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Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis

An organization that has defended the First Amendment rights of Nazis and the Ku Klux Klan is split by an internal debate over whether supporting progressive causes is more important.



The American Civil Liberties Union took root in the defense of conscientious objectors to World War I and Americans accused of Communist sympathies after the Russian Revolution.

By Michael Powell
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It was supposed to be the celebration of a grand career, as the American Civil Liberties Union presented a prestigious award to the longtime lawyer David Goldberger. He had argued one of its most famous cases, defending the free speech rights of Nazis in the 1970s to march in Skokie, Ill., home to many Holocaust survivors.

Mr. Goldberger, now 79, adored the A.C.L.U. But at his celebratory luncheon in 2017, he listened to one speaker after another and felt a growing unease.

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

Mr. Goldberger, a Jew who defended the free speech of those whose views he found repugnant, felt profoundly discouraged.

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

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



“Liberals are leaving the First Amendment behind,” said David Goldberger, a Jewish lawyer who defended the free speech rights of Nazis in the 1970s.

Its national and state staff members debate, often hotly, whether defense of speech conflicts with advocacy for a growing number of progressive causes, including voting rights, reparations, transgender rights and defunding the police.

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

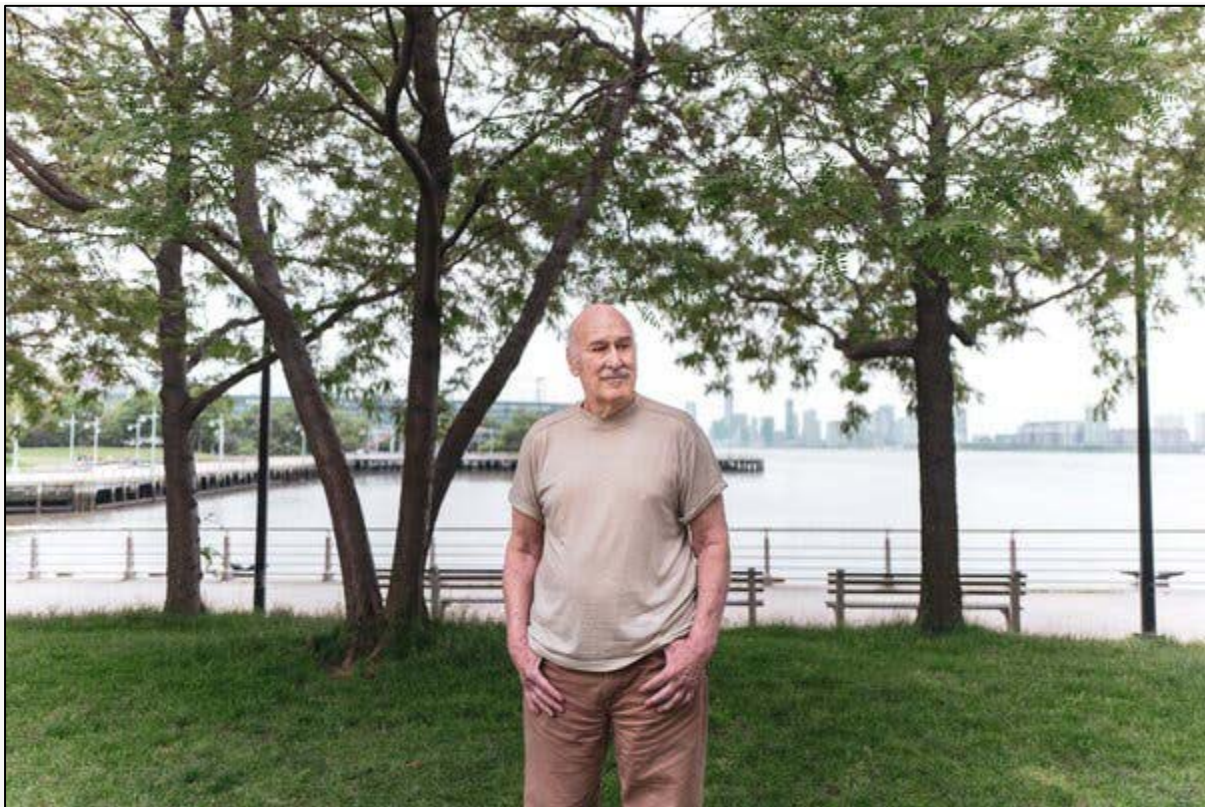
The organization, said its former director Ira Glasser, risks surrendering its original and unique mission in pursuit of progressive glory.

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

Founded a century ago, the A.C.L.U. took root in the defense of conscientious objectors to World War I and Americans accused of Communist sympathies after the Russian Revolution. Its lawyers made their bones by defending the free speech rights of labor organizers and civil rights activists, the Nation of Islam and the Ku Klux Klan. Their willingness to advocate for speech no matter how offensive was central to their shared identity.

One hears markedly less from the A.C.L.U. about free speech nowadays. Its annual reports from 2016 to 2019 highlight its role as a leader in the resistance against President Donald J. Trump. But the words “First Amendment” or “free speech” cannot be found. Nor do those reports mention colleges and universities, where the most volatile speech battles often play out.

Since Mr. Trump’s election, the A.C.L.U. budget has nearly tripled to more than \$300 million as its corps of lawyers doubled. The same number of lawyers — four — specialize in free speech as a decade ago.



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

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

To which David Cole, the national legal director of the A.C.L.U., rejoined in an interview: “Everything that Black Lives Matter does is possible because of the First Amendment.”

A tragedy also haunts the A.C.L.U.’s wrenching debates over free speech.

In August 2017, officials in Charlottesville, Va., rescinded a permit for far-right groups to rally downtown in support of a statue to the Confederate general Robert E. Lee. Officials instead relocated the demonstration to outside the city’s core.

The A.C.L.U. of Virginia argued that this violated the free speech rights of the far-right groups and won, preserving the right for the group to parade downtown. With too few police officers who reacted too passively, the demonstration turned ugly and violent; in addition to fistfights, the far right loosed anti-Semitic and racist chants and a right-wing demonstrator plowed his car into counterprotesters, killing a woman. Dozens were injured in the tumult.

Revulsion swelled within the A.C.L.U., and many assailed its executive director, Anthony Romero, and legal director, Mr. Cole, as privileged and clueless. The A.C.L.U. unfurled new guidelines that suggested lawyers should balance taking a free speech case representing right-wing groups whose “values are contrary to our values” against the potential such a case might give “offense to marginalized groups.”

A.C.L.U. leaders asserted that nothing substantive had changed. “We should recognize the cost to our allies but we are committed to represent those whose views we regard as repugnant,” Mr. Cole said in an interview with The New York Times.

But longtime free speech advocates like Floyd Abrams, perhaps the nation’s leading private First Amendment lawyer, disagreed. The new guidelines left him aghast. “The last thing they should be thinking about in a case is which ideological side profits,” he said. “The A.C.L.U. that used to exist would have said exactly the opposite.”

A common enemy

The 2016 election blew like a hurricane over the A.C.L.U. Lawyers texted one another in disbelief; a deputy director broke into sobs as he told his 4-year-old that Mr. Trump had won; some staff members spoke of a nation irredeemably racist.

Mr. Romero, who is Latino and the organization’s first nonwhite executive director, arrived at the office just past dawn the next day. He crafted a letter to Mr. Trump and ran it as a full-page ad in The Times, attacking the president-elect on such issues as immigration and abortion rights. “If you do not reverse course and instead endeavor to make these campaign promises a reality,” he warned, “you will have to contend with the full firepower of the A.C.L.U.”

The A.C.L.U. became an embodiment of anti-Trump resistance. More than \$1 million in donations sluiced into its coffers within 24 hours and tens of millions of dollars followed in 2017, making the organization better funded than ever before. Salaries reflected that — Mr. Romero now makes \$650,000 and some staff attorneys \$400,000. Its 2017 annual report came with “RESIST” superimposed on an image of the Statue of Liberty.

When Brett M. Kavanaugh was nominated for the Supreme Court, the A.C.L.U. surprised longtime supporters by entering the fray, broadcasting a commercial that strongly suggested the judge was guilty of sexual assault. When a book argued that the increase in the number of teenage girls identifying as transgender was a “craze” caused by social contagion, a transgender A.C.L.U. lawyer sent a tweet that startled traditional backers, who remembered its many fights against book censorship and banning: “Stopping the circulation of this book and these ideas is 100% a hill I will die on.”

The A.C.L.U. embraced dormitories set aside for Black and Latino students and argued that police forces were inherently white supremacist. “We need to defund the budgets,” Mr. Romero said last year. “It’s the only way we’re going to take power back.”

Mr. Romero insisted he oversaw no retreat from the fight for free speech and points to key cases to underscore that. In recent years the A.C.L.U. argued that the attempt by Gov. Andrew M. Cuomo of New York to deny the National Rifle Association access to financial services infringed on freedom of speech; defended motorists’ right to put the Confederate flag on specialty license plates; and criticized Facebook and Twitter for banning Mr. Trump.

“I recall a conversation with a Planned Parenthood leader after we defended the right of protesters to stand outside clinics,” Mr. Romero said. “She was annoyed and told me, ‘When you lie down with wolves, you wake up with fleas.’ I replied, ‘If I have fleas, I wash them off in the morning.’”

Still, many of the group’s newly hired lawyers — the staff has grown markedly more diverse under Mr. Romero, who is the organization’s first openly gay executive director — often are most energized by issues that range beyond and sometimes collide with free speech advocacy.

“Am I sorry I leaned into our opposition to Trump? Hell no,” Mr. Romero said. “I’m asked, ‘Are we a free speech or racial justice organization?’ and I answer, ‘Yes.’ We are a domestic human rights organization.”

That said, in an interview Mr. Romero acknowledged missteps. The A.C.L.U. in 2018 poured \$800,000 into what looked like a campaign ad for Stacey Abrams during her bid for governor of Georgia — a questionable move for a nonprofit organization that calls itself nonpartisan. “I probably would do a different ad today to be completely candid,” Mr. Romero said.



"I'm asked, 'Are we a free speech or racial justice organization?' and I answer, 'Yes,'" said Anthony Romero, the A.C.L.U.'s executive director.

The \$1 million anti-Kavanaugh ad campaign, which compared his denial of a sexual assault accusation to Bill Cosby's incredulity at mounting allegations and Bill Clinton's lie about an affair, left some longtime lawyers inside the A.C.L.U. uncomfortable. No organization aside from the U.S. government argues more cases before the Supreme Court, and A.C.L.U. amicus briefs have drawn praise from even the strictly conservative justice Clarence Thomas.

"I share the discomfort with the A.C.L.U.'s engaging in partisan-looking activity; it risks taking luster off our reputation as straight shooters," noted Ben Wizner, the longtime head of the A.C.L.U.'s free speech, privacy and technology project.

The money that flooded into the A.C.L.U. after Mr. Trump's election allowed Mr. Romero to flex the organization's progressive muscles and greatly increase the size of its staff. Many of the new employees, however, were not nearly as supportive of the A.C.L.U.'s traditional civil liberties work. They worked inside their policy silos, focused on issues like immigration, transgender rights and racial justice.

Some fired off tweets like bottle rockets, causing headaches and confusion. This March, Senator Chuck Grassley of Iowa — who survived a bout with the coronavirus — was conducting confirmation hearings for a former A.C.L.U. lawyer who was nominated to serve as associate attorney general. Rebecca McCray, an A.C.L.U. editor, listened to the sharp tone of Mr. Grassley, a Republican, as he grilled the nominee and felt a flush of anger.

She tweeted: "Tried to watch Vanita Gupta's confirmation hearing but got too angry Chuck Grassley survived COVID."

Mr. Romero quickly apologized to Mr. Grassley's staff and took no action against his staffer. Asked about Ms. McCray, he responded, "She is highly valued by me."

Those who control the official A.C.L.U. Twitter account can prove erratic, at the national and state levels. In 2018, the Trump administration proposed revamping Obama-era regulations on Title IX, which sets guidelines for investigations of sexual harassment and assault on campuses. It strengthened protections for the accused.

The A.C.L.U. tweet in response to the news was scathing: This "promotes an unfair process, inappropriately favoring the accused."

Because the A.C.L.U. has championed the due process rights of the accused for 100 years, the tweet came as a surprise. It turned out a staff member at the A.C.L.U.'s women's rights project had typed and clicked "send."

Mr. Cole, the legal director, saw the tweet and as the organization addressed the issue going forward, it stated that the Trump rules offered "important provisions that promote fair process for all parties."

In another case, a police officer in Columbus, Ohio, fatally shot 16-year-old Ma'Khia Bryant as she tried to plunge a knife into a young woman. The A.C.L.U. of Ohio tweeted, "@ColumbusPolice murdered a 15 year old Black girl."

Here too was another example — in this case an A.C.L.U. affiliate — of seemingly overriding its traditional insistence on the presumption of innocence. Video shows that the officer made a split-second decision. And murder is determined in a court.

Mr. Romero was philosophical about the cacophony. "My staff are the major consumers of freedom of speech within the organization," he said.

But in interviews, several younger lawyers suggested a toll taken. Their generational cohort, they said, placed less value on free speech, making it uncomfortable for them to express views internally that diverged from progressive orthodoxy.

"A dogmatism descends sometimes" inside the A.C.L.U., noted Alejandro Agustin Ortiz, a lawyer with the racial justice project. "You hesitate before you question a belief that is ascendant among your peer group."

Some argued for carefully vetting hires. "I never do a job interview without raising Skokie/Charlottesville and asking if they are comfortable with that history," said a lawyer who asked not to be named because of the fear of inflaming colleagues. "Not many colleagues agree. It's about the cause."

Mr. Romero offered a verbal shrug. "I reject that we need an entrance exam on civil liberties to establish the bona fides needed to work here," he said.

The A.C.L.U. has in fact often gloried in its internal contentions. It split over decisions to represent the Nazis in the 1930s, the Ku Klux Klan in the 1960s, and the Nazis in the 1970s. After Skokie, a leader of the left-wing National Lawyers Guild complained of its "poisonous evenhandedness."

In the 1980s, Nadine Strossen, the A.C.L.U.'s former president, wrote an essay defending it against charges of "trendy liberalism." All of this prefigured current tensions, not least the debacle at Charlottesville.

Dissent from within

Less than two months after that terrible day in Charlottesville, Claire Gastanaga, then the executive director of the A.C.L.U. chapter in Virginia, drove to the College of William & Mary to talk about free speech. One of her board members had resigned after Charlottesville, tweeting, "When a free speech claim is the only thing standing in the way of Nazis killing people, maybe don't take the case."

Ms. Gastanaga planned to argue that by defending the rights of the objectionable, the A.C.L.U. preserved the rights of all. She walked onstage and dozens of students who proclaimed themselves allied with Black Lives Matter approached with signs.

"Good, I like this," Ms. Gastanaga said. "This illustrates very well ——"

Those were the last of her words that could be heard.



When Claire Gastanaga, left, was the executive director of the A.C.L.U. chapter in Virginia, she was shouted off the stage while trying to speak about free speech on a college campus.

"A.C.L.U., you protect Hitler, too!" the students chanted, setting up a line that stretched the width of the stage.

They stood in front of the stage and Ms. Gastanaga and for half an hour blocked anyone in the audience from approaching and talking with her. She eventually left.

"The revolution," the students chanted, "will not uphold the Constitution."

The debate inside the A.C.L.U. proved scarcely less charged. “People were rubbed raw,” said Mr. Parker, who directed its racial justice project and took part in these impassioned discussions. “I’ve never seen anything like it.”

A decade earlier, Mr. Parker, who is Black, debated before taking a job at the A.C.L.U. He had worried about representing white fascists of the sort who paraded about in Charlottesville. “I have a predisposition to be less concerned about the rights of people who would like to see me dead, and that did complicate my decision.”

After Charlottesville, Mr. Cole wrote an essay in *The New York Review of Books* that defended the decision. “We protect the First Amendment not only because it is the lifeblood of democracy and an indispensable element of freedom, but because it is the guarantor of civil society itself,” he wrote.

That ignited anger among some 200 staff members, who signed a letter stating the essay was “oblivious” to the A.C.L.U.’s institutional racism. The A.C.L.U.’s upper ranks are diverse; 12 of the top 21 leaders are either Black, Latino or Asian. Fourteen are women.

“David’s approach fails to consider how our broader mission — which includes advancing the racial justice guarantees in the Constitution and elsewhere, not just the First Amendment — continues to be undermined by our rigid stance,” they wrote.

The A.C.L.U. held wide-ranging discussions with its staff, and summary sheets of those gatherings captured the raw feelings within. One group demanded that the A.C.L.U. “no longer defend white supremacists.” Another said top leaders “are not to be trusted alone with making decisions on these delicate” questions.

The A.C.L.U. lawyers who defend speech acknowledged tension. “I don’t sleep or eat well when I take cases defending such clients, but this is who we are,” said Emerson Sykes, a Black lawyer who previously worked to represent those who struggle for free speech and assembly across Africa. “I have worked in countries where the government locks you up for speech.”

Other senior officials however pointedly distanced themselves from the Virginia affiliate, saying it failed to recognize the nature of its client.

“They got snookered,” said a longtime senior leader with the A.C.L.U. involved with many decisions over the years. “We don’t want to be in-house counsel for the N.R.A. or the alt-right.”

AWOL on campus?

Two decades ago, as free speech battles erupted on college campuses, a new civil liberties group took shape to vigorously advocate for First Amendment principles. Called the Foundation for Individual Rights in Education, the organization was purposely nonideological and nonpartisan. A founder, Harvey Silverglate, had served on the board of the A.C.L.U. of Massachusetts and considers it an ally even as he sees its limits.

“When you deal with campus hate speech, you know they most often won’t file a brief with you,” Mr. Silvergate said. Mr. Romero, he added, “is not a liberal, he’s a progressive. His A.C.L.U. prefers cause work.”

That may be an overstatement. Mr. Wizner, who runs the A.C.L.U.’s free speech project, has represented the National Security Agency whistle-blower Edward Snowden and rattled off important cases his lawyers handled. But FIRE, he acknowledged, has taken a strong lead on campuses, where so many consequential battles are fought.

“FIRE does not have the same tensions,” Mr. Wizner said. “At the A.C.L.U., free speech is one of 12 or 15 different values.”

Traditionally, the A.C.L.U.’s state affiliates monitor and argue free speech cases, but in recent years some shied from such fights. Here are a few examples:

In 2015, University of Missouri students protested racism and established an encampment in a campus quad. When a student journalist tried to take photos and talk to protesters, students and a journalism professor physically blocked the reporter from doing so. The A.C.L.U. of Missouri applauded the “courageous” leadership of student activists and faculty members, and two national A.C.L.U. officials wrote columns about the protests. They did not mention First Amendment rights.

Four years later at the University of Connecticut, two white students walking home late at night loudly repeated a racial slur. In the ensuing uproar, the university police arrested and charged the students with ridicule on account of race.

The A.C.L.U. of Connecticut demanded that the university hire 10 Black faculty and staff members and require a freshman course on ending racism on campus. It made no mention of the arrests, other than to opine that the police force is “an inherently white supremacist institution.”

Two days later, Mr. Cole issued a corrective: The students’ conduct “is not criminal,” he stated. “The First Amendment protects even offensive and hateful speech.”

Even the New York Civil Liberties Union, traditionally an independent-minded A.C.L.U. affiliate that has produced several national executive directors and stood at the forefront in defending free speech cases, did not want to talk about those issues. A spokeswoman for its executive director, Donna Lieberman, said, “We don’t feel we’ll have anything to add.”

Such reticence sounded like terra incognita to Norman Siegel, who led the New York group when Mayor Rudolph W. Giuliani tried to block the Ku Klux Klan from rallying downtown in 1999.

The Klan was anathema to Mr. Siegel, but he fought like a cornered cat for its First Amendment rights. “Did I give anyone else a veto? No way,” he said. “I would have compromised my integrity.”

Mr. Siegel, who is white, drew support from the Black publisher of The Amsterdam News and from the Rev. Al Sharpton, a Black activist, who filed suit in support of the N.Y.C.L.U. Mr. Siegel recalled receiving a standing ovation from a Black audience.

“A woman came up and said: ‘You did the right thing. If Giuliani could shut down the Klan, he would do it to us,’” he recalled.

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