, *supra* note 7, at 162-63, 262-70. The Civil Rights Restoration Act is Pub. L. 100-259, 102 Stat. 28 (1988) (codified primarily at 20 U.S.C. §§ 1687-88 & 42 U.S.C. § 2000d-4a

ject has helped to empower black voters throughout the southern United States and has facilitated the election of hundreds of black officials.⁶² In addition, ACLU affiliates have allocated substantial resources to civil rights cases.⁶³

Also contrary to Dworkin's contention,⁶⁴ 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.

III. SOME JUSTIFICATIONS FOR THE ACLU'S SUPPORT OF FREE SPEECH IN AN IMPERFECT WORLD

The real ACLU is not the juggernaut that Dworkin's verbal assault presupposes. Though ACLU activists unite in believing that the political process renews and rejustifies itself only when dissent is encouraged to flourish, we divide—and agonize over our divisions—when the speech we defend furthers the social evils of sexism, racism, prejudice, and despair. Because racial domination and gender oppression have proved stubbornly intransigent, because our nation's social and political consensus still seems to exclude an active commitment to equal justice, some of us in the ACLU no longer adhere to what we view as the discredited argument that "neutral principles"⁶⁵—instead of explicit choices among differing values—will

(Supp. 1989)).

62. See S. WALKER, *supra* note 7, at 356–57.

63. For example, the Southern California ACLU successfully challenged school and housing segregation and miscegenation laws as early as 1946. S. WALKER, *supra* note 7, at 239. The ACLU-SC initiated and provided lead counsel for the major school desegregation cases in Los Angeles and Pasadena. This litigation spanned more than 20 years. See, e.g., Crawford v. Board of Educ., 458 U.S. 527 (1982), *aff'g* 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Crawford v. Board of Educ., 17 Cal.3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

64. Dworkin, *supra* note 1, at 38.

65. The seminal argument that neutral principles are necessary to legitimize judicial review of legislative acts appears in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (focusing on neutrality and generality in application of principles without regard to results generated in particular cases to which the principles apply). See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971) (principles must also be neutral in definition and derivation). For (relatively) early criticism, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968). For a thoughtful attempt to reconcile Wechsler and his critics, see Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978) [hereinafter Greenawalt, *Neutral Principles*] (neutral principles are necessary but not sufficient; judges still must choose among conflicting values in deciding constitutional cases). Cf. Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 123 n.11 (1989) [hereinafter Greenawalt, *Justifications*] ("basic premises of

resolve most important legal and moral questions.⁶⁶ For us the tension between equality and liberty is in some circumstances real and perplexing; even the ACLU's traditional focus on impartial protection of free speech can be questioned from the perspective of those who have been traditional targets of its indiscriminate exercise. We wonder whether it is too easy for those individuals and groups who benefit from competitive norms of social and political interaction and from the primacy of procedural fairness in classical liberal theory, to deny or denigrate the perceptions, needs, and rights of those who more often lose than win.⁶⁷ But some of us in the ACLU continue to insist that in the end, and in service of the ends we seek, liberty and equality reinforce each other. We contend that the ACLU should remain one of the last strong refuges for the process-oriented, content-impartial norms of traditional liberalism—a philosophy and politics that empowered, and provided a moral foundation for, both the civil rights movement of the 1960's and the feminist revival of the 1970's.⁶⁸ Out of such fundamental arguments, which perhaps can never be fully resolved, the ACLU nonetheless renews its own strength, and determines when and how to speak and act on questions of public policy that involve civil rights and civil liberties.

That Dworkin disagrees with some of the ACLU's positions is no surprise. It is more surprising that, despite her opposition to pornography, she invokes apparent sexual imagery in accusing the ACLU of serving as "a handmaiden of the pornographers, the Nazis, and the Ku Klux Klan."⁶⁹ To turn her metaphor around, such a characterization is a kind of verbal rape, meant to violate the identity and the integrity of the rhetorical victim. In contending that "the ACLU saw to it that the Nazis marched in Skokie"⁷⁰ (although the Nazis didn't)⁷¹ and that it seeks "an

liberal democracy" do not include "neutrality among ideas of the good").

Some adherents of legal realism and critical legal studies have argued that there are no neutral principles anyway, that law and adjudication are inevitably indeterminate, personal, contextual, and political, and that history precludes starting over on the basis of abstractions about individual and group equality. See, e.g., Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982) (exploring tensions between constitutional protection of political processes and minority rights); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-24 (1983).

66. This stance does not preclude recognizing that "[t]he effort to conceive similar settings and develop principles is particularly important when people make moral choices" in order to avoid prejudice, to test our intuitions, to rank and weigh competing principles in the context of particular problems, and to develop a coherent moral self. See Greenawalt, *Neutral Principles*, *supra* note 65, at 997.

67. Professor Gale tends to take this position, at least on some issues.

68. Professor Strossen supports these views.

69. Dworkin, *supra* note 1, at 37 (italics deleted). The ACLU has no objection to emotionally powerful words and images; we merely note the inconsistency of Dworkin's objection to them when used by others.

70. *Id.* at 38.

71. The Nazis canceled their Skokie rally after winning their case in the courts. They demon-

absence of distinctions" between venal and virtuous groups and words,⁷² Dworkin herself glosses over distinctions that the ACLU has long argued are vital to the ideal of democratic self-government.

We know that free speech never comes cheaply and often is very expensive indeed. Not so long ago, proponents of dissenting views were regularly sent to jail or prison.⁷³ If free speech is to have meaning, it must encompass "freedom for the thought that we hate,"⁷⁴ freedom for the idea, opinion, or expression that is unpopular, divergent, degraded, derided, dangerous, or even pornographic or obscene.⁷⁵ The ACLU doesn't see to it that such thoughts are formed or expressed, but rather that they remain unsuppressed—to ensure that the cacophony of democracy will include all voices.

Our position is based partly on the hope that in the "marketplace of ideas" the wisest voices will prevail, and that free expression "will ultimately produce a more capable citizenry and more perfect polity."⁷⁶ In one of his best-known dissents, Justice Holmes passionately defended this view as the theory of our Constitution:

[W]hen men [sic] have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is

strated instead in downtown Chicago and in Marquette Park, near their Chicago headquarters. Kneeland, 72 *Seized at Rally of Nazis in Chicago*, N.Y. Times, July 10, 1978, at A14, col. 1; Kneeland 2,000 Protestors Drown Out Nazis at Chicago Rally, N.Y. Times, June 25, 1978, at A19, col. 1. See generally D. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985); D. HAMLIN, THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE (1980); A. NEIER, *supra* note 48, at 7; Dorsen, *Is there a right to stop offensive speech? The case of the Nazis at Skokie*, in CIVIL LIBERTIES IN CONFLICT 122 (L. Gostin ed. 1988).

72. Dworkin, *supra* note 1, at 39.

73. See generally A. BARTH, PROPHETS WITH HONOR 157-83 (1974); L. LEVY, EMERGENCE OF A FREE PRESS (paperback ed. 1985). In a 1917 editorial, The New York Times warned civil libertarians that "jails are waiting for" opponents of the United States' entry into World War I. S. WALKER, *supra* note 7, at 11. Before *Yates v. United States*, 354 U.S. 298 (1957) (reversing convictions under the Alien Registration Act of 1940), the Supreme Court often upheld convictions of defendants accused of engaging in prohibited expression. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). Nonetheless, the ACLU won some victories for free speech during this era. See, e.g., *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927). ACLU involvement is documented respectively in S. WALKER, *supra* note 7, at 106, 399; 90, 396; and 80-81, 394.

74. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Cf. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) ("freedoms of speech, press, petition and assembly . . . must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("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 so imminently threaten immediate interference with . . . the law that an immediate check is required to save the country.").

75. The ACLU opposes "any restraint on the right to create, publish or distribute materials to adults, or the right of adults to choose the materials they read or view, on the basis of obscenity, pornography, or indecency." National ACLU Policy Guide, *supra* note 4, Policy No. 4, at 6.

76. *Cohen v. California*, 403 U.S. 15, 24 (1971).

better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁷⁷

Even if we are skeptical about the existence of objective truth, either of facts or of values,⁷⁸ we may acknowledge that scientific theories have advanced human understanding, and that free discussion, both rational and imaginative, “can test the coherence of value claims, and can elucidate and clarify the values of a culture and of individuals.”⁷⁹

Yet history and economics may suggest that the market metaphor is suspect and misplaced.⁸⁰ The rich have more access than the poor to the most powerful means and media of communication.⁸¹ The articulate lie may prevail over the stuttering truth. The nonfact that smoothly connects with our unconscious prejudices may be believed, while the awkward fact that would contradict or correct them is rejected.⁸² Professor Charles Lawrence has persuasively argued that “[t]he American marketplace of ideas was founded with the idea of the racial inferiority of nonwhites as one of its chief commodities, and ever since the market has opened racism has remained arguably the market’s most active item in trade.”⁸³ Sexism

77. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *Cf.* *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (similarly justifying the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. . .”).

78. See Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 25 (1984).

79. See Greenawalt, *Justifications*, *supra* note 65, at 132. This is not a claim that science has a corner on truths that exist independent of human ability to see and structure them. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (describing possibilities and limits of scientific paradigms and paradigm shifts, or “revolutions”).

80. For strong criticism of the market metaphor, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974-83 (1978), and Ingber, *supra* note 78.

81. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (2d ed. 1988) (given that the rich have more access to the media than the poor, “how can we be sure that ‘free trade in ideas’ is likely to generate truth?”). *But see* Greenawalt, *Justifications*, *supra* note 65, at 134 (if “an aggregation of economic and social power” overwhelms disfavored ideas, “the government might make available new channels of communication or regulate existing channels to assure more equal access.”). However, the ACLU has traditionally opposed governmental regulation of print media, even to promote equality, urging self-regulation instead. For broadcast media, the ACLU “believes that an enforceable right of access is justified because the airwaves belong to the public” and because a broadcast license is “a government-conferred benefit.” National ACLU Policy Guide, *supra* note 4, Policy No. 12, at 28-29.

82. *Cf.* Greenawalt, *Justifications*, *supra* note 65, at 135: “The claim that people are persuaded to believe what is already dominant or what fits their irrational needs is a . . . serious challenge to the truth-discovery justification for free speech.” Partly for that reason, “modest limits on maximum freedom of speech [may] contribute to the promotion of truth.” *Id.* at 138.

83. C. Lawrence, *When Racism Dresses in Speech’s Clothing: Reconciling the First and Fourteenth Amendments* 27 (1989) (paper prepared for June 1989 ACLU Biennial Conference) (revised version forthcoming in DUKE L.J.) [hereinafter Lawrence, *Racist Speech*]. Lawrence continues:

[Racism] is a disease which infects and skews or disables the operation of the market (like a computer virus, sick cattle, diseased wheat or junk bonds). Racism is irrational and often unconscious. Our belief in the inferiority of nonwhites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other despised minorities less saleable (as distinguished from their intrinsic value) in the marketplace of ideas.

Id. at 27-28 (footnotes omitted). See also Lawrence, *The Id, the Ego, and Equal Protection: Reckon-*

has not lagged far behind. Despite its undeniable power and appeal, the market metaphor alone might not suffice to justify free speech. But it is not alone.

The ACLU's position is based also on the knowledge that censors have far more often stifled the voices of oppressed persons and groups than the voices of their oppressors,⁸⁴ and that no censor has ever succeeded in winnowing out good from evil. Censorship has traditionally been the tool of those who seek to subordinate women and minorities, not of those who seek to liberate them.⁸⁵

Distrust of censorship is based on respect for the diversity of human beings and of their ideas, feelings, and opinions, on the importance of challenging entrenched theories and practices, on the difficulty of avoiding vice without evading virtue, and on the extraordinary and sometimes valuable changes that can occur in the lives of individuals and societies when dissenters successfully appeal to the majority's sense of justice. In our system of government, the appeal may be to the current majority, represented (however imperfectly) by elected legislatures, or to the collective majorities of the last two hundred years, represented (also imperfectly) by federal and state constitutions and by the courts as their designated interpreters, or simply and directly to the people themselves—or perhaps, in different ways, to all three. But no appeal can ever succeed if traditional authority and governmental power combine against it, ensuring that it is never effectively made.

When the censor wields the scissors, the good ideas are too often the first ones to wind up on the cutting room floor. Just ask civil rights protesters how far they would have gone—what they could have said or written, where they could have marched, or sat- or kneeled-in—without the first amendment's implacable indifference to the content of their self-expression and their search for justice. Government officials insistently equated civil rights activists with Communists, subversives, and criminals.⁸⁶ Mounting legislative inquisitions against the NAACP and

ing with *Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *Unconscious Racism*].

84. See, e.g., L. LEVY, *supra* note 73; Dorsen, *supra* note 71, at 133.

85. See S. WALKER, *supra* note 7, at 84-86, 98-99, (discussing governmental attempts to censor information about birth control in the 1920's, '30's, and '40's), Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in WOMEN AGAINST CENSORSHIP 4, 16-17, 20 (V. Burstyn ed. 1985) (tying modern attempts to censor pornography to "old, patriarchal Judeo-Christian beliefs about the relative merit and place of the sexes" and to conservative politics); Willis, *Feminism, Moralism, and Pornography*, in POWERS OF DESIRE 460, 466 (A. Snitow, C. Stansell, & S. Thompson eds. 1983); Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate* (Book Review), 62 N.Y.U. L. REV. 201, 225 n. 108 (1987); *infra* text accompanying notes 92-94.

86. See, e.g., T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 181-82, 468-69 (1988) (accusations by FBI Director J. Edgar Hoover against black activists in general and Martin Luther King, Jr. in particular); K. O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA 1960-72 (1989).

seeking compulsory disclosure of its membership lists, government officials thus endangered the jobs and lives of NAACP members.⁸⁷ Only a broad principle of freedom of association could—and did—protect the challenge to segregation that many white southerners perceived as an assault on their cherished way of life. Martin Luther King, Jr. wrote his historic letter from a Birmingham jail,⁸⁸ but the Civil Rights Act of 1964⁸⁹ became law and the Birmingham parade ordinance that King and other demonstrators had violated was eventually declared an unconstitutional invasion of their equal rights to freedom of speech.⁹⁰

Ask also the feminists who first sought to tell women about the new technologies of birth control, to end the tyranny of forced pregnancy, and to inspire women to step beyond their homes and families, if they so chose, into the public world. Historically, anti-feminists have often suppressed speech to suppress women. From 1873 until 1971, the Comstock Act⁹¹ was used to outlaw materials providing information about contraception and abortion.⁹² More recently, modern Comstockians have sought to remove the feminist magazine *Ms.* from high school libraries.⁹³ It is no accident that in the 1920's, Boston Mayor James Michael Curley, with majestic impartiality, banned both Ku Klux Klan leaders and birth control advocate Margaret Sanger from speaking their minds—the former as a criminal conspiracy, the latter as an apologist for murder. The ACLU's equally impartial defense of free speech permitted the Klan—which in the 1920s dominated many state legislatures, played a major role at the 1924 national Democratic convention, and staged a massive march on Washington, D.C.—to diminish its own influence by exposing its vicious plans to public view. This exposure ultimately enabled the message of birth control and reproductive choice to win wide acceptance.⁹⁴ Like the economic market, the ideological market sometimes works to improve society.

Perhaps most important, the ACLU's position is based as well on the

87. For Supreme Court cases protecting the NAACP against state laws attempting to force disclosure of its membership lists, see *Louisiana ex rel. Gremlion v. NAACP*, 366 U.S. 293 (1961); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See S. WALKER, *supra* note 7, at 240-41.

88. M. KING, *Letter From Birmingham Jail*, in *WHY WE CAN'T WAIT* 76 (paperback ed. 1964). For a description of the circumstances in which the letter was written, see T. BRANCH, *supra* note 86, at 737-44.

89. Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified primarily at 42 U.S.C. §§ 2000a et seq. (1982)).

90. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Cf. *Cox v. Louisiana*, 379 U.S. 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961) (all reversing criminal convictions of civil rights demonstrators despite prosecutors' contentions that their speech and peaceful assembly would stir others to anger, dispute, unrest, or violence).

91. 18 U.S.C. §§ 1461-62 (1982) & 19 U.S.C. § 1305 (1982 & Supp. II 1984).

92. See, e.g., *United States v. One Book, Entitled 'Contraception'*, 51 F.2d 525 (S.D.N.Y. 1931); *United States v. One Obscene Book Entitled 'Married Love'*, 48 F.2d 821 (S.D.N.Y. 1931).

93. See, e.g., *Salvail v. Nashua Bd. of Ed.*, 469 F.Supp. 1269 (D.N.H. 1979).

94. See S. WALKER, *supra* note 7, at 59-62.

belief that freedom of expression is valuable as an end in itself and not merely as a means of self-government. Freedom of thought, the development of our capacity to comprehend our world and to transcend or renew it, depends on the possibility of saying what we think, in everyday conversation or philosophical discourse, in politics or poetry, through science or music or dancing in the street. To express ourselves is to discover who we are and what we know. To listen to the self-expression of others is to discover who they are and what they know. Free speech allows us to risk sharing, to create or dissolve communities of belief and opinion, to agree or dispute, to learn, and to change. In the words of the second Justice Harlan, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."⁹⁵

Dworkin would probably reply that the civil rights and feminist movements embodied good and virtuous ideals and ideas, which contributed to the long, and far from complete, process of liberating people of color and women in the United States from the bondage of racial and sexual discrimination and injustice. By contrast, the Nazis, the Klan, and the pornographers—all of whom have been ACLU clients in free speech cases⁹⁶—seek to degrade and even destroy racial, ethnic, and religious minorities, and to vilify and dehumanize women. The civil rights movement and the original and current feminists as well, exemplify the moral strength of speaking the truth about oppression to challenge the oppressors, thereby deepening public understanding of and commitment to social justice while empowering themselves. Racist hate groups and pornographers, Dworkin might contend, speak overwhelming lies—lies

95. *Cohen v. California*, 403 U.S. 15, 24 (1971). See L. TRIBE, *supra* note 81, at 785–89 (“[n]o adequate conception of so basic an element of our fundamental law . . . can be developed in purely instrumental or ‘purposive’ terms.”); Dorsen, *The Need for a New Enlightenment: Lessons in Liberty from the Eighteenth Century*, 38 CASE W. RES. 479, 488 (1988) (major purposes of first amendment include “individual fulfillment through self-expression,” advancement of knowledge, facilitation of social reform through spirited public debate, and “checking” of governmental corruption and excess).

For an elaborate taxonomy and exploration of the possible justifications for free speech, see Greenawalt, *Justifications*, *supra* note 65.

96. *E.g.*, *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (state may not impose prior restraint on display of swastika during Nazi rally without providing immediate appellate review or stay of restraint); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (state may not convict Ku Klux Klan leader of criminal syndicalism because his advocacy was not both directed to inciting or producing imminent lawless action and likely to succeed); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175 (1968) (ex parte injunction against political rally by white supremacist group violates first amendment); *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (Indianapolis antipornography ordinance violates first amendment), *aff’d mem.*, 475 U.S. 1001 (1986); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.) (Skokie ordinances aimed at barring Nazi march violate first amendment ban on content-based restrictions of speech), *aff’d*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Rockwell v. Morris*, 12 A.D.2d 272, 211 N.Y.S.2d 25 (first amendment entitles American Nazi leader to hold rally in public park despite expected hostile reaction from spectators), *aff’d mem.*, 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268, *amended*, 10 N.Y.2d 749, 177 N.E.2d 48, 219 N.Y.S.2d 605, *cert. denied*, 368 U.S. 913 (1961). The ACLU appeared as amicus curiae rather than direct counsel in *American Booksellers*. For discussion of ACLU representation of Klan and Nazis in 1970’s and 1980’s, see A. NEIER, *supra* note 48, at 80–103; S. WALKER, *supra* note 7, at 332–33, 373.

that do incalculable harm, that diminish our sense of moral community.⁹⁷ Wielding the first amendment to strike down one version of a model anti-pornography ordinance drafted by Dworkin and Professor Catharine A. MacKinnon, a federal court nonetheless recognized that pornography hurts women because “[w]ords and images act at the level of the subconscious before they persuade at the level of the conscious.”⁹⁸ Why, Dworkin asks, cannot or will not the ACLU deny aid to pornographers and racists when they seek to wrap their despicable messages in the mantle of the first amendment?

It is far more difficult to reply to this question than civil liberties advocates sometimes admit. We know that lies are sometimes inextricably or mistakenly entangled with important truths,⁹⁹ but it can be argued that pornography and racist vituperation are seldom about ideas at all.¹⁰⁰ Yet pornography conveys manifold messages on which viewers and readers may not agree. Feminist civil libertarians have denounced violence and discrimination against women while opposing censorship of pornography, arguing that it often legitimizes sexuality, even though it may further misogyny. Antipornography ordinances are “laden with our culture’s old, repressive approach to sexuality” and may imply that many common sexual activities, including heterosexual relations, are in themselves oppressive to

97. See generally A. DWORKIN, *Pornography: Men Possessing Women* (1981); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

98. *Hudnut*, 771 F.2d 323, 328-29. The court accepted the legislative premise that “[d]epictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.” *Id.* (footnotes omitted). Cf. *supra* notes 82-83 and accompanying text.

For an in-depth discussion from an antiregulation perspective of research on the disputed causal link between pornography and sexual violence, see *Making Sense of Research on Pornography*, in *WOMEN AGAINST CENSORSHIP*, *supra* note 85, App. I at 181-205.

99. The best-known statement of this view comes from J. Milton, *Speech for the liberty of unlicensed Printing to the Parliament of England* (1644) (entitled “Areopagitica”), *reprinted in* MILTON’S PROSE 275, 290 (M. Wallace ed. 1959):

Good and evil we know in the field of this World grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed on Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed.

See also *id.* at 318-19: “Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.” But see L. TRIBE, *supra* note 81, at 786. Milton himself was unwilling to extend his defense of freedom of the press to Catholicism or to “that . . . which is impious or evil absolutely . . .” See MILTON’S PROSE, *supra*, at 320; Lukas, *supra* note 48, at 11.

100. See, e.g., Sunstein, *supra* note 97, at 612; Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 470-74 (1984). But see *Hudnut*, 771 F.2d 323, 328 (anti-pornography ordinance is constitutionally impermissible regulation based on viewpoint); L. TRIBE, *supra* note 81, at 924 (partially agreeing).

women.¹⁰¹ Embodying racial hatred in words is to state an idea, the single most pernicious idea in American history, but an idea nonetheless.¹⁰²

We know too that self-expression, the articulation of emotions, is fundamental both to individual dignity and autonomy and to communication with others. But it can be argued that self-expression which in itself profoundly harms others without serving some substantially redeeming social purposes¹⁰³ should be regulated or controlled to alleviate its harms. The revival of racist and sexist speech and actions, on the college campus and elsewhere in the last decade,¹⁰⁴ undermines the essential optimism of some theories of the first amendment. Dworkin is not wrong to remind us that our society is stained with the blood of innocent victims of racist and sexist brutality. In contending that the bludgeon of censorship leads even more ineluctably than the most savage speech to the stillness of enforced conformity and the silence of the grave,¹⁰⁵ we have our answer.

101. See Duggan, Hunter, & Vance, *False Promises: Feminist Antipornography Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP*, *supra* note 85, at 134. See also *id.*, at 130, 138-39, 146-47; Willis, *supra* note 85, at 465 ("to attack pornography, and at the same time equate it with heterosexual sex, is implicitly to condemn not only women who like pornography, but women who sleep with men."). Duggan, Hunter, & Vance argue that "pornography [does] not cause the kind and degree of harm that can justify the restraint of speech" and "serves some social functions, which benefit women." These include flouting conventional mores, ridiculing sexual hypocrisy, underscoring the importance of sexual needs, and advocating sexual adventure. *Id.* at 145. See also Willis, *supra*, at 462, 464-65.

102. See Lawrence, *Racist Speech*, *supra* note 83, at 27-28.

103. But see Duggan, Hunter, & Vance, *supra* note 101, at 145 (contending that pornography "carries many messages other than woman-hating" and may help legitimize female sexual desires and acts).

104. See generally Lawrence, *Racist Speech*, *supra* note 83, at 1-3 (listing incidents); Strong, *Free Racist Speech*, CAL. L. REV. 24 (July 1989) (reporting California incidents, focusing on Stanford University); *Lessons from Bigotry 101*, Newsweek, Sept. 25, 1989, at 48 (citing study that documents racial incidents at 250 colleges since fall of 1986); Temkin, *Times of Tension*, BROWN ALUMNI MONTHLY, June-July 1989, at 24 (analyzing in detail incidents and reactions at Brown University).

Professor Lawrence argues that the first amendment permits regulation when "narrowly drafted provisions [are] aimed at that form of racist speech which results in direct, immediate and substantial injury and which advances none of the purposes of the first amendment." Lawrence, *supra*, at 4-5, 11-16. Cf. D. DOWNS, *supra* note 71, at 154-69 (arguing that a proper balance between individualism and communitarianism would permit abridging intentionally harmful and unprovoked (1) racist speech that advocates death or violence against members of a targeted group, and (2) explicit, implicit, or symbolic vilifying or derogatory words targeted at a definable audience); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

Professor Strossen opposes regulation of racist speech unless it constitutes "targeted harassment of an individual" or "intimidating or assaultive conduct" comparable to the Supreme Court's "fighting words" exception to protected free speech. See Remarks by Nadine Strossen, *supra* note 59, at 3-4. Professor Gale believes that the ACLU should explore the possibility of endorsing very narrow restrictions similar to those proposed by Professor Lawrence, in order to combat historic patterns of discrimination and ensure that colleges provide minority students with genuinely equal educational opportunities while maintaining the free inquiry and expression necessary to intellectual growth and exploration.

105. Cf. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-42 (1943) (invalidating state law requiring religious dissenters to salute the United States flag). Justice Jackson, writing for the Court, rejected governmental compulsion of individuals to think and feel in officially sanctioned ways:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall

It is, we think, a powerful answer. In 1978, when the uproar over the Skokie case reached its crescendo, Aryeh Neier, then ACLU national executive director, explained why political dissidents of all kinds should support free speech, even for their deadliest adversaries. "The right to free speech is always tested at the extremes," he said:

Rarely are centrist groups denied their First Amendment rights. . . . For that very reason it is the extremes that have the greatest interest in protecting the rights of their enemies. Once the freedom of one group is abridged, that infringement will be cited to deny the rights of others. The people who most need the A.C.L.U. to defend the rights of the Klan are the blacks. The people who most need the A.C.L.U. to defend the rights of Nazis are the Jews.¹⁰⁶

Neier's argument reaches cultural as well as political dissenters—not only pornographers but also left-wing feminists, people like Andrea Dworkin who write with passion and anger about human experience beyond the boundaries of cultural respectability.¹⁰⁷

If Neier is correct, then Dworkin postulates a false choice between defending free speech and protecting women's rights. In fact, the ACLU has ardently advocated freedom of expression for all individuals and groups while actively pursuing equal rights for women and others who have been traditionally oppressed. These goals are not inconsistent but mutually reinforcing. Ensuring the free speech rights of anyone, including a racist or misogynist, secures the same rights for everyone else, including an intended victim.¹⁰⁸

One response to Neier may be that his dichotomy does not hold—that the Klan, the Nazis, and the pornographers, at some deeper level of our national psyche, are not really despised fringe groups at all, but centrists in extremists' clothing, purveyors of the denied truth that we as a nation

be Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

. . . It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

Id. at 640-41.

106. Quoted in Lukas, *supra* note 48, at 10. See also A. NEIER, *supra* note 48, at 7: "It is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for succor."

107. See, e.g., A. DWORKIN, *INTERCOURSE* (1987). Dworkin herself was once represented by the ACLU, though not in a free speech case. In 1965 the New York Civil Liberties Union, then directed by Aryeh Neier, assisted Dworkin and other women who objected to body-cavity searches after their arrests during demonstrations against the Vietnam War. The NYCLU negotiated an agreement with correctional officials to limit such searches and set guidelines for conducting them. Interview with Aryeh Neier, former ACLU national executive director (Nov. 7, 1989).

108. The ACLU has frequently relied on victories it won in cases defending free speech for racists to protect civil rights demonstrators and civil liberties advocates. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ku Klux Klan leader); *Kunz v. New York*, 340 U.S. 290 (1951) (anti-Catholic and anti-Semitic speaker); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (race-baiting individual) (ACLU appeared *amicus curiae*).

are still hostages to our history of racial and sexual xenophobia and oppression.¹⁰⁹ By allowing them to speak freely, while overtly and sanctimoniously denouncing their message, we covertly accept it. Because the political and social context in which they speak is not and never has been neutral, we cannot comfortably contend that they alone are the enemy of equal rights and freedoms. The enemy is still us.¹¹⁰

Consider too the other half of Neier's dichotomy. He implicitly defines the struggles of blacks and Jews for equal dignity, respect, and power—and, by extension, the feminist struggle as well—as political extremism. Is that merely a regretful acknowledgment that racial and religious minorities and women have never occupied the center of American political and cultural consciousness—or is it, in part at least, an acceptance of a white-Christian-male status quo? Even if it is not so intended (as surely it was not), do most listeners hear the words not spoken instead of the ones that are?

But if such questions can arise about a seemingly simple and straightforward statement in support of an indivisible right of free speech for everyone, then perhaps the argument answers itself. Even pornography and racist hate speech may in the end mean something different from what they purport to say. Modern literary critics have shown that ordinary speech—as well as legal and literary expression—can undermine itself.¹¹¹ Even without the aid of linguistic theories, we can recognize that words take their meaning not only from the (often complicated and contradictory) intentions of the speaker, but also from the context—the layered web of direct facts, and of social, political, and cultural circumstances—in which they are spoken. If the speaker and the listener occupy different subcultures or social roles, their different experiences may shape

109. See generally Lawrence, *Unconscious Racism*, *supra* note 83 (arguing that modern psychological theories require expansion of conception of "discriminatory intent" to include unconscious, culturally instilled motivations).

110. See Lawrence, *Racist Speech*, *supra* note 83, at 22, 27:

. . . [B]lack folks know that no racial incident is "isolated" in America. That's what makes them so horrible, so scary. It is the knowledge that they are not the isolated unpopular speech of a dissident few; the knowledge that these incidents are manifestations of an ubiquitous and deeply ingrained cultural belief system, an American way of life.

. . . .

. . . Our experience is that the American system of justice has never been symmetrical where race is concerned. Is it any wonder that we see equality as a necessary precondition to free speech. . . .

See also *id.* at 29 ("racist speech benefits powerful white-dominated institutions" by "keep[ing] non-white people on edge" and preventing them "from organizing on behalf of more important things.") (quoting address by Professor Richard Delgado, State Historical Society, Madison, Wisconsin (Apr. 24, 1989)). Cf. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975) (rape is "a conscious process of intimidation by which *all men* keep *all women* in a state of fear.") (emphasis in original).

111. See, e.g., Brosnan, *Serious But Not Critical*, 60 S. Cal. L. Rev. 267, 360-76 (1987) (describing Jacques Derrida's deconstructionist approach to texts, which, among other things, denies the easy attainment of single meanings).

their understandings in very different ways.¹¹² And even where the meanings seem remorselessly clear, they (like judicial precedents) can change over time as the specific event that prompted them recedes and the context changes. The recent antipornography movement sparked by Dworkin and others provides a paradoxical example; instead of repressing words and images of sexual violence and domination, it has provoked serious discussion of female sexuality and arguments for the liberation of women from the constraints of sexual gentility.¹¹³

Sometimes the social context changes partly because particular speech, cruelly intended, instead (or also) illuminates a moral issue that can no longer be thrust aside. Allowing racists and misogynists to speak may help us as a society to learn to know ourselves as our own enemy, to see and begin to repair the harms we have done. Attempting to bury racist and sexist speech underground may only make martyrs of the speakers and solidify the attitudes they express. History tells us that censorship invites—and incites—resistance. Nothing in our national experience suggests that silencing evil has ever corrected it.

Words are symptoms and symbols, but they are not the thing in itself.¹¹⁴ To eradicate racism and sexism, we need to listen to the words in which they are expressed, to delve beneath them, to find our own words of reply and explanation, before we can even begin to make the changes that we seek.

The ACLU recognizes that speech and conduct are not easily divided from each other. We know that some speech is used as a weapon to intimidate particular individuals and groups. Crimes and torts accomplished by words can be forbidden by law without invading first amendment freedoms,¹¹⁵ though it is not easy to draw the line between protected expression that advocates the commission of torts or crimes and unprotected ex-

112. See Williams, *supra* note 5, at 405 (describing the “discourse boundary” that exists between blacks and whites because of their different experiences in our society).

113. See, e.g., S. WALKER, *supra* note 7, at 350–52; Duggan, Hunter, & Vance, *supra* note 101, at 145; Willis, *supra* note 85, at 464–65.

114. But see Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1881–82 (1987) (footnotes omitted):

[T]here is no bright line separating words and facts. . . . Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and the shape (for us) of reality itself.

115. Among the crimes and torts that may consist primarily of words are bribery, fraud, and intentional infliction of emotional distress—though the latter in some circumstances can raise first amendment problems. Professor Kent Greenawalt has identified and differentiated three categories of speech: “ordinary expressions of fact and value, which deserve maximum First Amendment protection; utterances that are strongly situation altering, which are unprotected; and action-inducing encouragements, which warrant an intermediate level of protection that varies according to context.” Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 741 [hereinafter *Speech and Crime*]. Strongly “situation-altering utterances” directed at criminal ends include agreements to fix prices or rob a bank, offers to pay for criminal acts, and superiors’ orders to subordinates to perform illegal behavior within the superiors’ area of authority. *Id.* at 742–43; Greenawalt, *Justifications*, *supra* note 65, at 119 n. 2.

pression (such as “fighting words”) that furthers or commits them.¹¹⁶ Antidiscrimination laws can prevent the use of words as tools of harassment to destroy equal employment and educational rights and opportunities.¹¹⁷ Like Dworkin,¹¹⁸ we understand that “rape the women” and “kill the Jews” are words that in some contexts constitute a concrete and punishable threat:

There are limits that can be imposed on hate groups that are consistent with a system of free expression. During the Skokie episode, the ACLU refused to defend a Nazi who was prosecuted for offering a cash bounty for killing a Jew. The reward linked the speech to unlawful action in an impermissible way. Nor would we defend a Nazi (or anyone else) whose speech interfered with a Jewish religious service or who said, “There is a Jew; let’s get him.”¹¹⁹

Where we differ with Dworkin is in our belief that outside those limited contexts, the Constitution still protects those words.

That does not mean the ACLU accepts or endorses the messages of racist hatred¹²⁰ and sexist denigration.¹²¹ Nor does it mean we can turn away while, as Dworkin puts it, “those who are targeted as victims are left defenseless.”¹²² Precisely because the ACLU has chosen to advocate everyone’s right to speak regardless of what she or he has to say,¹²³ we have a special obligation—one we acknowledge in our policies and embrace in our lobbying and litigation efforts—to expose and oppose those

116. The line-drawing problems become especially acute when the speech is remote from the criminal enterprise, such as communications that precede (or appear to be an invitation to) an offer to commit a criminal act. Greenawalt, *Speech and Crime*, *supra* note 115, at 746. Because the only (or strongest) evidence of criminal conspiracies, attempts, or solicitations may be speech, they pose similar difficulties.

The doctrine that excludes protection for “fighting words,” defined as personally offensive statements likely to provoke violence from their target, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is also troublesome. See Greenawalt, *supra*, at 770 (classifying offensive speech is difficult because differing contexts and inflections change the meaning and “what is offensive shifts over time.”). From a feminist viewpoint, the fighting words exception may seem both irrelevant and mis-focused. Cf. Lawrence, *Racist Speech*, *supra* note 83, at 15 n. 31 (the doctrine “presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face[to-face] insult with violence. In this way, it is a paradigm by and for white males.”).

117. National ACLU Policy Guide, *supra* note 4, Policy No. 72, at 142; *id.*, Policy No. 316, at 400.

118. See Dworkin, *supra* note 1, at 39.

119. Dorsen, *supra* note 71, at 133–34.

120. See, e.g., National ACLU Policy Guide, *supra* note 4, Policy No. 46, at 93–94: “[T]he democratic standards in which the ACLU believes and for which it fights run directly counter to the philosophy of the Klan and other ultra-right groups”; therefore ACLU should deal “with the difficult dilemma of having to defend the civil liberties of groups whose activities do fundamental injury to civil liberties” by “vigorously present[ing]” its opposing views “while defending the group’s right to speak.” See also *id.*, Policy No. 312b, at 389b.

121. See, e.g., National ACLU Policy Guide, *supra* note 4, Policy No. 314–15, at 393–99 (supporting the Equal Rights Amendment and equality of treatment under law “without differentiations based on sex.”).

122. Dworkin, *supra* note 1, at 39.

123. E.g., National ACLU Policy Guide, *supra* note 4, Policy No. 46, at 93.

who seek through means including speech itself to destroy the democratic, civil libertarian, and egalitarian ideals that freedom of speech is intended to further. Precisely because we have chosen to attack the official morality of the censor, we have a special obligation to vulnerable groups and individuals who incur the primary risks of uncensored liberty, to declare and act on our belief that every person is of equal moral dignity and value, that women as well as men, people of color as well as whites, Muslims and Jews as well as Christians, homosexuals as well as heterosexuals, have equal rights to personal autonomy, familial community, political participation, and social justice.

We know that social and individual perceptions of disfavored minorities are skewed by insensitivities insistently reinforced by the mainstream media:

While white perception of black criminality is readily evoked, white awareness of black anger or anguish has been not only historically avoided but, on the deepest psychic levels, guarded against. Existentially, the concept of black people as vulnerable human beings who sustain pain and love and hatreds and fears and joy and sorrows and degradations and triumphs is not yet permitted in the national consciousness. Hence the constant need of the dominant society, in age after age, to reinforce linguistic and ritualistic symbols that deny black humanity.¹²⁴

Other minorities are similarly dehumanized, as exemplified by the words of a politician's wife, explaining why the wife of a well-known television actor is an effective fund-raiser for AIDS treatment centers: "She has [the AIDS virus], but she isn't black, she isn't poor, she isn't homosexual, she isn't a drug user. She is like the rest of us."¹²⁵ In other contexts, women are equally likely to become the denigrated Other, whose needs and pains do not matter. The persistence and pervasiveness of such attitudes have led the ACLU to commit major resources to combating discrimination.

CONCLUSION: THE INTERDEPENDENCE OF CIVIL RIGHTS AND CIVIL LIBERTIES

The struggle to empower women and minorities is deeply, perhaps inextricably, intertwined with the struggle for civil liberties. The term "civil liberties" in this context may refer primarily to the freedoms of conscience, thought, and expression protected by the first amendment, while the term "civil rights" may denote primarily the guarantees of the thir-

124. Gresham, *The Politics of Family in America*, 249 *THE NATION* July 24-31, 1989, at 116, 120.

125. Huck, *Breaking a Silence*, *L.A. Times*, Aug. 25, 1989, § 5, at 12, col. 2 (quoting Sandy Brock, wife of former Secretary of Labor Bill Brock).

teenth, fourteenth, and fifteenth amendments and of statutes that promote equal treatment. In practice, the ACLU originally deferred to the NAACP to litigate questions of racial equality.¹²⁶ But the division between rights and liberties often seems more semantic than real. The right to vote is fundamentally important to both freedom and equality. When the ACLU began representing prisoners who had been denied the right to read Muslim religious texts and periodicals,¹²⁷ it focused on freedoms of speech and religion. Today it litigates throughout the nation to bring prison conditions up to minimum constitutional standards, partly because we learned that the denial of civil liberties was interwoven with a denial of basic civil rights that seemed equally urgent to oppose. On the occasions when civil liberties and civil rights genuinely appear to differ and conflict, the ACLU chooses between them in the context of particular facts, weighing the potency and applicability in each instance of the general values of liberty and equality.¹²⁸

But in many cases, civil liberties and civil rights are firmly woven together. When the ACLU argues for every woman's right to reproductive freedom, to control her body and her destiny without interference, to choose abortion or childbirth, and if she is poor to obtain governmental assistance that respects her choice,¹²⁹ it furthers both civil liberties (freedoms of conscience and moral choice) and civil rights (equality under law). When the ACLU endorses the right to speak, march, picket, and boycott on behalf of racial justice,¹³⁰ it promotes both civil liberties and civil rights. When the ACLU demands equal employment rights and opportunities for women, minorities, political dissidents, and persons with AIDS,¹³¹ or supports employee rights of privacy, due process, and free

126. See S. WALKER, *supra* note 7, at 60, 88.

127. *E.g.*, Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971) (first amendment requires that inmates have access to religious newspaper "Muhammad Speaks").

128. For example, the ACLU has supported free speech for abortion protesters while also protecting the rights of women who seek abortions, and of the clinics that provide them, to be free from harassment, intimidation, trespass, or invasions of privacy. Compare S. WALKER, *supra* note 7, at 349 (discussing ACLU representation of anti-abortion demonstrators) with National Abortion Fed'n v. Operation Rescue, No. CV 89-1181 AWT (C.D. Cal., Aug. 29, 1989) (holding anti-abortion demonstrators in contempt for violating order earlier obtained by Southern California ACLU to protect abortion clinics and patients). On Sept. 14, 1989, the court dismissed the underlying cause of action in *National Abortion Fed'n* for failure to state a claim, but granted leave to amend, with the injunction still in effect.

For another example, on the complex issue of surrogate parenting, the ACLU supports both the freedom to use new and old reproductive technologies to form nontraditional families and the right to contract for reproductive services, but opposes waiver of the gestational mother's parental (or abortion) rights prior to the birth of a child. National ACLU Policy Guide, *supra* note 4, Policy No. 262a, at 346a-i.

129. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981). See National ACLU Policy Guide, *supra* note 4, Policy No. 263, at 347-48. This 20-year-old policy is currently under review for updating and clarification.

130. National ACLU Policy Guide, *supra* note 4, Policy No. 3, at 5; *id.*, Policy No. 41, at 85-88.

131. National ACLU Policy Guide, *supra* note 4, Policy No. 53, at 104; *id.*, Policy No. 264, at 349; *id.*, Policy No. 268, at 354, 356; *id.*, Policy No. 303, at 374; *id.*, Policy No. 306, at 380-82; *id.*,

speech,¹³² it speaks for the civil liberties and civil rights of all workers. When the ACLU attacks standardized tests that overpredict college performance for males and underpredict it for females,¹³³ it speaks for the rights of women to an equal education that will help provide them with the knowledge that is both power and freedom. When the ACLU opposes sexual as well as racial harassment in the workplace, recognizing that some speech or expressive conduct constitutes discrimination,¹³⁴ it reconciles a possible conflict between civil liberties and civil rights in favor of rights that feminists helped to create.

The real ACLU confronts every day the disparity between democratic ideals and social realities that Dworkin accuses us of ignoring. We know, as Justice Holmes wrote long ago, that "[e]very idea is an incitement" to action¹³⁵ and that "[t]o allow opposition by speech seems to indicate that you think the speech impotent, . . . or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises."¹³⁶ We know that words are social facts, that they have real power to work irrevocable harm, that expressions of racist and misogynist hate can diminish the freedom and security of minorities and women,¹³⁷ that pornography often encourages men to see women as toys or targets rather than as equals, and that social attitudes are constructed in the mirror of what we say as well as what we do.

Perhaps, therefore, some of us are not as ready as we once were to denounce those, like Dworkin, who pressure us to abandon the principle of free expression. But neither are we ready to denounce or abandon the principle. Feminists as well as civil rights activists, political, religious, moral, and aesthetic dissidents, all have sheltered in its embrace. We risk the harms of free expression because we have found no other way to ensure its benefits.¹³⁸ Medieval mapmakers inscribed at the edge of the known world, "Beyond this place are dragons." But if we are to transcend

Policy No. 315, at 395-99; *id.*, Policy No. 317, at 401-02. The ACLU has participated in nearly every major AIDS-related case. See S. WALKER, *supra* note 7, at 373-74. In 1988 the Southern California ACLU won a major decision ordering a local school district to return a teacher with AIDS to the classroom. *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988).

132. See generally NATIONAL ACLU, PUBLIC POLICY REPORT, LIBERTY AT WORK: EXPANDING THE RIGHTS OF EMPLOYEES IN AMERICA (1988).

133. See *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989) (issuing preliminary injunction ordering New York not to award 1989 merit scholarships based solely on Scholastic Aptitude Test that favors males over females).

134. National ACLU Policy Guide, *supra* note 4, Policy # 316, at 400. See generally, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

135. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). In *Gitlow*—an early ACLU case—the Court rejected the free speech claim, but presaged future victories by assuming that the fourteenth amendment's due process clause protected first amendment rights from state impairment. See S. WALKER, *supra* note 7, at 79-80.

136. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

137. See, e.g., Lawrence, *Racist Speech*, *supra* note 83, at 13-22.

138. Cf. *Abrams v. United States*, 250 U.S. 616, 630 (1925) (Holmes, J., dissenting): Constitutional guarantee of free expression "is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."

our political, social, and cultural limitations—to replace racism and sexism with equality and justice—we have to venture beyond the maps we have now. The ultimate irony of Dworkin's attack on the imaginary ACLU is that for almost seventy years the real ACLU has been working to make the world safe for her to write it.

