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# AREYEH NEIER: DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM

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## BOOK REVIEW

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

*Reviewed by Peter T. Elikann\**

SIR THOMAS MORE: What would you do? Cut a great road through law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . [D]you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>1</sup>

It has been said facetiously that one's ability to maintain two conflicting viewpoints simultaneously without going mad is, indeed, a rare ability. Aryeh Neier experienced this dilemma, which was caused by his own antagonistic attitudes. As an infant in Berlin, Neier narrowly escaped death in the Nazi Holocaust that claimed the lives of most of his Jewish family. Several decades later, in 1978, as executive director of the American Civil Liberties Union (ACLU), he was reviled by much of the American Jewish community for defending the Nazis' right to march and speak in Skokie, Illinois. His action not only resulted in a fierce legal battle that sent shockwaves through many American institutions, but also shook the foundations of the ACLU.<sup>2</sup> His book depicts this dilemma.

DEFENDING MY ENEMY: *American Nazis, the Skokie Case,*

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1. R. BOLT, A MAN FOR ALL SEASONS, Act I, at 66 (Random House ed. 1962).

2. A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 79 (1979). The controversial case caused about 30,000 ACLU members comprising 15% of its membership to withdraw from the organization. The drop in membership decreased its annual dues by \$500,000. *Id.*

*and the Risks of Freedom* meticulously outlines and analyzes the first amendment<sup>3</sup> principle that freedom of speech is available to the vicious as well as to the virtuous. This scholarly, painstakingly researched book is the unraveling of a lawyer's ethical dilemma about whether to defend those he detests and whether to strive to secure rights for those who would curtail his own.

While no novel legal arguments were raised in the *Skokie* case, Neier's story discloses what it means to be a civil libertarian. Perhaps this point is best illustrated by a letter he recounts in the prologue. The letter, which appears to haunt Neier, is representative of thousands he received after he began defending the Nazis. A man wrote:

My only hope . . . is that if we are both forced into a march some day to some crematorium, *you* will be at the head of the parade, at which time you will in your rapture have an opportunity to sing hosannas in praise of freedom of speech for your tormentors.<sup>4</sup>

But Neier replies, "I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted."<sup>5</sup>

Neier is asked by many whether he thinks that given the chance to speak, the Nazis might gain converts and grow strong enough to abolish his freedom. He concedes that he is not so naive as to accept as infallible John Milton's view that truth will prevail in a free and open encounter with falsehood.<sup>6</sup> Neier argues, however, that since the Jews are today such a small minority, they cannot depend on force and power to protect themselves. Instead, they must depend on freedom to speak, publish and gather, even if the preservation of these rights temporarily might benefit their enemies.<sup>7</sup> Neier asserts that the events of the Nazi rise during the German Weimar Republic probably could not be repeated today. He maintains that the Nazis' meteoric rise was due to the intentional neglect of the German government in prosecuting Nazi murdering and lawbreaking. Furthermore, he notes that this failure to

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3. U.S. CONST. amend. I.

4. A. NEIER, *supra* note 1, at 1.

5. *Id.* at 3.

6. *Id.* at 4.

7. *Id.* at 4-5.

prosecute is not shared by the current American government.<sup>8</sup> It is with regard to this latter argument that Neier's thesis breaks down slightly. Numerous incidents have occurred in American history where, for suspect reasons, government authorities have refused to prosecute crimes. Recent revelations of the FBI's refusal to protect civil rights activists in the 1960's,<sup>9</sup> payoffs to federal officials in return for calling off investigations and lawsuits against giant corporations,<sup>10</sup> and government infiltration and abuses of political activist groups<sup>11</sup> serve to demonstrate that the government will sometimes turn its back on flagrant crimes or, in fact, participate in them. Indeed, the most cogent evidence that the liberty of a particular group of American citizens can be trampled on by the American government simply because of the group's ethnic origin was the internment of Japanese-Americans in the Nisei camps during World War II.<sup>12</sup> In this crucial facet of Neier's stance, that is, whether the government could allow a Holocaust to happen again, Neier's explanation is weak.<sup>13</sup>

His work, however, has too many strengths to dismiss it for this one weakness. As background for the *Skokie* case,<sup>14</sup> Neier traces the history of anti-Semitism and the tradition of the ACLU in championing rights for unpopular groups such as the Klu Klux Klan, unionists, radicals and communists. He discusses the development of freedom of speech from the English Star Chamber<sup>15</sup> through the Zenger trial<sup>16</sup> to the present.<sup>17</sup>

Neier, in his fluid manner, brings together these diverse, unrelated histories and lays a first-rate framework for understand-

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8. *Id.* at 167.

9. *Tales of the FBI*, NEWSWEEK, Dec. 1, 1975, at 35.

10. *Fallout From the ITT Affair*, FORTUNE, May, 1972, at 151.

11. MCWILL, *Second Thoughts*, NATION, Dec. 29, 1979, at 678.

12. F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* (1976).

13. A. NEIER, *supra* note 2, at 160-68.

14. *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

15. The Star Chamber was a court existing in England in the fifteenth through seventeenth centuries that was characterized by secrecy, oppressiveness, and arbitrariness. The Court was particularly noted for its harsh suppression of free speech, especially criticism of the Crown. A. NEIER, *supra* note 2, at 107-08.

16. The early eighteenth century trial of John Peter Zenger, a newspaper printer who was acquitted of charges of seditious libel for criticizing the governor of New York, was a milestone case for the establishment of American freedom of speech. *Id.* at 108-09.

17. *Id.* at 69-128, 137-39, 149-58.

ing the *Skokie* case. By scrutinizing the *Skokie* case, the reader discerns the plethora of unconstitutional legal moves that can be used to block the freedom and rights of those who support despicable and unpopular causes.

In early 1977, Frank Collin, the leader of a Nazi organization called the National Socialist Party of America, wrote to government officials of several Chicago suburbs, requesting a permit to hold a rally in their parks. Most of the officials did not respond to Collin. Officials from Skokie, a predominantly Jewish community with an unusually high number of Holocaust survivors, did. The Skokie Park District Board of Trustees wrote that Collin could hold the rally in their park if he posted \$350,000 in insurance to pay for any possible damage. To protest an apparently exorbitant insurance request, Collin announced that the Nazis would picket the Skokie Village Hall. As the date of the public demonstration approached, tensions in Skokie peaked.

Four days before the demonstration, Skokie sought an injunction calling the planned march "a grave and serious threat to the peace of the citizens."<sup>18</sup> Ironically, the injunction contained no allegations that the demonstrators would engage in violence, but argued that village residents might be provoked to harm the Nazis.<sup>19</sup> The ACLU sought dismissal of the injunction, calling the request "a classic case in which government officials ask a court of equity to impose a prior restraint on the speech of persons advocating unpopular ideas."<sup>20</sup> Circuit Court Judge Joseph Wosik granted the injunction barring the Nazi march, calling it an incitement to riot.<sup>21</sup>

Immediately after the injunction was issued, Skokie adopted a number of new village ordinances requiring that a high insurance bond be posted in order for groups to march on public streets. The ordinance also barred any group that portrayed depravity and hostility, forbade the dissemination of literature which incited hatred, and prevented any political group that wore militarylike uniforms from assembling.<sup>22</sup> Based on a unique theory, the Anti-Defamation

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18. *Id.* at 45.

19. *Id.*

20. *Id.* at 47.

21. *Id.*

22. *Id.* at 55-57. Almost a year later, the Federal District Court for the Northern District of Illinois found the ordinances unconstitutional. The insurance had proved impossible to obtain and Federal District Judge Bernard M. Decker stated the requirements were unconstitutional because they "impose a virtually insuperable obstacle to the free exercise of First Amendment rights . . . which obstacle has not been proven to be justified by the legitimate needs of the Village . . ." *Collin v.*

League brought another suit against the Nazis, requesting that they be barred from marching lest they inflict "menticide," a form of emotional harm, on the survivors.<sup>23</sup> Numerous appeals by the ACLU to both the injunction and the ordinances were denied.<sup>24</sup>

On July 12, 1977, the Illinois Appellate Court modified the injunction.<sup>25</sup> It held that the Nazi march could take place, but without display of the swastika. Speech has never been absolutely protected against governmental interference, according to the opponents of the Nazis, especially when speech creates a dangerous situation. The court reasoned that the swastika is an incitement to violence and, therefore, is not constitutionally protected speech.<sup>26</sup> The court relied on the "fighting words" doctrine established by the United States Supreme Court in *Chaplinsky v. New Hampshire*.<sup>27</sup>

*Chaplinsky* became the principal precedent cited by the opponents of the Nazi march in Skokie. The *Chaplinsky* Court had observed:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>28</sup>

Neier maintains that the *Chaplinsky* decision is regarded as a low point in judicial protection of freedom of speech. He does not, however, explain his opinion other than to demonstrate that *Chaplinsky* is distinguishable from the *Skokie* case.

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Smith, 447 F. Supp. 676, 686 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). Judge Decker called the ordinance restricting racial slurs vague and overly broad. He said it unconstitutionally imposed a prior restraint on speech. He found the ordinance banning uniforms impermissible because uniforms are a form of free speech. *Id.* at 692.

23. *Id.* at 49-50.

24. *Id.* 38-53.

25. *Id.* at 51.

26. *Id.* at 51-52.

27. 315 U.S. 568 (1942). The Supreme Court unanimously upheld the conviction of a Jehovah's Witness who had gotten into a fight with a policeman after calling him a "God damned racketeer" and a "damned fascist" during the course of an argument. *Id.* at 574.

28. *Id.* at 571-72.

The doctrine implies that "fighting words" are as dangerous as a fist or a weapon. In the thirty-five years since the *Chaplinsky* decision, the "fighting words" doctrine has been defined narrowly and never as a prior restraint. Neier says that the purpose of the doctrine was to allow punishment of a person who in a one-to-one, face-to-face sudden encounter says something so personally insulting as to provoke an immediate and unplanned violent response. The fighting words doctrine, he continues, has not been used in a circumstance similar to that in Skokie. In this assertion, he is correct.<sup>29</sup>

According to Neier, in the *Skokie* case, a sudden encounter was not expected. Advance notice was given to the police to prevent violent outbursts. The spectators knew exactly what to expect and would have no excuse for unpremeditated violent reactions. If the situation was different and the Nazis unexpectedly ran into a synagogue shouting anti-Semitic epithets to a captive audience that had come together for a purpose other than to see the Nazis, this would constitute a clear and present danger and would provoke violence. In contrast, the Nazi march in Skokie, planned for a Sunday afternoon, would primarily attract spectators who knew of it and had come to the village hall for the purpose of seeing it.<sup>30</sup>

On appeal, the Illinois Supreme Court agreed with Neier.<sup>31</sup> The Nazis were given permission to march with their swastikas. Further appeals, to the United States Court of Appeals for the Seventh Circuit<sup>32</sup> and to the United States Supreme Court,<sup>33</sup> proved fruitless to the opponents of the demonstrators.

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29. Since the *Chaplinsky* decision, the Supreme Court has reviewed many cases said to be outside constitutional protection, but most have been found to be within it. In *Cohen v. California*, 403 U.S. 15 (1971), the Court held that wearing a jacket in the courthouse inscribed with the message "Fuck the Draft" was protected because it was a political statement. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court found that defamatory statements against public officials concerning public matters were also protected by the Constitution. The Court in *Gooding v. Wilson*, 405 U.S. 518 (1972), declared that the "fighting words" doctrine could not be used to punish inflammatory speech directed at a large group of people. In *Gooding*, the defendant was convicted by a lower court for saying to a police officer, "White son of a bitch, I'll choke you to death." The Supreme Court reversed the conviction.

30. For an excellent exegesis of the opposing viewpoint, that the "fighting words" doctrine prohibits the Nazis from displaying their swastikas because it is an intentional infringement on the emotional well-being of the Village residents, see Rabinowitz, *Nazis In Skokie: Fighting Words or Heckler's Veto*, 28 DE PAUL L. REV. 259 (1979).

31. See *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

32. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

33. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

Ultimately, on July 9, 1978, the long-awaited demonstration took place in an almost ignominious anticlimax. Two dozen Nazis substituted Marquette Park in Chicago for Skokie. They assembled under heavy police protection for less than an hour. They gained no new adherents, and they have not since appeared publicly.

DEFENDING MY ENEMY presents a clear, logical, almost unassailably compelling argument depicting the constitutional protection of freedom of speech, even those forms espousing unpopular and repugnant views. Unfortunately, legal principles might appear frail and naive to a Skokie resident who saw his or her family murdered under the laws of Hitler's government. Neier's only weak argument is his unconvincing assertion that giving the right to speak to a group espousing a song of death could not lead to the repetition of the Nazi atrocities under the Weimar Republic. Though many may be unable to derive comfort from this assertion, his answer to criticism of it is compelling: Although freedom has its risks, "[s]uppression of freedom . . . is a sure prescription for disaster."<sup>34</sup>

Every time we uphold a constitutional freedom in this country, it is a blow against the likes of the Nazis though it may seem fleetingly to be in their favor. If the constitutional freedom of those detested is allowed to be chipped away, our own freedoms will surely go next. Ironically, the Nazi victory in the Skokie case was a terrible defeat for them and was a towering triumph for those who despise the Nazi philosophy and favor freedom. In a free society, one cannot build walls to shut out threatening ideas. Neier says in great detail what Supreme Court Justice Oliver Wendell Holmes said in a single sentence: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."<sup>35</sup>

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34. A. NEIER, *supra* note 2, at 3.

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