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DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM. By *Aryeh Neier*. New York: E.P. Dutton. 1979. Pp. 182. $9.95.

I

Few legal disputes in the last decade captured public attention with such dramatic force as that involving a small band of Nazis and the village of Skokie. For well over a year, the case was seldom out of the news and often thought to merit front page coverage. It all began in the spring of 1977 when Frank Collin, the leader of the Chicago-based National Socialist Party of America, requested a permit to march in front of the Skokie village hall. The community, with a Jewish population of over 40,000, several thousand of whom had survived the Holocaust, mobilized all its resources against the planned demonstrations. Skokie insisted that the Nazis obtain liability and property insurance, which they could not, and then formalized the insurance requirement in a hastily promulgated ordinance covering all marches and demonstrations. Two additional sections were added, one prohibiting incitement to religious and racial hatred and the other the wearing of military-style uniforms in demonstrations. The town also sought an injunction in the Illinois state courts against the proposed march.

The American Civil Liberties Union advanced to defend the Nazis, first by directly opposing the injunction action and then by filing an independent lawsuit in federal district court attacking the constitutionality of the ordinance under the free speech clause of the first amendment. Much if not most of the public reaction was hostile to the ACLU's position. Many expressed outrage that the right of free speech was being invoked to protect the dissemination of Nazi propaganda, whether generally or in this particular locale. Perhaps the most telling evidence of the public's dissatisfaction was to be found in the ACLU's own membership rolls, which declined by 30,000 at an annual cost in lost revenues to the organization of half a million dollars (p. 79). The beleaguered free speech proponents, conversely,

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seemed incredulous at this public outcry: It was an "easy case" one heard again and again, though usually with a note of despair.

The ACLU position won in the end, of course. The Illinois Supreme Court and the Court of Appeals for the Seventh Circuit both concluded that the proposed demonstration (and the demonstrations covered by the ordinance) amounted to protected first amendment activity under the Supreme Court precedents. In June of 1978, the Supreme Court declined to hear the case, thus allowing the federal court's decision to stand. The decision of the Illinois court was never even challenged.[1]

The important question remains, however, whether or in what sense this was a victory for the *principle* of free speech. Surely the vitality of the freedom of speech concept depends as much — if not more — on the *process* by which disputes over its application are resolved as on any particular outcome. It is the process that reveals whether we understand the purposes underlying the principle, whether we have developed the capacity to articulate views about the relevance of the principle to particular facts and whether there exists a strong and continuing public commitment to the principle. Tolerance of ideas, like any other behavior, may be valuable or empty depending upon the reasons behind it.

The Skokie case provides, in other words, an appropriate occasion for self-examination, for taking the vital signs of our general first amendment theory. Litigation involving extremist or subversive expression has always been the classic stock of first amendment jurisprudence. The days of the red scare following the First World War and the McCarthyism of the early 1950s are gone for now, but perhaps the Skokie case should still be to us what those now-famous early cases of *Schenck*, *Abrams*, and *Whitney* were to Zachariah Chafee: a time to inquire whether all is well in the realm of the first amendment.

A good place to begin this examination is with a book by Aryeh Neier, the executive director of the ACLU at the time of the Skokie dispute. Neier's *Defending My Enemy* is the best illustration that we have of the effort to defend the free speech position in that case. To be sure, although his self-assigned task is to justify the ACLU's position in Skokie, Neier also offers the reader other fare as well, most notably: a description of the Nazi and Klan organizations in America; an analysis of the attitudes of Jews since World War II on the Nazi question; and an accounting of the ACLU's defense of radical speech since its inception several decades ago. But the discussions of these subjects cohere around the first item on Neier's agenda, the justification for the defense of the free speech rights of

1. Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 915 (1978); Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

Nazis in Skokie. It is to that argument that I would like to turn, treating it, and the Skokie case generally, as exemplars of our first amendment jurisprudence. In Part III, building upon the reflections that follow, I offer some proposals for a new direction in first amendment theory.

II

The primary problem to be surmounted in thinking about the Skokie case is that of distinguishing appearance from reality. What we think we see in the controversy often turns out on further reflection to be quite different, or far more complex, than it purported to be initially. Take the parties. The "Village" of Skokie is not a village in any meaningful sense of the term (though, as Neier points out, it was obviously to its advantage to portray itself as such). It is, in simple language, a Chicago suburb. And even the question of whose "turf" it is is a matter of some confusion. Before the Second World War, Neier tells us, Skokie had been a primarily German community, known as "Little Germany," and the home of the German-American Bund.

On the other side, the National Socialist Party, with its few dozen members, is hardly a "party" at all though it, too, no doubt liked the self-depiction. Nor was the extent of its identification with the policies of the Third Reich entirely clear. Even the real identity of its leader, Frank Collin, was in doubt. Symbolic of the deeply confusing nature of the dispute, it appeared that Collin's father was a Jew and a survivor of Dachau (p. 17).

The problem of identifying reality extends even to the issue itself. Was this march to proclaim religious and racial hatred, or even genocide? No, said the Nazis quite explicitly from the beginning. It was to protest the denial of their "free speech" rights. They proposed to carry placards emblazoned with such nasty slogans as "White Free Speech" and "Free Speech for White Americans" to protest the demand for an insurance policy as a prerequisite to obtaining a march permit. (They were, however, to carry these signs dressed in storm trooper regalia.) On the other hand, the stated desire to conduct a march was itself fictitious. The object was not to march but to be *opposed* in the effort. The Nazis never did march in Skokie, even after they secured the right to do so; rather, they chose to appear in Chicago, where before the Skokie case they had also been rebuffed when they had sought permission to demonstrate.

The problem of determining who these people were and what they were fighting about, of separating appearance and reality, is endemic to the case as a whole. Not only does it involve aspects of the identities of the parties and the central dispute between them, but the

legal positions formulated for each side as well. Getting to the bottom of things requires more stamina than one might suppose.

This is certainly true of Neier's own argument. He claims that he "defended his enemy" to "defeat his enemy." Things are not what they seem to be, he appears to be telling us. But how and in what sense will Nazism be defeated by applying the first amendment in the Skokie case? We all have, it must be conceded, a curious attraction for paradox; it can numb the pains of intellect, as Orwell captured in the ultimate paradox, "War is Peace." We must try as best we can to rise above this temptation. The task of figuring out the libertarian argument, however, is not made easy for us.

At one level, we find Neier arguing at length that the legal precedents compel tolerance. The dispute involved "no novel legal questions," he claims (p. 9). The city had advanced a number of doctrinal arguments, none of which Neier finds meritorious: The Nazi march would amount to "fighting words" within the meaning of *Chaplinsky v. New Hampshire*;[2] a "clear and present danger" of violence justified suppression; the Nazi speech, in this setting, was the communicative equivalent of a physical assault; and the 1952 decision in *Beauharnais v. Illinois*[3] had confirmed the constitutional validity of group defamation laws. To these arguments Neier responds: First, *Chaplinsky* has been and should be narrowly applied to instances involving highly insulting statements spoken by one individual to another in a face-to-face encounter. Second, since there was no evidence or claim here that the Nazis would ask for immediate implementation of their party platform, there could be no "clear and present danger" of violence from them. And the possibility of a "clear and present danger" of violence stemming from the *unrest* created in an audience hostile to the speaker's message, the so-called "heckler's veto," had been held since *Terminiello v. City of Chicago*[4] to be an unacceptable basis for suppressing public discussion. Third, as to offensiveness as a basis for suppression, *Cohen v. California*[5] had settled the matter by emphasizing the possibility of "averting the eyes" and ears to avoid injury from unwanted expression — a self-help remedy readily available to the Skokie residents, who need not on a Sunday afternoon come anywhere near the Nazi march unless they choose to. Finally, *Beauharnais* was no longer good law after *Brandenburg v. Ohio*,[6] which required at least a showing in justification of suppression that the danger of serious unlawful

2. 315 U.S. 568 (1942).

3. 343 U.S. 250 (1952).

4. 337 U.S. 1 (1949).

5. 403 U.S. 15 (1971).

6. 395 U.S. 444 (1969) (per curiam).

conduct resulting from the speech was imminent.[7]

Neier's effort to piece the Skokie case into the mosaic of Supreme Court case law is competently, if conventionally, done. But it is not worth reading the book for this accomplishment; the judicial opinions in the Skokie lawsuits perform the task with equal skill, and perhaps more economically. That is not to suggest, I hasten to add, that I necessarily agree with Neier that the Skokie case presented no "novel legal questions." If by that Neier means that the general issue of what to do about this kind of speech has been thought about before, then he is probably right. If, on the other hand, he thinks that the case law as it exists completely forecloses the possibility of creating any viable exception that would cover the Skokie situation, then I think he is wrong. As long as *Beauharnais* exists, at least, the law must be taken to be somewhat unsettled.

But the real problem is not in finding directly controlling precedent, anyway, but rather in explaining or justifying why such a result makes any sense in the first place. That Neier also sees this as his task is clear from the book's beginning. He is not content to rely solely on the cases to determine the result. He is squarely committed to the proposition that the "right" result here, as a matter of constitutional principle and policy, is tolerance. It is, then, for that argument that we must continue to look.

In seeking out Neier's prescriptive claims for tolerance we are tossed into a quagmire. At one point he tries to demonstrate that the theoretical underpinnings of the first amendment demand tolerance; he advances the conventional claim that our shared commitment to the search for truth and the democratic ideal also requires tolerance.[8] As quickly as these theories are advanced, however, Neier runs up against certain obvious and difficult problems: Why should our commitment to either of these goals lead us to protect the advocacy of false and subversive ideas, spoken by those whose object is to undermine the very ends to which we profess our common allegiance? If we want "truth" or "democracy," then why should we protect those who advocate and seek the destruction of those values?[9]

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7. Neier's principal analysis of the case is contained in chs. 6-8.

8. *See, e.g.*, pp. 134-37.

9. Neier seems to find an argument of this variety powerfully expressed by the political scientist Ernest van den Haag, whom Neier quotes as stating:

> The fathers of our Constitution were successful in protecting us against a government that might keep itself in power by taking away our rights. Less attention was paid to the possibility that some citizen[s] might *give away* their democratic birthright and invite others to do so, as large groups abroad have done. Yet if our right to choose the government freely is *inalienable*, then we are not entitled to *give* the right away any more than the government is entitled to *take* it away. We cannot then elect a government that does not recognize the right of the people to oust it peacefully or that denies the necessary civil liberties. Nor, if freedom is to be inalienable, can invitations to alienate it be recognized as a legitimate part of the democratic process.

P. 131 (quoting E. van den Haag without further citation) (emphasis in original).

This is, of course, a classic conundrum for freedom of speech. One typically finds any one of three techniques of escape employed at this point in the discussion. The first is to reject the assumption that the speech in question involves "false" or "invalid" ideas, that is, to maintain the possibility of truth in the suppressed message, or to assert the impossibility of any one individual's arriving at the truth.[10] It is quite clear that Neier does not intend to follow this line of argument. Understandably, he leaves no doubt about his belief in the total "falsity" of the Nazi doctrine.

The second type of response generally encountered concedes the premise of falsity but argues that the tolerance of even false ideas advances certain social interests, or at least that intolerance is not necessary to protect those interests. Neier does at certain points suggest his belief in this kind of argument. Thus, he appears to embrace the Millian view that tolerance of falsity stimulates the vitality of truth by confrontation between the two.[11] And he also endorses the idea, associated with both Milton and Jefferson, that we need not bother with speech such as this because truth will emerge victoriously in the end anyway.[12]

But these are not arguments that, at least today, people can live with comfortably. The confidence in the voice that is necessary for their successful invocation is usually lacking — and I think justifiably. That liberty and justice will prevail though we sit on our hands

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Later, Neier returns to this as the "most sophisticated argument against permitting the Nazis to speak." P. 145. It is here that he makes the response about the difficulty of line drawing to which I refer below.

It should be noted that the van den Haag argument is curious (though representative of a certain style of free speech argument) in that it seeks to argue that a position of tolerance is somehow logically compelled by the declaration that certain rights are "inalienable." Arguments such as these, which seek to defend a posture of tolerance as somehow compelled as a matter of linguistic logic, never fail to surprise one.

10. The classic statement of this position is, of course, to be found in Mill: "We can never be sure that the opinion we are endeavouring to stifle is a false opinion." J.S. MILL, ON LIBERTY 21 (New York 1926) (1st ed. London 1859).

11. Neier says:

> The marketplace of ideas is, rather, a means to permit people to engage freely in the search for truth. They choose what doctrine to accept and what doctrine to reject. By being forced to compete with falsehood, truth is tested and strengthened. Truth is not allowed to degenerate into a tyranny that only has a hold on the minds of people because it is imposed on them.

P. 147.

12. The statement attributed to Thomas Jefferson, as quoted by Neier, is as follows: "If there be any among us who would wish to dissolve this Union or to change its Republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." P. 134 (quoting Jefferson's first inaugural address).

The statement of John Milton, again as quoted by Neier, is as follows:

> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing . . . .

P. 135.

has a dangerous, ostrich-like ring to it. "[W]e have lived through too much to believe it," Alexander Bickel said with convincing rejection.[13] Of course, one can always play with the time span and get the hoped-for result; but it does little good to most people to know that in the "long run" truth will eventually return and we will be liberated. Besides, it might be asked (though it rarely is), if truth will ultimately prevail then why not punish the falsehood just for safety's sake?

One could go on in this vein, but this is not the occasion, and in any event, Neier himself intimates that he has similar reservations. What leads him to the position of tolerance in the end, he says, is not a stout confidence in some notion of the evolutionary progress toward truth so much as an instinctive concern for the risks associated with the alternative of suppression. And it is here that he adopts the third line of argument typically encountered in these sorts of cases — that no safe line can be constructed to deal with the problem. There is much force to the argument, he admits, that speech that is false and calculated to subvert fundamental social values (whether reflected in the Constitution or elsewhere) should not be encompassed within the protective mantle of the first amendment. But how can we draw the line, he asks: "The difficulty with this view (that Nazi speech is unworthy of constitutional protection) is that it requires us to put our trust in government to determine who shall be denied the right to speak because it is their intention to take away freedom of speech. Unfortunately, governments have very bad records in making such determinations" (p. 145).

Neier spends much time trying to construct this bad record. He cites the McCarthy period as a prime example of how the effort to extirpate society's enemies resulted in the indiscriminate hurting of innocent people. And he points to *Dennis v. United States*[14] as showing how legal lines can be manipulated in periods of intolerance to permit government suppression of valuable expression. But the experiences recounted transcend national boundaries. Thus we are reminded of how the French convicted Zola for his essay *J'accuse* on the grounds that he had defamed the military, while the group libel law under which his conviction was secured was never applied against the anti-Semitic authors who regularly published anti-Semitic materials. Neier also describes briefly the suppression of legitimate speech in Britain through such laws as the Public Order Act of 1936.[15]

On the other hand, Neier contends, legal precedents protecting the freedom of undeserving dissidents often help deserving dissi-

13. A. BICKEL, THE MORALITY OF CONSENT 71 (1975).

14. 341 U.S. 494 (1951).

15. Discussion of the material cited in this paragraph can be found in chs. 6 & 9.

dents as well. The free speech victories in *Terminiello* and *Brandenburg* are said to have protected the civil rights and anti-Vietnam War protesters of the 1960s. And so Neier concludes: "Deny free speech to Frank Collin in Skokie today and people with contrary views will lose some of their freedom . . . . History is clear. The freedom of our enemies must be defended if we are to preserve our own freedom" (p. 124).

The difficulty with this argument is in identifying precisely its presuppositions. Is the argument that one cannot draw a line fine enough to take care of the problem at hand without risking a broadening application? Is the claim that, for example, group defamation laws are so inherently vague that they inevitably encompass more than should be excluded from public debate? If so, and one need not concede the point, it might be a sufficient answer simply to propose a narrower and more specific exception, such as the advocacy of genocide or the wearing of the swastika. We could establish a kind of "dustbin" exception to free speech under which certain ideas about which we have considerable historical experience could be relegated to an unprotected status. Would such an exclusionary rule be less specific than many others that are already well established, such as those involving vague and ill-defined concepts like "obscenity," or "public figures" in the libel area, or "commercial speech"?

The claim, however, does not seem to rely on some aspect of the inherently unspecific character of language. Rather, it seems to rest on the notion that whatever line is drawn will ultimately be manipulated to cover valued expression. Intolerance is perceived, at least implicitly, as a force within the society that exists under such pressure that the smallest crack in the wall sends the entire structure crumbling down in a heap. But what is this underlying reality? Is it true that contemporary American society is likely to reproduce the experiences of repression recounted in France, Britain, or even in the United States in the 1950s? Moreover, is the cause-and-effect relationship between the creation of an exception and the ultimate punishment of innocent victims necessarily clear? In short, what assumptions are being made in this claim about the sources of potential intolerance, about the likelihood of a revival of intolerance, and about the nature of our political and judicial institutions during periods of intolerance?

Neier's attempt to answer these questions can be found in his Prologue. It is there, beyond the structure of the "official" argument, that he speaks with a concrete and, it must be said, stirring voice. Nowhere else in the book, nor in the ACLU documents in the Skokie case, does the argument for tolerance rise to this level of candor and straightforwardness. The contrast between the Prologue and the rest of the book also incidentally shows how our inherited rhetoric

about the first amendment — where a literary form of argument and persuasion has occasionally proved *too* attractive — has fossilized our thinking. Sometimes beautiful phrases can evoke noble sentiments but divert us from real issues.

In the Prologue, Neier speaks not only as a lawyer and Director of the ACLU but also as an individual, a Jew. He recites his "credentials" for despising Nazis, and recounts his last-minute escape from Hitler Germany when a young boy. "I recite my own background," Neier explains, "to suggest why I am unwilling to put anything, even love of free speech, ahead of detestation of the Nazis" (p. 3).

From this position he develops his argument, one largely shorn of the usual encrusted rhetoric and platitudes. He appreciates the risk of persuasion inherent in permitting the Nazi ideology to flourish unencumbered by legal restraints: "The risks are clear. If the Nazis are free to speak, they may win converts. It is possible that they will win so many adherents that they will obtain the power to abolish freedom and destroy me." And though he professes that "John Milton's view that truth will prevail in a free and open encounter with falsehood is my view, too," he adds that he "cannot accept Milton's principle as infallible," and is "wary of putting too much faith in any principle of human behavior" (p. 4).

Still, Neier says, he "must examine with care the alternatives that are available to me." The only "alternative to freedom is power." And as he tallies up the risks and benefits of each alternative scenario, he reaches this sober conclusion:

> If I could be certain that I could wipe out Nazism *and* all comparable threats to my safety by the exercise of power, perhaps I would be tempted to choose that course. But we Jews have little power. We are few in number. We are known by the world as a separate race and a separate religion. Only Jews are doubly marked as a people apart.
>
> The rest of the world is suspicious of us Jews. We are like each other and we will stick by each other, the world believes. If a scapegoat is needed for any evil, look among Jews and accuse all Jews. If a Jew took part in the Crucifixion, all Jews are Christ killers. If a Captain Dreyfus is a traitor, all Jews are traitors. If a Karl Marx — despite his childhood baptism — is a Jew, all Jews are revolutionaries. If a Jew lends money, all Jews are usurers. If one Jew is a participant in a financial scandal, the Jews are manipulating the economy. Because he is identified as a Jew, the Jew captures attention. There are Jews everywhere. We can be blamed for everything. [Pp. 4-5.]

Given this reality, Neier is clear in his own mind what legal principles are called for:

> Because we Jews are uniquely vulnerable, I believe we can win only brief respite from persecution in a society in which encounters are settled by power. As a Jew, therefore, concerned with my own survival

> and the survival of the Jews — the two being inextricably linked — I want restraints placed on power. The restraints that matter most to me are those which ensure that I cannot be squashed by power, unnoticed by the rest of the world. If I am in danger, I want to cry out to my fellow Jews and to all those I may be able to enlist as my allies. I want to appeal to the world's sense of justice. I want restraints which prohibit those in power from interfering with my right to speak, my right to publish, or my right to gather with others who also feel threatened. Those in power must not be allowed to prevent us from assembling and joining our voices together so we can speak louder and make sure that we are heard. To defend myself, I must restrain power with freedom, even if the temporary beneficiaries are the enemies of freedom. [P. 5.]

Here, then we finally have Neier's real argument before us. Tolerance is not just demanded by the case law; nor is it logically compelled by some general commitment to the search for truth or the democratic ideal; nor does tolerance seem to be the most attractive alternative because of some intrinsic and abstract problem of line drawing in the free speech area. It is rather a matter of self-protective political strategy, a response to a perceived reality of ever-threatening prejudice against a group (or groups) that possesses only a fraction of the power needed to secure its future. Legal principle becomes, therefore, a refuge, secured by an odd alliance with one's archenemy. As such, the act of tolerance becomes at once an ambiguous symbol of safety and vulnerability.

III

To conceive of the meaning of the act of tolerance in this way, to defend its value on this basis, is extremely odd and unsatisfactory for a number of reasons. Maintaining a policy of no exceptions in order to preserve the security of the basic rule, even when it is thought that a limited exception is appropriate, often has nothing more to offer than the illusion of success. Legal rules can always be changed improperly. If a government is really bent on persecuting a particular group, it will probably not find it significantly more difficult to adopt a new rule favorable to that policy than it will to extend one already in existence that had been created for a narrower purpose. The claim will invariably be the same in either case: An "emergency" or "special circumstances" will be said to justify the "new" state of affairs. If it is argued that the judges will be there ready to strike down a brand new rule, then one might reasonably wonder why they would not also be there to prohibit the unreasonable expansion of a narrow, legitimate exception. And, even if it is thought that a narrow exception poses greater risks of expansion than a policy against any exceptions (which, of course, is practically speaking impossible: witness the continued existence of some form of "clear and present

danger" test), is it realistic to assume that the judicial system will summon the strength to resist the tide of pressures from a powerful government intent on suppression? The judicial record of protection for civil liberties during such periods, which Neier himself recounts, gives little reason for optimism. (Even the ACLU succumbed to the rabid intolerance of the 1940s and '50s by purging communists from its official hierarchy and assisting the FBI in identifying "subversives.")[16]

But troubled thoughts about the chances of securing a "fortress" of legal rules leads one on to even more fundamental difficulties. Neier, like so many others engaged in the defense of free speech at the margins, frequently talks as though the exclusive or real threat to civil liberties lies in the habits and attitudes of those in officialdom, of government, and not in the "people." When defining the problem that the principle of free speech is designed to resolve (as opposed to speaking of the glories of self-government and its relation to free speech) it is conveniently forgotten that we live in a democracy. During periods of intolerance, the people *want* their government to supress radical and unpopular views.[17] Government representatives do not have a monopoly on prejudice. If the problem were simply one of controlling characteristics peculiar to members of government, a solution might be found in the application of more democracy. But such is not the case.

The implications of this reality for a simple strategy of maintaining the purity of legal rules are obviously momentous. The legal "right" to speak when there is no one ready to listen is a rather empty possession indeed. For all our haste to give permanence to a legal principle we may very well lose in the process the point of having it in the first place. The real question for us, then, ought to be not What is the best course to follow so that everyone will be able to speak when they want or need to? but rather How shall we understand this process of intolerance toward ideas and seek to allay its causes? How shall we preserve a society in which people have mastered whatever controls are necessary to forestall the problem of intolerance from arising in the first place?

It is, of course, precisely that ultimate end that those defending a course of intolerance, as in a situation like Skokie, jealously embrace as their own and make the basis of their argument. They say that the better way is to exclude from public discourse those ideologies or ideas that seek to undermine basic civil liberties or fundamental norms of decency. This policy will affirm within the society — through the educative value of law — the importance of the line

16. See Neier's account of the history of the ACLU in ch. 5.

17. This is certainly one of the overriding lessons demonstrated by Zachariah Chafee in his classic work, FREE SPEECH IN THE UNITED STATES (1941).

between what is permissible and what impermissible to entertain in our minds and to implement through our actions. Intolerance thus conveys a message that some things are wrong, quite simply beyond the pale of consideration. Through law, it is said, we are led to distinguish between the good and the bad, and only then can we derive any true feeling of security.[18]

Free speech theory provides us with no satisfying response to this line of argument. Confronted with the paradox of protecting speech whose object is to undermine either the liberty of speech or the institutions said to be dependent on it, our free speech thinking reaches for the quickest means of shifting the burden of argument — and finds it in the claim about the difficulties of line-drawing. But this kind of logic deprives tolerance of any intrinsic meaning, other than that of having preserved the "rule of law" as a "rule of the game"; it concedes the absence of any other value or lesson inhering in the choice to be tolerant. To the assertion that we must learn to distinguish between the good and the bad (the basis of the position for intolerance), those advocating the free speech position can only respond with a feeble defense that seems to exalt consistency and concede helplessness.

This response does not seem to satisfy our intuitions about the full importance of maintaining a principle of free speech. There does seem to be inherent value in the pro free speech position, but identifying or articulating it seems always just to elude us.

There are many reasons for dissatisfaction, but the primary source of the problem, I believe, can be traced back to our fundamental conception of "liberty" which involves the absence of external restraints on the individual's will to act. Our difficulty with freedom of speech, therefore, is that we consistently seek to identify the value of the principle in the *act of speaking*. We conceive of the concept as ensuring the opportunity to express ourselves; we seek to define or justify the principle by assigning some utility to the speech act, whether it be with reference to the interests of the individual speaker or to those of his audience. We do not, on the other hand, focus our attention on the benefits to be gained in the simple act of self-restraint, of tolerance. Perhaps this avoidance is natural. Preserving the "freedom" to speak *is* an important objective; and, by

18. A variation on this argument was made in a *Washington Star* editorial, which Neier quotes:

> Free speech, as originally conceived, was not designed, after all, to foist on us the mischief of guttersnipes, but to protect the community from official suppression of valuable ideas — ideas of conceivable truth, ideas deserving close consideration. "Truth" was Milton's word for such ideas, but truth is a commodity in which the American Nazis, like their forerunners in Germany, have no interest. Their stock is evil myth and slanderous falsehood, identifiable as such by every civilized instinct. If this distinction cannot be made, what can be?

P. 125 (quoting a *Washington Star* editorial without further citation).

way of additional exculpation, it can be pointed out that the constitutional language ("the freedom of *speech*") does point at the act of speaking as opposed to that of self-restraint toward speech. Nevertheless, it is far more fruitful, I believe, to reexamine our classic free speech literature, and particularly that arising out of the twentieth-century American experience, from the vantage point of what it has to say about the dilemmas and benefits of tolerance rather than simply the value of expression. What we would find, I think, is that our approval of the free speech principle is grounded as much in a desire to avoid being the slaves of our own intolerant impulses as it is in a desire to preserve an unshackled freedom to speak one's mind as one wishes. The "liberty" interest at stake is not simply the positive one of exercising the will, but also the negative one of controlling the will.

If we are to focus on the general role of tolerance in generating a commitment to the free speech principle, we must examine a number of things that we have heretofore largely ignored. We must seek to learn what psychological theory underlies each of the respective positions on free speech that has been handed down to us. This inquiry can be subdivided into a number of separate questions. What are our assumptions about the nature of intolerance and what is it that we seek to avoid or overcome? (Intolerance is "perfectly logical," Holmes said in one of his frequently quoted but cryptic passages.)[19] If intolerance is such a natural and powerful human response, then what are its origins, its causes? What in turn is responsible for the nature of belief and, most important, how should people feel toward their beliefs and how should they decide how to react toward the expression of contrary beliefs by others?

The disagreements that we have witnessed over the decades between various free speech theorists (and particularly the dispute between the views of Holmes and Meiklejohn) stem from different answers to these questions. The actual sources of our disputes over the meaning and purposes of free speech are not to be found in dis-

19. Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Apart from the odd description of the impulse to persecution as "logical," Holmes's statement is also oddly elliptical in its depiction of the roots of intolerance. If one has "no doubt" of either your "premises or your power," then why would one feel the need to correct any contrary impression created by inaction, at least when — as is so often the case — the opposition is realistically not very threatening? To whom, in other words, is the individual seeking to communicate these messages of confidence in power and premise? The answer, of course, is often "to oneself." I refer to this source of intolerance below in addressing once again the specifics of the Skokie litigation.

agreements over whether the principle serves the ideal of self-government or a broader quest for truth, or whether it serves a general social interest or a private interest in autonomy, but rather in more fundamental differences in attitudes about the nature of intolerance and about how people should think about their beliefs and those of others. Following this path we are likely to arrive at a better understanding of why we have failed to develop a single, comprehensive theory of free speech, a question Harry Kalven raised many years ago.

What is at issue in free speech is really just a slice of a much more pervasive individual and social dilemma. Take politics, for example. How one thinks about one's own ideas or beliefs, and about the likely sources and causes of an impulse to reject those of others, will directly determine one's behavior, not just in deciding what political discourse to allow or disallow, but also in deciding on what political course of action to take. If one is part of the majority, the question will arise how one should deal with minority views in deciding what political course to follow. The choice one makes will largely depend on the attitude one takes toward the beliefs underlying one's own behavior. The minority, too, must face the question of how to respond to the loss that their beliefs have suffered, whether to accede to the majority, continue to object, engage in civil disobedience, or perhaps even revolution. (We have witnessed recent evidence of gross miscalculations along these lines in the activities of the rump of the Weathermen faction.) These decisions are critical to democratic politics, but they are not limited to it; they in fact exist in all interpersonal relations.

But it is also the very breadth, or pervasiveness, of the problem of developing a capacity for tolerance in social life that helps us begin to account for the rather extreme behavior we see taken in the name of free speech (of which Skokie is merely illustrative). Consider this. If learning how to adjust one's beliefs to those of others, how to guard against a natural impulse not to tolerate contrary views or feared ideas is thought to be an important lesson for society, then it makes sense to take one area of human behavior — in this case, legal restraints on thought or expression — and commit society to a general response of self-restraint as a means of demonstrating the importance of and potential capacity for tolerance generally. And it is only in this sense that tolerance of speech in an extreme degree, further than would be necessary (or even desirable) across the broad spectrum of human activities, has powerful justification. For it is really at the outer edges of the exercise of speech, at the perimeters, that the general capacity of tolerance is tested and the lessons sought to be conveyed and learned are highlighted.

From this perspective upholding a right of free speech in a case

like the Skokie case seems to make the most sense. The value of any act is dependent upon the reasons behind it, and in free speech, as in any other area, getting the reasons straight is of first importance. One can understand Neier's choice to protect the free speech activities of Nazis, but not because people should value their message in the slightest or believe it should be seriously entertained, not because a commitment to self-government or rationality logically demands that such ideas be presented for consideration, not because of a simple hope *qua* conviction that anti-Nazi sentiment will win in the end, not because the anti-Nazi belief will be stimulated by open confrontation and argument with the Nazi belief, not because a line could not be drawn that would exclude this ideology without inevitably encroaching on ideas that one likes — not for any of these reasons nor others related to them that are a part of the traditional baggage of the free speech argumentation; but rather because the danger of intolerance toward ideas is so pervasive an issue in our social lives, the process of mastering a capacity for tolerance so difficult, that it makes sense somewhere in the system to attempt to confront that problem and exercise more self-restraint than may be otherwise required. We should be, in short, more concerned with addressing through the act of tolerance the potential problems of intolerance than with valuing the act of speech itself.

On this basis, then, tolerance becomes not merely a futile attempt at shoring up the legal barricades, a response devoid of intrinsic value and meaning, but instead a symbolic act indicating an awareness of the risks and dangers of intolerance and a commitment to developing a certain attitude toward the ideas and beliefs of others. At least a part of this attitude is a willingness to recognize the existence of ideas within society that we might otherwise prefer to ignore, and to see the risks involved in succumbing to the wish to refuse to acknowledge their existence. Self-knowledge may be the best defense available against the ideas that we hate.

When we look closely at what occurred in Skokie — even as Neier himself describes the events and their background — we can see some of the dangers of intolerance.[20] These "puny anonymities,"[21] as so often happens to such individuals, had every chance of becoming the victims of a felt need to demonstrate the complete de-

20. I do not mean to suggest that a finding along the lines of what I am about to say is essential to the application of the free speech principle in the Skokie case. In the first amendment, as elsewhere, we follow a course of action for its general symbolic value without regard to the particular characteristics of discrete situations. We do not, for example, choose to ask ouselves as a precondition of extending constitutional protection whether a particular idea is in some sense "valuable."

21. The reference of course is to Holmes's view of the defendants in the *Abrams* case. It is one of the more striking facts about the free speech case-law that many if not most of the defendants have been relatively powerless individuals.

nial of anti-Semitism within the society and, in the case of many Jews, the removal of the sense of guilt (whether or not justified) at not having resisted Nazism sufficiently in the past.[22] Impotent, extremist groups such as the National Socialist Party and the likes of Frank Collin can become — no doubt *because* of their very powerlessness — the scapegoats for other issues. That they often seem to invite such a response does not diminish the problematic character of the response.

This is not to say that no form of intolerance would ever be reasonable. But it does point up rather dramatically the dangers of excessive intolerance. And to the extent that intolerant impulses nearly got out of hand in the Skokie episode, it is no wonder that people like Neier felt personally queasy at the prospect of their being unleashed, even in the form of a legal rule banning Nazism. There is more than a casual identification running through the thought, so often encountered during the Skokie case, to the effect that "if we permit the Nazis to be banned here then we will have to let Southern whites stop black demonstrators." "I heard myself like Bull Conner opposing Freedom Marchers," says one troubled Skokie resident without evident awareness of the full nature of the perceived identification (p. 59). Perhaps, as another manifestation of the problem of appearance and reality in the Skokie episode, it can be wondered whether many Jews themselves, who felt compelled to respond in more or less violent fashion to the Nazis should they march in Skokie, half welcomed — like the person who succumbs to the restraining hands of friends while attempting to retaliate against the speaker of a personal insult — the command of the first amendment that intolerance not occur.

On the other hand, any concern we might have over intolerance, generated by improper motives, getting out of hand, should never be confused with the legitimacy, indeed the necessity, of explicitly rejecting the Nazi creed. For the successful outcome of the entire Skokie episode, it was as essential that there exist a strong desire for intolerance and that it manifest itself in a clear, unambiguous, articulated rejection of the evil of anti-Semitism and Nazi behavior generally. In a sense, the principle of free speech depends for its meaning and vitality on its being difficult to live by, perhaps even on

22. Neier speaks to this issue, though he does not draw any conclusions from it other than to try to account for the response of Jews to the proposed Nazi march in Skokie. In his second chapter, entitled "Never Again," he says:

> The resistance of Skokie's Jews to a proposed demonstration in their town by American Nazis was a kind of delayed response of anger about the past. When German Nazis overran their towns in Eastern Europe, most Jews had not resisted.

P. 28. The characterization of passivity in the face of attack is also addressed in a discussion about the controversy surrounding the publication in 1963 of Hannah Arendt's book, *Eichmann in Jerusalem*.

its being resisted. In that sense, we must only hope that there will never come a time when a Skokie case is an "easy case."

And, of course, the free speech proponents in the Skokie case would never want that to occur either. Still, the presence of a powerful resistance to tolerance, premised upon the claim that it was wrong to tolerate a moral evil, no doubt also had the effect of hardening their conviction that absolutely no exceptions to the basic principle of free speech could ever be "tolerated." The less "choice" one sees oneself as having on the matter of whether or not to make an exception, the easier it can be to live with the fact that one is tolerating what one detests or regards as evil. This may help to explain at least a part of the "easy case" posture we saw. But it is also, I think, a piece of an identifiable and more generalized tendency in free speech argumentation and rhetoric: Perhaps because those who defend the principle feel constantly under siege, threatened by the continual specter of intolerance, perhaps because they often (as I have argued) do not feel able to defend their positions with arguments that correspond to their intuitions about what tolerance means, whether it is for one or both of these reasons, one often detects in the free speech arguments, under the guise of indefatigable efforts for consistency, a rigidity of mind that reflects an underlying fear that to acknowledge (even secretly) the possible validity of the arguments of the opposing side would reveal a weakness of resolve and unacceptable self-doubt.

There is good reason to suspect, therefore, that little meaningful dialogue occurred in the Skokie case. Each side found it "intolerable" to consider the alternative posed by the other; neither could show or acknowledge any weakness or self-doubt. To each side the case became an "easy" question, which also became the tip-off about what was going on. Neither side was ever really interested in what the other had to say.

The upshot is not simply that there are dialogue-thwarting forces, perhaps even unavoidable ones, at work in cases like the Skokie case. It is more important to understand that what we can see, beneath all the appearances, of these forces at work provides us, ironically, with powerful reasons for having a principle of free speech in the first place. Although free speech is often concerned with "censorship," it is not just the official censorship of the state but the "censorship" of each individual over himself that counts. Through a societal choice not to "censor" ideas through law, there is reflected a general willingness to be alert to untoward effects of the internal censor as well — a problem of pervasive social significance. And it is the relevance of the idea of free speech to that broader issue that has given it so high a priority in our hierarchy of "rights."