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“Free Speech, Academic Freedom, and Racial Justice on Campus: An ACLU Lawyer’s Perspective”

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**University of California, Hastings College
of the Law
Practitioner-in-Residence Keynote[†]**

August 31, 2022

Emerson Sykes, a Senior Staff Attorney with the American Civil Liberties Union gave a speech at UC Hastings Law titled “Free Speech, Academic Freedom, and Racial Justice on Campus: An ACLU Lawyer’s Perspective” These are excerpts from his speech.

**“Free Speech, Academic Freedom, and
Racial Justice on Campus:
An ACLU Lawyer’s Perspective”**

EMERSON SYKES*

Biography:

Emerson is a senior staff attorney with the ACLU Speech, Privacy, and Technology Project where he focuses on First Amendment speech protections. From 2019-2020, he was host of At Liberty, the ACLU’s weekly podcast. Emerson holds a J.D. from the New York University School of Law, where he was a Root-Tilden-Kern scholar for public interest law, and a Master of Public Affairs degree from the Princeton School of Public and

[†] A previous version of this keynote was delivered at University of Oregon on October 27, 2021 as part of the African American Lecture Series. Special thanks to Yvette Alex-Assensoh and the Black Student Task Force, without whom the series would not exist.

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International Affairs. He earned his undergraduate degree in Political Science at Stanford.

INTRODUCTION

Thanks very much to Grace Hum, Dean of Students, for the invitation to campus and thank you all for coming. It's always a pleasure to be in San Francisco.

I'll start by saying there is a bit of an elephant in the room at UC Hastings when we talk about free speech and racial justice. And I'm not here re-litigate or hash through who did what, when, and how, and who broke what rules in March of this year. But I do want to say that the reason I accepted Grace's invitation is because it is my primary goal to support student activists. And so, when I spoke with some students who were involved in the protests last school year, I asked them if it be helpful for me to come and share some information about the First Amendment, to share my perspective on why, even as we try to tear down so many social structures, the principle of free speech is something worth preserving?

And they said, "You know what? I think that kind of information might help, it might add something to the dialogue." So, that's why I'm here today.

BREAKING NEWS: PERNELL V. FLORIDA BOARD OF GOVERNORS

Now, some breaking news. In the last couple of weeks, we at the ACLU's National Office, along with the ACLU of Florida, the NAACP Legal Defense Fund, and *pro bono* counsel at Ballard Spahr have sued to stop the enforcement of Florida's Stop W.O.K.E. Act. Ron DeSantis, the governor of Florida, has championed a few different laws, including the "Don't Say Gay" law, that weigh in on culture war issues and one of them is the Stop W.O.K.E. Act. Governor DeSantis literally said, "We want a woke-free state of Florida."

I hesitate to start the conversation with Ron DeSantis, though, because I think it's important where we begin the story. Discussions around how we think about and talk about our history as a country in public schools is a debate that has been with us since the founding of our country. There's nothing really new about arguing about what our history is, and who our heroes are, and what kinds of stories can be told to our children. For generations, we had a white-washed history in our schools. Over the last few decades, there's been significant progress in trying to present a more inclusive and representative curriculum in our schools. What we're seeing now is the backlash to that progress.

It's no coincidence that at the ACLU, our free speech team spent about a year and a half doing nothing but defending racial justice protesters and we

have spent the last year and a half working on these anti inclusive education bills. In the wake of the 2020 national reckoning with how we think about and talk about race in this country, we've seen these efforts to squash that conversation and to prohibit certain viewpoints from being shared.

Now, a bit more about our lawsuit. The Stop W.O.K.E. Act includes eight prohibited concepts which are lifted directly from President Trump's Executive Order 13950 that was blocked by a federal court because it was too vague. The Executive Order was also withdrawn by President Biden, but nonetheless, it's gone on to live a thousand lives because it's been cut and pasted into hundreds of policies and state bills around the country.

This list of eight so-called "divisive concepts" is interesting because some of them are seemingly innocuous. The first concept is that you're not allowed to teach that one race or sex is inherently morally superior to another. No one was really teaching that to begin with, so banning it doesn't really stifle anyone's speech in particular, but it's still kind of strange.

Some of the concepts are nonsensical. My favorite is there's one that says that you're not allowed to teach, that anyone "cannot or should not attempt to treat others without respect to race, sex, gender and national origin." A judge—actually our judge—in Florida recently ruled that the same provision in the employment context, "achieved the rare triple negative." So, some of these concepts on their face are ungrammatical and unconstitutionally vague.

There is another category of these concepts, though, that directly target topics of public debate. For example, you're not allowed to teach that meritocracy, objectivity, or colorblindness are racist or sexist concepts. Of course, people might not agree with the idea that colorblindness is racist, but I know that there are multiple professors in this very law school who believe and teach based on mountains of research and evidence that colorblindness can be racist. But in Florida, it's a violation of the law to teach that colorblindness can be a racist concept, and that's on penalty of termination, on penalty of individual lawsuits being filed against you through this law and on penalty of the withdrawal of state funding for your public institution of higher education.

Another banned concept is that you're not allowed to teach that anyone has specific status or privilege based on their race or sex. So, you're not allowed to teach the idea that there is such a thing as white privilege. Again, that's a topic of public debate. Some people might think that there's no such thing. But the Stop W.O.K.E. Act says that you're allowed to criticize the idea that white privilege exists, but you're not allowed to promote it.

There's another clause that says that the banned concepts can be discussed, but they must be discussed in an "objective way and without endorsement." But what does that really mean? This was actually an attempt to cover some of the loopholes in earlier versions of these laws. We filed the first federal lawsuit challenging one of these statewide laws in Oklahoma last

year and that law included almost the same list of divisive concepts. That law, though only applied the concepts to K-12 schools and said you could not make any of these concepts a “part of a course,” which we argued meant that you’re not even allowed to mention them. The Florida legislature attempted to cover their behinds a little bit in this regard and said, of course, you can discuss these topics but they have to be covered in an objective way and without endorsement. But we argue this phrase does not cure all of the other problems with the law, and actually makes the whole thing more confusing.

They also threw in a nice little nugget where there’s mandatory black history curricula also, insulating themselves further from the argument that they are prohibiting all talk about racism, which we argued the Oklahoma law did. But what’s unique about the Stop Work Act, despite these efforts to sort of cover some of the loopholes, is that it applies the eight prohibited concepts to higher education. These are purely viewpoint-based restrictions on academic freedom in higher education, and that’s unconstitutional.

We sued on behalf of seven professors and a student. Our lead our lead plaintiff is Professor Leroy Purnell, who’s a Florida A&M University Law professor and former dean. And we named eight defendants, the Florida Board of Governors of the State University System of Florida, the education commissioner and the boards of trustees of the universities that the different professors come from. We also have one declarant who is department chair speaking on behalf of non-tenured instructors. We really wanted to represent the non-tenured voice because we think that these are some of the most vulnerable people in the academy and they’re the most likely to get complaints lodged against them. They also have the fewest protections if they expose their university to any sort of liability. Not surprisingly, we had a hard time finding non-tenured folks who are willing to stick their necks out and be plaintiffs. We don’t blame them for that—they face a very real risk— but we really did want to bring that narrative into view, so we were pleased to at least get the declaration about the non-tenured perspective.

We’re bringing four claims to under the First and Fourteenth Amendments. Our first claim is based on the viewpoint based regulation of academic speech by instructors. I’ll note that instructors includes professors, non-tenured professors, adjuncts, teaching assistants, and even possibly students who are leading a particular session. I think this highlights how on university campuses, people wear different hats at different times: students, teachers, employees, residents. It makes it hard to make sharp divisions about who is an instructor.

There’s the right to academic speech by instructors and there’s also a students’ right to receive information that’s recognized under the First Amendment and that’s the basis for our second claim. We represent one FSU student who’s a very brave student activist who actually testified against the Stop W.O.K.E. Act in the legislature twice and I think she has a particularly compelling narrative. People often say, protesting is all well and good, but

you need to actually engage in the process. And this plaintiff, Johanna Dauphin, she engaged, she's testified, and now she's one of the plaintiffs against this law.

Our third claim is that the law is void for vagueness. As I mentioned, there are some provisions that are obviously unconstitutionally vague and this is related to but separate from the First Amendment issues – vagueness is a due process violation. People often conflate due process vagueness with First Amendment overbreadth, but they're actually separate, which we think is important in such a politically charged case. A judge could, though we hope they don't take this option, rule that the law is vague without having to say anything about so-called wokeness or censorship. In Oklahoma, our lead claim was a vagueness claim. We have a slide deck that a school district produced to provide teachers with guidelines for how they will implement HB 1775 where they literally wrote, "Nobody knows what this part of the law means." So, a teacher in Oklahoma can lose their license if they violate a law and nobody knows what it means.

The final claim is equal protection. We argue that based on the legislative record, it's obvious that there was discriminatory and racist intent in the passage of the law. We move to a preliminary injunction on the first three claims, the First Amendment and the due process claims. When we think of academic freedom and racial justice being in tension, we think of academic freedom as code for the right of powerful professors to say offensive things, but I want to change the narrative a little bit. This is an academic freedom case. This is also a racial justice case.

MY JOURNEY TO THIS WORK

Before I dive deeper into free speech, academic freedom, and racial justice on campus, I want to take a moment just to introduce myself a little bit more.

As a First Amendment litigator, I cover the right to protest, campus speech, and cases that deal with the intersection of free speech and racial justice. I have many colleagues who also work on these issues in different capacities, but this is my core portfolio. I came to this work through a somewhat unconventional path, as I was an international human rights lawyer before joining the ACLU. I worked for the International Center for Not-for-Profit Law (ICNL) where I advocated for the freedom of association, freedom of assembly, and freedom of expression across sub-Saharan Africa. Before that, I worked for the New York City Council in their Office of the General Counsel. But let's take a step even further back than that and I'll tell you about how I became so passionate about campus speech.

I grew up in Andover, MA on the campus of Phillips Academy. Campus life is in my blood. My mom and my dad were both born and raised in Shreveport, Louisiana in the 1950s and 1960s. They attended segregated

schools all the way through high school and then made their way to Cambridge, MA for college. My dad first went to Dillard University, a historically Black college in New Orleans and then transferred to Harvard. My mom, his high school sweetheart soon joined him at Radcliffe. Through a Harvard alum, they ended up taking jobs at Phillips Academy after they graduated.

If you ask my parents about their experience as students in the 60s they would not claim to have been activists. (Incidentally, if you ask my classmates they wouldn't say I was the biggest activist, either.) But for my parents, having come from where they came from, activism took a different form. As my dad says, "Being a Black kid from Shreveport, I felt the most revolutionary thing I could do was go to class."

I'm going to talk a lot about what student activists can accomplish and the ways in which the First Amendment facilitates their work, but I also want to acknowledge that there are many places where your presence can be a form of protest. Just being in the faculty room, in a department meeting, in class, in a student group, just existing in those spaces can be its own form of activism. So, I just want to name the fact that there's a time for raising fists and pulling out bullhorns, and I know that that's been done in San Francisco time and time again to great effect, but there are also times when just being there says it all.

I also want you to know that I have a cousin named Ollie on my mom's side of the family that's almost the same age as me. Our grandmothers were sisters. He grew up in Watts, CA, and when we were 15 years old and I was a student at Phillips Academy, he was arrested, convicted and imprisoned for felony murder. He participated in a robbery where an elderly woman was killed by his friend. He was sentenced to 35 years to life. I'm now 38 years old and since I was 16 years old, every step along the way I've been thinking about my cousin Ollie. All of this time, while I was in school and building a career and a family, Ollie's been in California State Penitentiary. So, when I say that your presence can be protest, it's not a cop-out, it's not an excuse to sit back and let things happen on your campus or in your community. It's just to say that it's not a foregone conclusion that we would end up in these spaces and it's but for the grace of God that we don't end up in very different places.

LESSONS FROM AFRICAN STUDENT ACTIVISM

The first time that the power of Black student activism resonated for me was when I was a teenager and I went to South Africa with some very close family friends. The Maqubela family,¹ who were my neighbors growing up, had been veterans of the anti-apartheid movement—they had participated in the Soweto uprisings—and when we went back to South Africa in 1997 Nelson Mandela was president and apartheid was over. During the trip I got to visit the streets of Soweto where thousands of students marched, many in their school uniforms. These young activists were at the front lines of the movement that eventually led to the toppling of the apartheid regime. They literally overturned their country's societal structures through the power of their protest. I was inspired by these students to understand that yes, things can indeed change. History is messy and things in South Africa today are complicated, to say the least, but the one thing we know is that change is certainly possible.

Many years later, after I finished law school, I found myself back in South Africa frequently when I was working as a human rights lawyer. For almost six years I was a Legal Advisor with ICNL and I was responsible for managing projects all over Africa.² We worked with activists, educators, and community organizers all over the continent to protect civil society: that area of life that is not business, family, government, or religion. A flourishing civil society requires freedom of expression, freedom of association, and freedom of assembly, all of which are enshrined in the African Charter on Human and Peoples' Rights (ACHPR). We at ICNL were trying to make sure that lofty ideas like civic space and international human rights documents like the ACHPR were experienced by people on the ground.

One of my favorite parts of that job was that each year I got to teach a short course on civil society law at the University of Pretoria Law School's Center for Human Rights.³ The Center is famous for attracting brilliant young lawyers from all over Africa to its Master's in Human Rights in Africa program. Students from different African countries come together for a year to study with and learn from each other and then they go off and do amazing things. My former students have gone on to run non-profit organizations, run for parliament, run massive advocacy campaigns to improve environmental justice, women's rights, LGBTQ rights, disability rights, you name it. These

1. Ines Novacic, *At elite Groton School, "unusual" headmaster puts focus on inclusion*, CBS NEWS (Nov. 24, 2016), <https://www.cbsnews.com/news/groton-school-headmaster-tembamaqubela-elite-education-inclusion/>.

2. *Sub-Saharan Africa Program*, INT'L CTR. FOR NON-FOR-PROFIT L., <https://www.icnl.org/our-work/sub-saharan-africa-program> (last visited Oct. 5, 2022).

3. *Advanced Human Rights Course: Civil Society Law in Africa*, CTR. FOR HUM. RTS. UNIV. OF PRETORIA, <https://www.chr.up.ac.za/courses-presented/civil-society-law-in-africa> (last visited Oct. 5, 2022).

folks are the vanguard of African human rights and it was an inspiration to work with them.⁴

Pretoria has long-been the frontier homeland of the Afrikaaners and it was also viewed by many as the heartland of apartheid. Pretoria was officially Whites only until 1989. But even with this long history and deep commitment to White supremacy, the University of Pretoria became the home to the Center for Human Rights where Africa's best and brightest human rights activists are fostered. Alums of the Center are so powerful and deeply connected to each other that other people in the field of African human rights affectionately call them "the mafia." It's a really dramatic example of the power of hope and change.

THE A.C.L.U AS PROTECTORS OF FREE SPEECH

After nearly six years, working on human rights in Africa, I decided to join the American Civil Liberties Union. When I made that decision, it was not lost on me that my new area of focus, free speech and the First Amendment, is at least as fraught as international human rights. And the ACLU, in particular, has played a unique role in shaping how we think about free speech in the United States.

For those who are not very familiar with the organization, the ACLU has been around for a hundred years, advocating for a broad range of civil rights and civil liberties through litigation, advocacy, and public education. One unique feature is that we have affiliates in all 50 states. (In California, we actually have three affiliates—northern California, southern California, and San Diego and the Imperial Counties.) The ACLU has a nationwide reach and a ground game that's frankly unparalleled in any organizations I've seen in any country. Equally importantly, the largest share of our funding comes from individual members and their small donations. We do receive significant funding from foundations and even some corporate donors, but we're not beholden to any of these wealthy interests because the majority of our funding comes from our members.

In addition to our state affiliates, the ACLU also has a National office where I work. Within ACLU National, we have our communications team; our political advocacy team which covers legislative advocacy, campaigns, and organizing; and our legal department where I sit. Within the legal department we cover many different issues: we've got a women's rights project, reproductive freedom program, a racial justice program, we work on immigrants' rights, LGBTQ rights, disability rights, capital punishment,

4. Special thanks to Prof. Frans Viljoen, Dennis Kweku Antwi, and Prof. Michelo Hansungule at U. Pretoria for welcoming me to the Center and making the course possible. And eternal thanks to my partner in crime, Irene Petras of ICNL and formerly of the Zimbabwe Lawyers for Human Rights.

national security, you name it. As I mentioned, I work on the Speech, Privacy & Technology Project. There are very strong and storied organizations working on each of these issues and we work in partnership with many of them — we work with Planned Parenthood on reproductive freedom, we work with the NAACP Legal Defense and Education Fund on racial justice, and we even work with some libertarian organizations on the First Amendment, but no other organization I’m aware of covers all of these different issues with the comprehensiveness that we do.

We have almost 2 million members, and 2 million followers on Twitter, but as you may know, the ACLU also has a lot of critics.⁵ The ACLU is known for, among other things, taking controversial free speech cases – cases that involve racist, sexist, homophobic or other bigoted speech. There have been several points in the ACLU’s history where we have lost thousands of members because we chose to, as we say, “defend the speech rights of all, even for speech we detest.” So, when I joined the ACLU, people said, “Oh my goodness, you know who they represent, right?” “Yes,” I replied, “but they have a principled position, and I’ve seen with my own eyes the importance of protecting speech that many, or even most people find offensive.”

But how does a Black ACLU lawyer defend the speech rights of racists? There is precedent. Soon after I joined the ACLU, I was honored to have the chance to interview ACLU legend and Washington, DC’s delegate in congress Eleanor Holmes Norton.⁶ As a young Black woman, straight out of law school, Eleanor Holmes Norton became the deputy legal director of the ACLU – she was actually one of only two attorneys at the ACLU’s national office at that time. (Then, the ACLU had a different structure whereby we had a small central staff and relied on what are called “cooperating attorneys” to litigate most cases.) The staff was lean, but even then, the ACLU was involved in countless important cases, including landmark free speech cases all over the country. Eleanor herself actually defended notorious racist Alabama governor George Wallace’s right to hold a rally at Shea Stadium here in New York City.

When I told Congresswoman Norton that I focus on the First Amendment, she was confused and said, “Well, what does everybody else do?” So, I had to explain the new project structure of the legal department, but then she told me some amazing stories about what it was like to defend the First Amendment rights of segregationists in the late 1960s. She told me her friends in civil rights organizations like the Student Nonviolent Coordination Committee (SNCC) that were fighting segregation would ask her, “How can you defend the rights of these white supremacists to spew their

5. Glasser, Michael Powell, critic from the grassroots left.

6. Emerson Sykes, *The Case for D.C. Statehood ACLU At Liberty Podcast* (2019), <https://www.aclu.org/podcast> (last visited Oct. 5, 2022).

hatred?!” and she told me, “Look, I understood that the precedent that was going to be created out of these cases on behalf of racists, was going to be used against the civil rights movement.” Norton and the ACLU advocated for neutral rules that prohibited the government from restricting speech it didn’t like. Her friends told her, “You know, what’s good for the goose is not necessarily going to taste the same on the gander” and she understood this very clearly – the playing field in America is never level, so neutral rules alone will not save us. But Eleanor and the ACLU were wary of giving the government the power to suppress speech—even bigoted and offensive speech.⁷ Where we draw these lines matters.

THE ACTIVISTS’ FIRST AMENDMENT

Since I’m an attorney, please allow me to spend a bit of time with the text of the First Amendment. It’s not long so I’ll just read the whole thing:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The very first word of the First Amendment is “Congress.” By contrast, the relevant provision in international human rights documents like the Universal Declaration on Human Rights,⁸ the International Covenant on Civil and Political Rights,⁹ and the African Charter on Human and Peoples’ Rights,¹⁰ the first word is “everyone” or “every individual.” These documents say everyone has the right to freedom of speech, everyone has the right to freedom of assembly, everyone has the right to freedom of association. But the First Amendment says “Congress shall make no law” respecting five different freedoms. Fundamentally, the First Amendment is about restricting the *government’s* authority to regulate private speech. That suspicion of those in power is in some sense a prerequisite for activism.

7. Emerson J. Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15, 20 (2019).

8. United Nations, General Assembly, *Universal Declaration of Human Rights*, A/RES/217(III) (10 December 1948) available from undocs.org/en/A/RES/217.

9. *International Covenant on Civil and Political Rights*, New York, 19 December 1996, *United Nations Treaty Series*, vol. 999, No. 14668, p. 3, available from https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

10. *African Charter on Human and Peoples’ Rights*, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, reprinted in Report of the Secretary General on the Draft African Charter on Human and Peoples’ Rights, O.A.U. Doc. CM/1149 (XXXVII) (Annex II) (1981); 21 I.L.M. 58 (1982).

Turning to the five freedoms enumerated in the First Amendment, there's a poetry to how the freedoms are ordered. This is something that Burt Neuborne, one of the legends of the ACLU and my alma mater NYU Law, has written and talked about a great deal.¹¹ The poetry and reasoning behind the ordering of these freedoms provides some insight into what we can glean from the First Amendment. I call it an activists' reading of the First Amendment.

First, the government can't regulate your religion, meaning what you believe, your thoughts, your ideas, your faith, what's going on in your head. Next, the government can't abridge the freedom of speech. So, now you've gone from having an idea, a belief, a faith system, to communicating that idea or belief to others around you. Next, the government can't abridge the freedom of the press. So, now we've gone from an idea, to speaking that idea to those who are within earshot, to the press, which really means publishing or otherwise disseminating ideas to a wider audience. Of course, the drafters of the Bill of Rights were talking about a literal printing press, but now we have myriad ways of disseminating ideas on a massive scale. In any case, we're talking about the journey from an idea to words to published words and then next is "the right of the people peaceably to assemble." Now you're not just thinking something or saying something or writing and publishing something, you're gathering people around this idea. People are coming together and mobilizing around an idea, they're feeling solidarity and they're physically sharing space. Finally, there's the right "to petition the government for a redress of grievances." This means that you have the right to not only have this idea, not only speak this idea, not only to publish this idea, and not only galvanize people around this idea, but you have the right to bring this idea to the seat of power—the government—to redress your grievances. In this way, I think we can understand the First Amendment, when we look closely at its text, as facilitating this journey from an idea to a movement.

FREE SPEECH ON CAMPUS

What does free speech and the First Amendment look like on college campuses? You students know better than I do, but I've worked with lots of folks on lots of campuses and there are a few key ideas I want to highlight:

We protect free speech more robustly in public colleges than almost anywhere else, which is great news for intellectual vibrancy in universities, but it also means that college students have it really rough in many ways. I don't need to tell the college students in the audience, but the unique nature of campuses can make it a treacherous place. Campus is where you eat, it's where you sleep, it's where you study, it's where you work, and it

11. See BURT NEUBORNE, *MADISON'S MUSIC* (The New Press 2015).

might also be where you teach and where you protest. There's a way in which what we ask college students and other members of academic communities to put up with is unlike anything that any of us put up with outside of the campus context. For example, I don't have to eat across the table from my political opponents every meal, I don't have to look at their provocative posters on their doors as I walk to and from the bathroom, so I want to be very conscious of the fact that when we say that there are robust protections for free speech on campus, we bear in mind what that looks like for students' everyday lives.

Time and time again, we've seen a similar pattern play out on campuses across the country: some kind of racialized or gender-related incident happens on a campus (this might sound familiar), students are up in arms, faculty are up in arms, community members are alarmed, they're hurt, the university is obligated to respond—often after some inordinate delay and often with some sort of statement like “this doesn't reflect our values” when in fact quite literally the incident does reflect exactly what's going on in the community, and then the administration basically throws up their hands at and say there's nothing we can do because freedom of speech. And of course, this leaves students and other community members feeling unheard, unwelcome, unsafe, and excluded.

So, what to do? We've been prioritizing working with student activists. In partnership with the University of California National Center on Free Speech and Civic Engagement at UC Irvine, we have developed a curriculum to help student activists understand their free speech rights.¹² Young people today are questioning everything about this country, in a beautiful way. Why aren't we being more active about protecting the climate? Why are we committed to letting guns be carried and used in all these public places? Why have we ignored the histories and the narratives of so many of our community members in our official curricula and our official history and our national mythology? And also, why are we so blindly committed to this principle of free speech even though it can hurt people?

Our workshops, one of which we ran last night here at UC Hastings, are designed to engage in-depth with student activists around these hard questions and to make the affirmative case that we need to fight with all our energy solve these societal problems and that without the protections in the First Amendment, we don't have a chance. We don't have a chance at social justice if we don't have the space to advocate for social change and to disagree with those in power. We've been preaching this message at campuses across California and we're really proud of the number of students that we've been able to engage with and we hope to bring it to many more campuses in the future.

12. FREE SPEECH FOR STUDENT ACTIVISTS: A FIRST AMENDMENT WORKSHOP FOR CAMPUS LEADERS, <https://freespeechcenter.universityofcalifornia.edu/fellows-19-20/sykes-research/> (last visited Oct. 5, 2022).

PEACE AND LOVE AT ARKANSAS STATE

Our work on campuses includes filing lawsuits like the case in Florida, and trainings like workshop we did yesterday, as well as filing what are called *amicus*, or friend of the court, briefs. This is getting slightly technical, but an *amicus* brief is where an entity who's neither the plaintiff or the defendant in a case but they have some relevant expertise that may help the court reach the proper decision. The ACLU, since we have s been around for 100 years and we've been litigating at every level of the court system, we have some sway when we choose to weigh in as an *amicus* on a case.

I want to tell you one more story about a case that I worked on with some student activists at Arkansas State University from a group called Peace & Love.¹³ At Arkansas State, there was a campus policy that established what they called "free speech zones." To be clear, under the First Amendment, a free speech zone is not really a thing. This is something that the university created in order allow protesting only in certain, mostly out of the way, parts of campus. But the policy went far beyond regulating protests. If you Peace & Love wanted to set up a table in a public area, they were limited to a designated free speech zone and to provide 24-hour notice and obtain a permit for the use of the zone.

Campus use policies like this violate the First Amendment by severely limiting students' free speech. The ACLU of Arkansas had been railing against the policy since it was first adopted. Then, a when a couple of years ago, a representative of Turning Points USA, a pro-Trump youth group, showed up at Arkansas State and without a permit tried to set up a table and get signatures for people to sign up for a new chapter on campus. That person was arrested for violating the campus use policy and sued on First Amendment grounds. It may be obvious without saying, but I'm no fan of Turning Points USA and I'm even less of a fan of their legal counsel, the Alliance Defending Freedom (ADF), which is anti-LGBTQ, anti-abortion, anti-affirmative action, among other positions. But in this case, ADF reached out to the ACLU and asked if we would weigh in as *amicus* based on our long-standing opposition to the free speech zones.

So, the ACLU and the ACLU of Arkansas had a decision to make. Now that a federal court was going to look at the constitutionality of this policy, were we going to be quiet about it because we don't like Turning Points USA, or were we going to weigh in to say as we've been saying for year, that the policy s is unconstitutional even when it was used, as in this case, against someone with whom we have a very, very, very long list of disagreements?

13. Brief for Peace & Love et al. as Amicus Curiae, p. 7, *TPUSA at Arkansas State v. Rhodes*, 409 F.Supp. 3d 677 (E.D. Ark. 2019).

We decided to file an *amicus* brief on behalf of Peace & Love. We were able to write a brief to the court that said, look, we do not support in any way the content or the viewpoints expressed by Turning Points USA, but this court should know that this policy is unconstitutional and it has been used against our clients and countless others on campus. In the end, the university withdrew the policy before the court could rule, but I think this illustrates the ways in which we can defend important principles, even if it means directly or indirectly supporting speech with which we vehemently disagree.

FREE SPEECH MESSAGING DO'S AND DON'TS

I want to finish up with a few helpful tips that I call the do's and don'ts of talking about free speech and the First Amendment. I've just spent almost an hour telling you all the reasons that I think you should believe in free speech and the value of the First Amendment, but there are actually many arguments in favor of the First Amendment that I think are totally bogus. Let's start with the don'ts:

First, most of the so-called Founding Fathers were slaveholders, so any time you start a conversation about the First Amendment directly or indirectly pointing to their immaculate wisdom, you've lost a huge chunk of your audience. I, for one, do this work not because a bunch of white dudes from a long time ago said it was a good idea, but because I believe in human equality and I've seen that the only way to bring about change is if you protect space for people to voice their concerns and you limit the government's ability to silence and censor them.

Another terrible argument for protecting free speech is that kids these days are snowflakes and they don't know how to listen to ideas they disagree with. I think what this line of thinking fails to recognize is that, first, if we don't teach civics in K-12 education, how can we expect young people to understand civics. Second, people argue kids these days don't understand the sacrifices needed to live in a democracy, implying that in some previous period of time, people had a better understanding of that principle. I think that's a blatant misreading of our history. To the extent that there is additional conflict in academic spaces, it is because the academy and other spaces were so exclusive before that now that more people are allowed to participate, we have to renegotiate terms of engagement. More generally, I reject any notion that things were somehow better before.

The last bad argument I want to address is the "marketplace of ideas" metaphor. I'll admit that courts, including the Supreme Court, frequently use this metaphor and it occasionally creeps into my briefs, but I don't like it. The logic behind the marketplace of ideas is that we just let as much speech and counter speech as possible, inevitably, almost magically, the right ideas will win out at the end. Truth will emerge from the invisible hand that guides the marketplace of ideas. But just as I don't trust the marketplace of goods to

yield a just distribution of wealth, I don't trust the marketplace of ideas to inevitably lead us to some more enlightened place. Undoubtedly, there are structural inequalities and pre-existing power dynamics that affect people's ability to spread their ideas and mitigate against a *laissez-faire* approach. Social media platforms and other technologies have allowed for a dramatic democratization in who can reach a broad audience, but power and money are still largely determinative in how much of a voice we have. This idea of the marketplace of ideas where everything will just work itself through market dynamics reflects a misunderstanding of how marketplaces work and also doesn't really apply very helpfully to the regulation of speech.

Instead of relying on these flawed arguments for free speech, I prefer to start with the idea of universal human equality. The freedom of expression, freedom of assembly, and freedom of association are universal human rights, and all people deserve to have these rights respected and protected. If we start with our feet firmly planted on equality, we can navigate the complexities of free speech and First Amendment doctrine.

Second, it's important to understand that the First Amendment is really about fighting the powers that be. The ACLU has been standing up to government, no matter which party is in power, for over a hundred years. We fundamentally don't trust the government to decide what ideas are okay and what ideas are not, because inevitably they will be tempted to prohibit dissent and that stifles progress. If we want to change our country, we've got to be allowed to disagree with the people in power, so we insist on limiting their power to censor us. In short, central to any understanding of why the First Amendment is important, is distrust of authority.

Finally, I think we all should remember that we can and do change our minds. In a deeply polarized world, it's hard for us to think about someone switching sides on a significant issue, but all of us have the capacity to change our minds, and if you're not willing to admit to waffling in your convictions, maybe you know someone who has changed their mind about something really important. I think of my own father's, and the majority of Americans', changing view of LGBTQ issues over the course of my lifetime. I'm not trying to be idealistic or say that we should all be like Daryl Davis trying to talk people out of the Ku Klux Klan.¹⁴ But if we believe Bryan Stevenson when he says "each of us is more than the worst thing we've ever done,"¹⁵ including people on death row, then surely people are also more than the worst thing they've ever said or thought.

If I believe in prison abolition; if I want to get my cousin Ollie home despite what he did; if I think that sending people into prison is not the

14. Dwane Brown, *How One Man Convinced 200 Ku Klux Klan Members To Give Up Their Robes*, NAT'L PUB. RADIO (Aug. 20, 2017), <https://www.npr.org/2017/08/20/544861933/how-one-man-convicted-200-ku-klux-klan-members-to-give-up-their-robos>.

15. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (New York, Spiegel & Grau 2015).

way to heal victims and engender real accountability that leads to growth; if I believe that when my two little kids do something hurtful that it's important for them to acknowledge the pain that they've caused, to understand the impact of their actions, and to figure out a way to make it better instead of just sending them to their room; if I believe in these principles of restorative justice, then I also have to believe that we can forgive people for things that they have said.

This call for forgiveness, does not mean that we should not call out discrimination and bias when we see it. I am a huge proponent of calling out—I believe that it is the epitome of free speech. But at the same time, I do have concerns about the idea of “cancelling.” Much ink has been spilt as to whether cancel culture is actually a thing, but to the extent that people on all sides of the political spectrum reach to the most punitive measure available when do or say something that they don't like, and share the impulse to excommunicate people from polite society for disagreeing with them, it makes me think about how can we find a way to show that we care about something without immediately resorting to censorship and punishment.

Restorative justice doesn't mean you let things go or that any harm done is not important, it means that we prioritize making victims whole and we prioritize real accountability. I submit that between throwing up our hands and saying there is nothing we can do to address controversial speech because of the First Amendment and excommunicating people from our community because of what they've said or thought are all the good ideas for how communities can heal and grow and prosper together.

I really appreciate the opportunity to speak with you today.