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Anti-Semitism and The Overlooked Benefits of Allowing “Hate Speech”

Michael Conklin*

INTRODUCTION¹

Recent increases in anti-Semitic speech and violence have led to calls for censorship of such “hate speech.”² Unfortunately, discussions regarding the tradeoff between censorship and free speech often focus solely on the costs and benefits of censorship, omitting the numerous benefits of allowing “hate speech.” This incomplete analysis results in an unjustified bias toward censorship. This Article chronicles the often overlooked benefits of allowing “hate speech,” thus providing a more accurate assessment of the tradeoffs that need consideration. This Article concludes by explaining how it is strategically advantageous for free-speech advocates to emphasize the benefits of allowing “hate speech” rather than simply warning of censorship’s harms.

I. BACKGROUND

Anti-Semitic speech and violence have generally been on the rise in recent years. Anti-Semitism has become more prevalent. American college campuses according to a 2021 survey.³ Over a one-week period in May 2021, the Anti-Defamation League found seventeen thousand tweets expressing the view that “Hitler was Right.”⁴ Celebrities have been increasingly bold in making anti-Semitic statements.⁵ The Black Lives Matter movement has been criticized for anti-Semitic actions.⁶ Despite a lack of any evidence to support the claim, Jews and Israelis

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¹ This Article is a more nuanced progression from Michael Conklin, *The Overlooked Benefits of Hate Speech: Not Just the Lesser of Two Evils*, 60 S. TEX. L. REV. 687 (2020).

² This Article places the term “hate speech” in quotation marks. This is not a semantic ruse or an attempt to belittle pro-censorship advocates. Rather, it is a grammatically accurate treatment of the term since “hate speech” is far from having an agreed-upon definition. There is no legal definition of “hate speech” in America. Laura E. Adkins, *Former ACLU President Says Censoring Hate Speech Can Backfire—Just Like It Did in Nazi Germany*, JEWISH TELEGRAPHIC AGENCY (Sept. 3, 2020, 3:47 PM), <https://www.jta.org/2020/09/03/opinion/former-aclu-president-says-censoring-hate-speech-can-backfire-just-like-it-did-in-nazi-germany>. Nadine Strossen provides an unavoidably subjective definition of “hate speech” as “speech that conveys a hateful or discriminatory message, particularly about people who belong to racial, religious, sexual or other groups that have traditionally been marginalized and oppressed.” *Id.*

³ Talia Kaplan, *Anti-Semitism on College Campuses on the Rise, Report Finds*, N.Y. POST (Sept. 9, 2021, 1:46 PM), <https://nypost.com/2021/09/09/anti-semitism-on-college-campuses-on-the-rise-report-finds/>.

⁴ Laura Kelly & Rebecca Beitsch, *US Sees Startling Rise in Antisemitic Attacks*, THE HILL (May 24, 2021, 7:31 PM), <https://thehill.com/policy/national-security/555189-us-sees-startling-rise-in-antisemitic-attacks/>.

⁵ Kareem Abdul-Jabbar, *Kareem Abdul-Jabbar: Where Is the Outrage Over Anti-Semitism in Sports and Hollywood?*, HOLLYWOOD REP. (July 14, 2020, 4:00 PM), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/kareem-abdul-jabbar-is-outrage-anti-semitism-sports-hollywood-1303210/> (citing recent examples from Ice Cube, DeSean Jackson, Stephen Jackson, and Chelsea Handler).

⁶ See, e.g., Ben Sales, *Jewish Men Abused with Anti-Semitic Slurs at Philadelphia Racial Justice Protest*, TIMES ISR. (Oct. 31, 2020, 8:53 AM), <https://www.timesofisrael.com/jewish-men-abused-with-anti-semitic->

experienced coronavirus-related slurs blaming them for the pandemic.⁷ In a 407-23 vote, Representative Ilhan Omar was officially censured in Congress for anti-Semitic comments.⁸ Europe appears to be experiencing a similar increase in anti-Semitism. In 2019, France reported a seventy-four percent increase in anti-Semitic offenses, while Germany reported more than a sixty percent increase.⁹ The Israel-Palestine conflict appears to be a significant contributor to the increases in anti-Semitic speech and violence.¹⁰

Unfortunately, the rise in anti-Semitic behavior has corresponded with a rise in support of censorship. A recent note published in the *Boston College Law Review* advocates for amending the First Amendment to remove protections of speech deemed to be “hate speech.”¹¹ In 2019, the United Nations responded to, among other things, “rising anti-Semitism” by stating that we “must confront hate speech at every turn. Silence can signal indifference to bigotry and intolerance.”¹² Former presidential frontrunner Howard Dean incorrectly asserted that “[h]ate speech is not protected by the first amendment.”¹³ Only forty-six percent of college students recognize that “hate speech” is protected by the First Amendment, and only thirty-five percent think “hate speech” should be protected by it.¹⁴ Richard Stengel—former national editor of *Time* magazine, former Under Secretary of State for Public Diplomacy and Public Affairs in the Obama administration, and former CEO of the National Constitution Center—wrote that the First Amendment should not protect “hateful speech that can cause violence by one group against another.”¹⁵ This conclusion was arrived at after experiencing “even the most sophisticated Arab

slurs-at-philadelphia-racial-justice-protest/; Ben Sales, *Kenosha Synagogue Still Supportive Despite Vandalism During BLM Riots*, JERUSALEM POST (Aug. 28, 2020, 7:21), <https://www.jpost.com/diaspora/antisemitism/kenosha-synagogue-still-supportive-despite-vandalism-during-blm-riots-640277>; City News Service, *Synagogue Vandalized in Fairfax District Amid Protests*, NBC L.A. (May 30, 2020, 11:22 PM), <https://www.nbclosangeles.com/news/local/synagogue-vandalized-in-fairfax-district-amid-protests/2371400/>.

⁷ Daniel Estrin, *New Report Notes Rise in Coronavirus-Linked Anti-Semitic Hate Speech*, NPR (Apr. 21, 2020, 1:02 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/839748857/new-report-notes-rise-in-coronavirus-linked-anti-semitic-hate-speech>.

⁸ Susan Davis, *House Votes to Condemn Anti-Semitism After Rep. Omar’s Comments*, NPR (Mar. 7, 2019, 5:43 PM), <https://www.npr.org/2019/03/07/701074291/house-votes-to-condemn-anti-semitism-after-rep-omars-comments>.

⁹ Jon Henley, *Antisemitism Rising Sharply Across Europe, Latest Figures Show*, THE GUARDIAN (Feb. 15, 2019, 12:00 AM), <https://www.theguardian.com/news/2019/feb/15/antisemitism-rising-sharply-across-europe-latest-figures-show>.

¹⁰ Kelly & Beitsch, *supra* note 4.

¹¹ Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2101 (2019).

¹² U.N. Secretary-General, *United Nations Strategy and Plan of Action on Hate Speech*, (June 18, 2019), https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf.

¹³ NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 18 (2018).

¹⁴ *Student Attitudes Free Speech Survey – Full Text*, THE FIRE, <https://www.thefire.org/research/publications/student-surveys/student-attitudes-free-speech-survey/student-attitudes-free-speech-survey-full-text/> (last visited Apr. 23, 2022).

¹⁵ Richard Stengel, *Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019, 8:20 AM), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/>.

diplomats that . . . did not understand why the First Amendment allows someone to burn a Koran.”¹⁶

While not explicitly advocating for censorship, it is perhaps a telling sign of the times that one of the most steadfast protectors of the First Amendment—the American Civil Liberties Union (ACLU)—is regressing in its support of free speech. After being accused of having “blood on its hands” when a counter protester was murdered in Charlottesville, some ACLU chapters narrowed their support for free speech, and the national director stated that the ACLU will no longer defend the right to protest while carrying a gun.¹⁷

II. HARMS OF CENSORING “HATE SPEECH”

Most of the harms of censoring “hate speech” stem from how censorship efforts rarely produce the desired result. For example, history teaches that censorship often leads to an increase in the underlying behavior that the censorship was designed to suppress. According to an analysis of the blasphemy laws, the Muslim-majority countries that enforce these laws are significantly more likely to experience Islamist terrorism compared to Muslim-majority states that do not criminalize blasphemy.¹⁸ These blasphemy laws are used by terrorist groups to punish people they perceive as threatening to their ideologies.¹⁹ Therefore, these laws function to aggravate hostilities, despite their intention to mitigate them.²⁰ Likewise, bans against Holocaust denial in some European Union member countries have corresponded with increased anti-Semitism.²¹

Attempts to censor “hate speech” frequently result in the unintended consequence of suppressing more speech than originally intended. For example, the University of Michigan implemented a hate speech code in 1987 to address anti-Black campus activity.²² But once implemented, the speech code quickly devolved into censoring what critics referred to as “obnoxious ideas civilly expressed.”²³ For example, a complaint was filed against a student who said that “Jewish people used the Holocaust to justify Israel’s policies toward the Palestinians.”²⁴ And a student was punished for repeating a comment regarding how “minorities had a difficult

¹⁶ *Id.*

¹⁷ Dara Lind, *Why the ACLU Is Adjusting Its Approach to “Free Speech” After Charlottesville*, VOX (Aug. 21, 2017, 10:06 AM), <https://www.vox.com/2017/8/20/16167870/aclu-hate-speech-nazis-charlottesville>. In Charlottesville during the “Unite the Right” rally, protestors chanted phrases such as “Jews will not replace us,” and one protestor drove his car into a crowd of counter protestors, killing one of them. Nicole Sganga, *What to Know About the Civil Trial Over Charlottesville’s Deadly “Unite the Right” Rally*, CBS NEWS (Nov. 19, 2021, 12:29 PM), <https://www.cbsnews.com/news/charlottesville-unite-the-right-rally-trial-what-to-know/>.

¹⁸ Nilay Saiya, *Blasphemy and Terrorism in the Muslim World*, 29 TERRORISM & POL. VIOLENCE 1087, 1087 (2016).

¹⁹ *Id.* at 1090.

²⁰ *Id.* at 1089–90.

²¹ Timothy Garton Ash, *A Blanket Ban on Holocaust Denial Would Be a Serious Mistake*, THE GUARDIAN (Jan. 18, 2007, 7:17 PM), <https://www.theguardian.com/commentisfree/2007/jan/18/comment.secondworldwar>.

²² ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 98 (2017).

²³ *Id.* at 99.

²⁴ *Id.* at 100.

time in a particular course.”²⁵ Fortunately, this speech code was struck down by a federal judge who explained how it was “simply impossible to discern any limitation” on the policy.²⁶

This has been the experience of “hate speech” laws internationally as well. In Canada, an Islamic group filed a “hate speech” complaint against a magazine for publishing excerpts from a best-selling author’s book that covered the topic of anti-Semitism in radicalized Islam.²⁷ In Germany, a demonstrator at an anti-Israel protest filed a criminal complaint against an Israeli woman for displaying an Israeli flag.²⁸ The police charged the Israeli woman with the crime of provoking the protestors under a criminal code that punishes “insults.”²⁹

Even worse, these attempts to censor “hate speech” frequently result in more of the speech that was intended to be censored. The Anti-Defamation League found that the presence of “hate speech” laws in Europe correspond to higher anti-Semitism than in the United States, where such censorship is not allowed.³⁰ These findings are similar to the research on hate crime legislation that shows the laws likely function to incentivize the exact behavior they are intended to reduce.³¹ “A hate crime charge is, after all, a mark of status in the social circles in which the perpetrators of such crimes seek to rise and, in their own minds, a badge of political martyrdom.”³²

The historically significant period of 1930s Germany provides an alarming example of how censorship efforts often backfire and create the potential for catastrophic consequences. Julius Streicher, a news media owner and Nazi leader, had either his newspaper confiscated or his editors taken to court thirty-six times for anti-Semitic speech.³³ But rather than preventing this targeted behavior, “[t]he more charges Streicher faced, the greater became the admiration of his supporters. The courts became an important platform for Streicher’s campaign against the Jews.”³⁴ During this same time period, the Weimar Republic passed legislation against “insulting religious communities.”³⁵ These laws were used to prosecute hundreds of Nazis.³⁶ “The Nazis turned their prosecutions for hate speech to their advantage, presenting themselves as political victims and whipping up public

²⁵ *Id.*

²⁶ *Id.*

²⁷ Richard Moon, *Revisiting the Maclean’s Human Rights Code Complaint*, CTR. FOR FREE EXPRESSION (Apr. 2, 2019), <https://cfe.ryerson.ca/blog/2019/04/revisiting-maclean%E2%80%99s-human-rights-code-complaint>.

²⁸ Benjamin Weinthal, *German Police Threaten Israeli with Crime for Show of Israeli Flag*, JERUSALEM POST (Sept. 28, 2020, 9:31 PM), <https://www.jpost.com/diaspora/german-police-threaten-israeli-with-crime-for-show-of-israeli-flag-643698>.

²⁹ *Id.*

³⁰ CHEMERINSKY & GILLMAN, *supra* note 22, at 109.

³¹ Michael Conklin, *Unnecessary, Counterproductive, and Unjust: The Case Against Federal Hate Crime Legislation*, GEO. MASON L. REV. F. (forthcoming 2022) (on file with author).

³² Jesse Larner, *Hate Crime/Thought Crime*, DISSENT, Spring 2010, at 76.

³³ STROSSEN, *supra* note 13, at 136.

³⁴ *Id.*

³⁵ Brendan O’Neill, *How a Ban on Hate Speech Helped the Nazis*, THE AUSTRALIAN (Mar. 29, 2014), <https://www.theaustralian.com.au/national-affairs/opinion/how-a-ban-on-hate-speech-helped-the-nazis/news-story/cb199a0aae4d42a54164f3c9463745f9>.

³⁶ *Id.*

support among aggrieved sections of German society, their future social base. Far from halting Nazism, hate speech legislation assisted it.”³⁷ And Adolf Hitler himself used government censorship effectively to burn books by Jewish authors, control all forms of media, and silence pamphleteers who were raising awareness of the plight of the Jews.³⁸

The previous examples illustrate how censorship efforts can have the unintended consequence of elevating a speaker to martyr status and unseat critics from the moral high ground. This newly acquired martyrdom status can then be used by objectionable groups to gain converts and motivate their bases.³⁹ The previous examples also likely illustrate the “forbidden fruit effect,” which holds that censoring speech creates an increased demand for it.⁴⁰

Efforts to censor “hate speech” are further problematic in that—because of its inherently vague nature—nearly anything can be defined as “hate speech.” Without an objective method of identifying “hate speech,” government officials possess a dangerous amount of discretion in punishing speakers in a discriminatory manner. Even both sides of a controversial issue could simultaneously be labeled as “hate speech.” For example, both pro-Palestinian speech and pro-Israeli speech could be labeled “hate speech,” as they both express disfavor for each other’s policies. Even reciting verses from the Torah could be labeled “hate speech” by an ambitious government censor.⁴¹ This inherently subjective nature of the term “hate speech” means that the practice of censoring it is inextricably at risk of discriminatory enforcement based on the personal preferences of the censors.

Another problem with attempts to censor “hate speech” is that, due to its inherently subjective nature, delineation between what should and should not be censored is extremely subjective. While a given person may be able to confidently state a personal preference for exactly what should and should not be censored, the real-life task of drafting legislation to provide a clear line for law enforcement and judges to apply is highly impractical. Using anti-Semitism as an example, while there are examples of speech that would have widespread agreement as to its classification as “hate speech” and examples of speech that would have widespread agreement as to not being “hate speech,” there would also be much speech in the middle, gray area, where there would be widespread disagreement as to whether it qualifies for censorship or not. The following are just a few examples of speech in the grey area:

³⁷ *Id.*

³⁸ Joel Griffith, Emilie Kao, Thomas L. Jipping & Brett D. Schaefer, *Combating Hate with Freedom, Not Censorship: The Example of Anti-Semitism*, THE HERITAGE FOUND. (Dec. 10, 2020), <https://www.heritage.org/civil-society/report/combating-hate-freedom-not-censorship-the-example-anti-semitism>.

³⁹ See Olga Khazan, *How White Supremacists Use Victimhood to Recruit*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/science/archive/2017/08/the-worlds-worst-support-group/536850/>.

⁴⁰ See *The Forbidden Fruit Effect*, EXPLORING YOUR MIND, <https://exploringyourmind.com/forbidden-fruit-effect/> (last updated Jan. 22, 2017).

⁴¹ For example, the first of the Ten Commandments mentioned in Exodus 20:3 and Deuteronomy 5:7 has God commanding that people shall have no other gods before Him. This exclusivist claim could be interpreted as “hate speech” against other religions, as it functionally accuses them of worshipping false gods.

- An admittedly hyperbolic joke about Jewish people
- Someone citing an unflattering statistic about Jewish people without proper context
- A joke about a Jewish stereotype that is arguably a positive attribute, such as being frugal
- Speech that insults people trying to pass anti-Semitic speech protections for Jews
- Denying the Holocaust happened without explicitly attacking the Jewish people
- Acknowledging the reality of the Holocaust but attempting to downplay the harm
- Writing a book that chronicles the anti-Semitic speech of others
- A Muslim who teaches his children that Jews worship a false God
- An atheist who says that Jews are naïve to believe that God exists

This great breadth of what can be considered “hate speech” also creates an inescapably circular conundrum for those who support censorship. Any government actor who objects to another’s speech so vehemently that he or she labels it “hate speech” in order to censor it could easily be said to “hate” that speech. Therefore, such a person would be trapped in a self-defeating paradox, as it would require “hate speech” on the part of the censor to engage in the act of censoring speech deemed to be “hate speech.” This inevitable circularity of “hate-speech” suppression efforts—if applied consistently—would lead to the patently untenable nature of any “hate speech” censorship.

III. BENEFITS OF ALLOWING “HATE SPEECH”

Attempts to censor “hate speech” are not only inadvisable because of all the harms mentioned in the previous section, they are also problematic because they prevent the various benefits that come from allowing “hate speech.” These often overlooked benefits include a more educated populace, facilitating the ability to challenge those with objectionable beliefs and change their minds, decreased susceptibility to objectionable views, increased efficiency of law enforcement, and improved mental health.

Allowing “hate speech” fosters a more educated populace as to the diverse beliefs held by others. Accurate knowledge of one’s fellow man that is produced helps the formation of educated opinions on a wide variety of topics, such as affirmative action, historical events, political ideologies, perceptions of mistrust of the government, terrorist attacks, international news, intergenerational poverty, and the experiences of marginalized groups. The more well-informed citizens that result from such information are an important component to a democracy.

The awareness of who holds objectionable beliefs affords people the opportunity to challenge those belief-holders and potentially change their minds. The Westboro Baptist Church (WBC) provides an excellent illustration of how beneficial such an interaction can become. According to the Southern Poverty Law

Center, the WBC is “arguably the most obnoxious and rabid hate group in America.”⁴² The WBC protests soldiers’ funerals with signs that read “Thank God for Dead Soldiers,”⁴³ Jews are “carrying water for the [slur for homosexuals],” and “God hates these dark-hearted rebellious disobedient Jews.”⁴⁴ In *Snyder v. Phelps*, the Supreme Court held that WBC members who had picketed a deceased marine’s funeral were not liable for the emotional distress they caused the marine’s father.⁴⁵ The lone dissenting Justice, Samuel Alito, maintained that the WBC members’ speech made “no contribution to public debate.”⁴⁶ Alito was proven wrong shortly thereafter, when an ardent WBC member escaped the organization after a debate that was only possible due to her freedom to express “hate speech.”

Megan Phelps-Roper was an avid member of the WBC, having been born into their system of beliefs.⁴⁷ Because she was allowed to freely express her views, a Jewish man named David was exposed to them, and he reached out to her.⁴⁸ They began having “heated but friendly arguments” regarding the controversial positions of the WBC.⁴⁹ Eventually, David came to meet Megan at a WBC protest.⁵⁰ David brought Megan a Jewish dessert, and she greeted him with a sign that read, “God Hates Jews.”⁵¹ As their relationship grew, David challenged Megan by presenting evidence that contradicted her beliefs from growing up in the WBC.⁵² This led to her beginning to question the WBC’s positions and eventually led to her leaving the church.⁵³ David made arrangements for her to temporarily stay with a Hassidic rabbi—the same rabbi Megan had previously protested against with a sign that read, “Your Rabbi is a Whore.”⁵⁴ Now, Megan shares her powerful story of how she left the WBC and promotes a message of tolerance and understanding.⁵⁵ Through communications with current WBC members, she has even been able to convince

⁴² *Westboro Baptist Church*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church> (last visited Apr. 23, 2022).

⁴³ *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

⁴⁴ *Westboro Baptist Church*, *supra* note 42.

⁴⁵ *Snyder*, 562 U.S. at 459.

⁴⁶ *Id.* at 464 (Alito, J., dissenting).

⁴⁷ See Megan Phelps-Roper, *I Grew Up in the Westboro Baptist Church. Here’s Why I Left*, TED (Mar. 2017), https://www.ted.com/talks/megan_phelps_roper_i_grew_up_in_the_westboro_baptist_church_here_s_why_i_left.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Her TED Talk video has received over ten million views, Phelps-Roper, *supra* note 48, she was the first-ever guest on the Sarah Silverman show, *I Love You, America* (Gary Sanchez Productions, Oct. 12, 2017), and her story is being adapted into a movie produced by Reese Witherspoon, Dave McNary, *Westboro Baptist Church Defector Movie in the Works From Marc Webb, Reese Witherspoon*, VARIETY (Aug. 28, 2017), <https://variety.com/2017/film/news/reese-witherspoon-producing-marc-webb-directing-westboro-baptist-church-1202539936/>.

them to alter some of their more controversial methods.⁵⁶ All of this good was only possible because David was not “protected” from hearing Megan’s speech.⁵⁷

Allowing public debate of objectionable viewpoints results in a society that is better equipped to refute such views. The exposure to the weaknesses and misinformation present in an objectional view makes it difficult for the purveyors of such beliefs to gain converts. This is because it is far easier to convince someone that a given view is correct if he or she has never been exposed to its counterarguments. This process is similar to how immunizations work. The free exchange of ideas exposes people to objectionable beliefs and the best arguments for overcoming them. Therefore, people are, in a sense, building up antibodies to these beliefs they may be exposed to. A person who is exposed to an objectionable belief for the first time, who has not built up any antibodies (i.e., been exposed to the best arguments against the belief), is more susceptible to be infected by the belief.

There are a variety of ways in which simply being aware of who holds objectionable beliefs is valuable. This is a benefit of allowing “hate speech,” because if such speech were criminalized, it would be pushed underground and largely hidden from most citizens. Therefore, allowing “hate speech” to be made public helps facilitate social trust by providing information which citizens can use to make important decisions.⁵⁸ These better-informed decisions result in fewer instances of misplaced trust, which produces more confidence in the system of social trust.⁵⁹ This enhanced social trust plays an essential role in a productive society.⁶⁰

Allowing “hate speech” also provides valuable information to law enforcement. For example, if an act of anti-Semitic vandalism were perpetrated against a Jewish family, law enforcement would benefit from knowing that a neighbor is an active participant in public, anti-Semitic speech. This information alone would not be enough to obtain a conviction, and it might not even be admissible at trial.⁶¹ But it would nevertheless be highly valuable to law enforcement officials, who have limited resources to invest in solving each crime they investigate. By more efficiently targeting suspects who are most likely to be the perpetrators, law enforcement saves precious resources and likely reduces the risk of interrogating innocent suspects.

Evidence suggests that intermittent exposure to “hate speech” can be beneficial to mental health. Former ACLU President Nadine Strossen explains how “facing and overcoming short-term stress can be a positive experience for our

⁵⁶ The Joe Rogan Experience, #974 - Megan Phelps-Roper, SPOTIFY (Jun. 2017) <https://open.spotify.com/episode/02G6G2tFE4yfu5FupMUCA2>.

⁵⁷ See Phelps-Roper, *supra* note 48. While teaching my first business law course at Washburn University in 2007, I had the unique experience of having Megan Phelps-Roper as one of my students while she was an active member of the WBC. Needless to say, it led to engaging discussions on certain topics. She was my favorite student then, and, for a very different reason, she is now my favorite former student.

⁵⁸ See Marcus Schulzke, *The Social Benefits of Protecting Hate Speech and Exposing Sources of Prejudice*, 22 RES PUBLICA 225, 230–34 (2016).

⁵⁹ *Id.* at 232–33.

⁶⁰ *Id.* at 231.

⁶¹ See FED. R. EVID. 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”).

mental and physical health.”⁶² The following quote demonstrates this benefit by explaining how allowing “hate speech” on college campuses may, in the long run, help reduce the risks of depression and anxiety:

[V]indictive protectiveness . . . prepares [students] poorly for professional life, which often demands intellectual engagement with people and ideas one might find uncongenial or wrong. The harm may be more immediate, too. A campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety.⁶³

IV. BENEFITS IN PRACTICE

Holocaust denial is often cited as the quintessential example of “hate speech” that does not deserve free speech protections.⁶⁴ These pro-censorship advocates accurately point out that Holocaust denial is patently false, is rooted in ethnic-based hatred, and is frequently used to support violent acts.⁶⁵ But even such an abhorrent and seemingly unredeemable view can illustrate the various benefits of tolerating “hate speech.”

Not barring people from expressing the view that the Holocaust is a hoax results in a more well-informed populace as to the extreme views that others in society hold. There are numerous benefits that come from this, including a more accurate understanding of certain geopolitical events and the plight faced by Jews. The knowledge that Holocaust denial exists and to what extent it is adhered to could be used by anti-discrimination nonprofits, such as the Anti-Defamation League, in their fundraising efforts. Allowing views on Holocaust denial to be expressed could spark introspection as to why people would choose to believe something so patently false, thus providing a better understanding of the underlying motivations for such a belief. By better understanding the root causes, Holocaust denial could likely be better curtailed. And, in a more general sense, just understanding the extremes the human mind is capable of provides a more robust understanding of human behavior.

The knowledge of who is a Holocaust denier also allows people to engage them in debate that may change their minds. And, even if the Holocaust denier does not ultimately change his mind, the interaction may cause third parties who are exposed to the conversation to be less receptive to Holocaust denial claims in the future, since they have now been exposed to the arguments against the claim.

Knowing which people are Holocaust deniers could be useful information in a variety of situations. It would effectively put people on notice to be highly skeptical

⁶² STROSSEN, *supra* note 13, at 153.

⁶³ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), at 42, 45.

⁶⁴ See Schulzke, *supra* note 58, at 229.

⁶⁵ See *id.* at 229, 236, 239.

of other claims made by a Holocaust denier, such as those relating to accusing a Jewish person of a wrongdoing, claims about the Jewish faith, or claims about the current Israeli–Palestinian conflict. Additionally, Jewish citizens could benefit greatly from recognizing a Holocaust denier in situations ranging from finding a roommate, asking someone on a date, deciding where to work, or deciding who to accept a ride from late at night.

Censoring Holocaust denial as “hate speech” may have the unintended consequence of making the topic appear more enticing. This is yet another example of the forbidden fruit effect.⁶⁶ Some people would likely become highly intrigued as to what opinion is so powerful that the government does not want people to hear it. Relatedly, this forbidden fruit status would likely breed conspiracy theories in certain circles of people who would reason that the desire to keep this issue secret is evidence that there must be some truth to it.

Banning Holocaust denial would likely lead to inaccurate estimates as to how many people hold the belief. This is because politicians are unlikely to admit they were wrong, and are thus incentivized to promote the idea that their censorship efforts have successfully reduced Holocaust denial, whether true or not. And the evidence may even deceptively support such a claim. This is because by banning Holocaust denial, the practice is forced underground where it is more difficult to track.

In a larger sense, banning Holocaust denial as “hate speech” could function to normalize censorship, leading to greatly expanding the practice. This is particularly dangerous because, due to the inherently subjective nature of the term, there is no natural cut-off point at which censorship efforts cease. In this way, allowing “hate speech” censorship of Holocaust denial does not just incur the costs and preclude the benefits of allowing “hate speech” as chronicled in this Article; it would likely also do the same for numerous additional categories of “hate speech.”

V. STRATEGIC ADVANTAGES OF PROMOTING BENEFITS

The benefits of allowing “hate speech” provide a valuable arrow in the quiver of free-speech advocates. By significantly expanding the number of arguments available, it makes it less likely that a free-speech advocate will resort to a counterproductive practice. These suboptimal practices may include attacking censorship activists’ motives, oversimplifying the issue by telling the other side to “toughen up,” or dismissing their legitimate, underlying concerns. Such misguided tactics are counterproductive to the end goal of converting those on the side of censorship over to the side of free speech and tolerance.

Furthermore, emphasizing the benefits of allowing “hate speech” may be even more effective than emphasizing the harms of censorship. This is because focusing on the harms of censorship can be perceived as assuming bad motives. For example, pointing out that censorship often leads to further victimization of the very group intended to be protected may come across as accusatory, as if one is accusing the

⁶⁶ See *The Forbidden Fruit Effect*, *supra* note 40.

censorship advocate of intending such a result. Conversely, pointing out the benefits is more likely to come across not as accusatory, but as inviting the other side to partake in something advantageous.

CONCLUSION

It is unfortunate that many free-speech advocates focus solely on the harms of “hate speech” censorship. Supplementing these well-known harms of censorship with the often-overlooked benefits of allowing “hate speech” results in a more robust and effective free-speech argument. Free-speech advocates should therefore emphasize the win–win nature of allowing “hate speech” by explaining the downsides of censorship *and* the benefits of free speech. This more positive, tactful, and winsome message is desperately needed in our current climate where pro-censorship advocates are gaining dangerous levels of support.