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WILLIAM O. DOUGLAS LECTURE

Current Challenges to the First Amendment¹

Nadine Strossen*

I am honored to follow in the footsteps of the many distinguished lecturers in this prestigious series, including the “supreme” Supreme Court Justice who delivered the inaugural lecture in 1972.² William O. Douglas has always been one of my heroes.

There has never been a stauncher civil libertarian on the Court. When I was in law school, Justice Douglas was still on the Court,³ and I used to be so cheered by his opinions. Even though they were usually dissents, at least someone on the Court was voicing the civil libertarian approach to constitutional issues. After all, some earlier dissents in this spirit were later adopted by majorities to become the law of the land—for example, the dissents by another judicial hero of mine and of William O. Douglas himself, Justice Louis Brandeis.⁴

In contrast, when you consider the current Court, on too many civil liberties issues, not even one Justice carries forward the Brandeis-Douglas legacy—even

1. This essay is a transcribed version of the twenty-ninth William O. Douglas Lecture that Professor Nadine Strossen delivered at Gonzaga University School of Law, Spokane, Washington, on March 23, 2000. Footnotes have been added by Professor Strossen's Academic Assistant, Kathy Davis, who has been aided by Research Assistants, Hillary Buyea, Elisa Gerontianos, Gregory Gomez, Mara Levy, and Janice Purvis. Professor Strossen gratefully acknowledges these members of her staff, who deserve full credit and responsibility for researching and writing the footnotes.

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2. See *The Oyez Project*, Northwestern Univ., at <http://oyez.nwu.edu> (last visited Jan. 30, 2001). William O. Douglas was born in Minnesota on October 16, 1898, but spent most of his youth in Yakima, Washington. He received his B.A. from Whitman College in 1920, and graduated from Columbia School of Law in 1925. Douglas served as a member of the Securities and Exchange Commission from 1936 until 1939, when President Franklin Roosevelt appointed him to the United States Supreme Court. During his time on the Court, Justice Douglas' opinions reflected his commitment to individual rights and a distrust of government power. After a long and distinguished career, Justice Douglas passed away on January 19, 1980. *Id.*

3. William O. Douglas served as a justice on the Supreme Court from 1939-1975. *Id.*

4. See, e.g., *Adams v. Tanner*, 244 U.S. 590, 597 (1917); *Adkins v. Children's Hospital of Dist. of Columbia*, 261 U.S. 525 (1923) (Brandeis, J. dissenting); *Tyson & Bro.-United Theatre Ticket Offices v. Bantan*, 273 U.S. 418 (1927) (Brandeis, J. dissenting).

in dissent. For example, since Justice Marshall resigned in 1991, there has not been a single strong, consistent advocate of the rights of individuals accused of committing crimes,⁵ or even of the Fourth Amendment rights of everyone—including those of us who are not even suspected of committing a crime.⁶

As another example, since Justice Blackmun resigned in 1994, not a single member of the Court has opposed the death penalty as inherently unconstitutional.⁷ In short, twenty-five years ago I regretted that so many of Justice Douglas' Supreme Court opinions were dissents. But now I have come to have the glass-half-full perspective on them. They were, after all, Supreme Court opinions.

In fact, I have recently had conversations with some publishers about a potential project that I consider very exciting. The idea is to put together a "Shadow Supreme Court" of law professors and other non-Justices, who would issue dissenting "opinions" when none are forthcoming from the current Court, to keep alive the spirits of such former Justices as Douglas and the others I have mentioned. The goal would be to preserve their libertarian vision of the Constitution for some future time when the composition of the Court has changed again so that it would once more be receptive to that vision.

Justice William O. Douglas is also an American Civil Liberties Union ("ACLU") hero because of his specific support in one particular, historically significant ACLU case. Back during the Vietnamera, when most judges refused even to hear constitutional challenges to the war effort, Justice Douglas was a notable exception. During the summer of 1973, ACLU lawyers journeyed to his remote, phoneless cabin in Goose Prairie, Washington, to make their case that the United States' bombing of Cambodia violated Congress' war powers.⁸ In an unprecedented move, Justice Douglas granted their request for an order to end the bombing.⁹ Although the full Court lifted the order a few hours later,¹⁰ it was still a historic breakthrough. It established the principle of judicial review, and restraint, of presidential war powers.

In fact, this historic case is highlighted in a book about the ACLU's history, which was published by Oxford University Press.¹¹ One of the few photographs featured in the book shows a rather incongruous scene, with a couple of ACLU lawyers wearing suits and ties and carrying briefcases, standing on the cabin

5. *Lankford v. Idaho*, 500 U.S. 110, 127 (1991).

6. *California v. Hodari D.*, 499 U.S. 621, 629 (1991).

7. *Callins v. Collins*, 510 U.S. 1141, 1141 (1994).

8. *See Holtzman v. Schlesinger*, 414 U.S. 1316, 1316 (1973).

9. *Id.* at 1320.

10. *Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973).

11. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 285 (Oxford Univ. Press 1990).

porch with a very dressed-down William O. Douglas.¹² Apparently he did not keep a spare judicial robe in the cabin!

I have had the opportunity to speak and write about Justice Douglas on a couple of prior occasions. Among other things, I contributed a chapter to a book about his jurisprudence that was published by the University of Pittsburgh Press in 1990.¹³ The book's title expressed the editors' and contributors' strong admiration for this remarkable man and Justice: "He Shall Not Pass This Way Again." Indeed! Alas. But that is why this lecture series is so essential—to ensure that his constitutional vision will never pass away.

In preparing for tonight's lecture, I re-read Justice Douglas' inaugural lecture in this series, *The Grand Design of the Constitution*,¹⁴ which he delivered back in 1972 when I was a college student, active in various social justice causes. Accordingly, I was very moved by Justice Douglas' lecture, especially his praise for student activists. He said that we were carrying on in the tradition of Thomas Jefferson and James Madison, and the Constitution and Bill of Rights they designed—in Justice Douglas' words—"to keep government off the backs of the people."¹⁵ That phrase certainly describes the ACLU's mission¹⁶ in a nutshell. But this really is ironic because both Justice Douglas and the ACLU are often described as liberal, if not radical.¹⁷ Yet this very same slogan has also been espoused by many revered conservatives, from Barry Goldwater to Ronald Reagan.¹⁸ And that is precisely why civil liberties are, and should be, supported across the political and ideological spectrum.

Indeed, we civil libertarians want to get government not only off our backs, but also out of our living rooms and bedrooms, and out of our decisions about how we raise our own children. As I am fond of saying, the ACLU is a pro-family organization. We just do not think that the traditional American family

12. *Id.*

13. Nadine Strossen, *The Religion Clause Writings of Justice William O. Douglas, in HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS* 91 (Stephen L. Wasby ed., 1990).

14. Hon. William O. Douglas, *The Grand Design of the Constitution*, 7 GONZ. L. REV. 239 (1972).

15. *Ollf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044 (1972).

16. "The ACLU's mission is to fight civil liberties violations wherever and whenever they occur." See *ACLU, Freedom is Why We're Here*, at <http://www.aclu.org> (last visited Jan. 21, 2001).

17. President George Bush Sr. and actor Burt Lancaster describe the ACLU as liberal and radical. See Sidney Blumenthal & Ruth Marcus, *Actors Rise to the Defense of ACLU After Bush's Attacks*, WASH. POST, Sept. 29, 1988, at A17; see also, John E. Beasley, *Supreme Court Justices' Views Defy Predictions*, BOSTON GLOBE, July 6, 2000, at A14.

18. *Straight Talk From Goldwater*, CHI. SUN-TIMES, June 11, 1993, at 33; see also *Civil Rights Under Reagan*, NAT'L JOURNAL, May 5, 1991, at 1257.

includes “Big Brother” as a member. And he is certainly not welcome in the non-traditional families whose rights we also defend.

This is precisely why we oppose government censorship, which leads me to the specific topic on which I was asked to focus—current challenges to First Amendment rights. One thing that is striking about these new threats is how many are the same as the old threats that Justice Douglas described in his lecture here twenty-eight years ago. For example, Justice Douglas criticized school dress codes, stating, “no one in government should tell us how long or how short to grow our hair, because one’s dress and demeanor . . . are methods of expressing views and attitudes toward society.”¹⁹ And yet, we are now facing an unprecedented crackdown on students’ hair, dress, and demeanor, in the wake of the tragic school shootings last spring.²⁰

All over the country, schools have overreacted by meting out harsh discipline against any student whose appearance or demeanor is different from the norm. Students have been suspended, expelled, and even imprisoned for the following “threatening” behavior: wearing black trenchcoats;²¹ wearing the color red or blue in general;²² having hair dyed blue;²³ having hair dyed pink;²⁴ wearing a pin showing that dangerous “gang symbol,” the Star of David—yes, a school board in Alabama did rule it to be such;²⁵ and wearing a T-shirt with the logo of that other dangerous gang, “Vegans.”²⁶ In the latter case, sadly, a federal judge in Utah upheld the school’s punitive action.²⁷ The judge “reasoned” that, in light of Columbine, schools can’t be too careful.²⁸

Well, we wish schools would be more careful about students’ constitutional rights. As we have had to remind school officials and others over and over again

19. Douglas, *supra* note 14, at 240.

20. See John T. McQuiston, *Terror in Littleton: The Echoes*, N.Y. TIMES, Apr. 24, 1999, at A15.

21. See Bobby C. Calvan, *Chesapeake Students in Trenchcoats Accused of Mocking Massacre*, VIRGINIAN-PILOT, Apr. 23, 1999, at A4.

22. See Katherine Bishop, *Schools Order Students to Dress for Safety’s Sake*, N.Y. TIMES, Jan. 22, 1992, at A18.

23. See Wes Allison, *ACLU Threatens Surry Lawsuit On Behalf of Blue-Haired Youth*, RICHMOND TIMES DISPATCH, May 26, 1999, at A1.

24. See *Osgood File: ACLU Concludes That 12-Year-Old Girl May Dye Hair Any Color She Likes and Still Attend Public School* (CBS News broadcast, Sept. 9, 1999).

25. See *Alleging Harassment of Jewish Kids, ACLU Sues Alabama School System*, CHI. TRIB., Aug. 29, 1997, at 10.

26. See Jennifer Toomer-Cook, *Defense Rejects Olive Branch in Vegan T-Shirt Case*, DESERET NEWS (Salt Lake City, UT), Aug. 26-27, 1999, at B2.

27. See Wendy Kaminer, *The War on High Schools*, AM. PROSPECT ONLINE (Dec. 20, 1999), at <http://www.prospect.org/print/VII/3/kaminer-w.html> (last visited Jan. 22, 2001).

28. See *Anti-Gang Dress Policy Upheld in Preliminary Ruling*, at <http://www.freedomforum.org/speech/1999/5/3utvegan.asp> (last visited Jan. 22, 2001).

in this panicked atmosphere, “different does not mean dangerous[.]”²⁹ In short, we have a huge First Amendment docket just in our nation’s public schools.

Beyond the school context, too, we face so many other First Amendment threats that I could not even list them all in my allotted time. Let me mention just a few other examples just from the past couple of weeks. Last Friday, a Utah law created the country’s first “pornography czar,” to coordinate a crackdown on any and all sexually-oriented expression that is considered offensive in any community, even if it has serious value and is therefore constitutionally protected.³⁰ One day earlier, last Thursday, the Family Research Council (“FRC”) “celebrated” the American Library Association’s “National Freedom of Information Day” by calling for more restrictions on freedom of information.³¹ Specifically, the FRC released a report accusing our libraries of “becoming virtual dirty bookstores” and peepshows.³² Shortly before that, Indiana passed a law promoting the posting of the Ten Commandments on all classroom walls,³³ despite the 1980 Supreme Court decision, in an ACLU case, that struck down such a measure.³⁴ The Court held that this type of law violates the First Amendment’s non-Establishment Clause since its purpose is to promote religion.³⁵

Speaking of the Ten Commandments reminds me of a cartoon that was in the *New Yorker* a few years ago around Passover.³⁶ It depicts Moses having just come down from Mt. Sinai bearing two stone tablets.³⁷ He is showing them to a man who is pulling a little wagon that contains a golden calf, on whose side is emblazoned “ACLU.”³⁸ The ACLU member is skeptically scratching his chin as he looks at the tablets.³⁹ He says: “The ten recommendations? I guess I can live with that.”⁴⁰

29. See Rachel Smolkin, *Schools Tone Down Violence Policies*, PATRIOT LEDGER (Quincy, MA), Apr. 18, 2000, at O1.

30. See Michael Janofsky, *Utah Law Creates First ‘Pornography Czar’*, N.Y. TIMES, Mar. 16, 2000, at A14.

31. David Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America’s Libraries*, FAM. RES. COUNCIL (2000), at <http://www.frc.org/papers/booklets/archives/BL063.pdf> (last visited Jan. 22, 2001).

32. *Id.* at v.

33. Valerie Richardson, *Colorado Board Endorses Motto ‘In God We Trust’ Recommends Posting in Schools*, WASH. TIMES, July 7, 2000, at A6.

34. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

35. *Id.*

36. Source unknown (on file with author).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Another current First Amendment challenge also threatens the non-Establishment Clause: the wave of actions by state education officials, which started in Kansas last summer, to discourage the teaching of evolution and to promote "creation science," an oxymoron. This brings to mind another cartoon by the editorial cartoonist Pat Oliphant.⁴¹ It shows a mother ape sitting in a tree with her little babies.⁴² She's telling them the facts of life and evolution: ". . . Kids, the awful truth is that we are descended from the Kansas board of education."⁴³ And a little character in the lower left-hand corner quips, "Make that *ascended*."⁴⁴

Now, turning back to my sampling of recent First Amendment violations just from the past couple of weeks, one comes from right in your own state. Earlier this month, the ACLU brought its second lawsuit against Seattle officials over their sweeping overreaction to protestors during the recent World Trade Organization ("WTO") meetings.⁴⁵ As you probably know, the city barred all expressive activity from an enormous "No Protest Zone," fifty whole blocks.⁴⁶ This excessive suppression was not justified by actual security concerns. The lawsuit "challenges the imposition of the zone, its extension, and the manner of its enforcement."⁴⁷ In the words of Kathleen Taylor, Executive Director of the ACLU of Washington: "The City essentially created a militarized zone in downtown Seattle and banned all protest within this zone. . . . An American city must not get away with such flagrant violations of citizens' freedoms. We intend to obtain a court ruling that the City's actions were unconstitutional and cannot be repeated."⁴⁸

The ACLU filed this lawsuit on behalf of seven citizens whose free speech rights were violated in this sorry episode.⁴⁹ The specific actions of city officials toward these individuals shockingly underscore the speech-suppressive impact

41. Pat Oliphant (1999), at <http://www.ukans.edu/~micro400/evolution/PatOliphant990826.gif>.

42. *Id.*

43. *Id.*

44. *Id.*

45. Press Release, American Civil Liberties Union, *In Second Lawsuit, ACLU Challenges Seattle's 'No Protest' Zone on Behalf of Seven Local People* (Mar. 7, 2000), at <http://www.aclu.org/news/2000/n030700c.html>.

46. The "no-protest zone" was not created by its own statute/ordinance. Instead, it was established pursuant to Seattle Municipal Code 10.02 which authorizes the mayor to declare certain procedures under "states of emergency." See *Local Proclamation of Civil Emergency Order Number 3 (2nd rev.) City of Seattle* (Dec. 2, 1999), at <http://www.ci.seattle.wa.us/wto/procs4.htm>.

47. *ACLU Challenges Seattle's WTO 'No Protest Zone' on Behalf of Seven Local People*, *supra* note 45.

48. *Id.*

49. *Id.*

of the city's broad policies, and how dramatically discordant they are with our democratic system of government. Some of the ACLU clients' stories are summarized as follows in the press release announcing the lawsuit:

[T]he seven individuals were either kept out or forced out of the 'No Protest' Zone solely because they had anti-WTO cartoons, buttons, stickers, or signs. Two were arrested while expressing their views. One of them, a representative of a nongovernmental organization with WTO conference credentials, was chased by police and arrested while talking to a reporter and citizens about his objections to the WTO's actions. Another person was tackled and arrested by police after handing out copies of a *New York Times* editorial cartoon critical of WTO environmental policies.

[O]ne . . . individual twice had signs taken away by Seattle police, including one that said, "I Have a Right to Non-Violent Protest." Yet another had an anti-WTO sign ripped from his clothing by police, and another was grabbed by police and threatened with arrest if she did not remove a protest sticker she was wearing.⁵⁰

Of all these shocking suppressions of free speech during Seattle's crackdown on peaceful anti-WTO demonstrators, the one that stands out the most to me, because of its sad irony, involved a student at the University of Washington. He was handing out to his fellow citizens copies of a document that the police confiscated, obviously considering it to be supremely subversive. What was this dangerous text? The First Amendment to the U.S. Constitution!⁵¹

I don't mean to single out a city in your fair state unduly. When it comes to recent First Amendment violations, Seattle is hardly alone. Indeed, another prime example comes from the other side of the country—my very own home city. The ACLU just filed our twenty-sixth First Amendment lawsuit against New York City Mayor—and Senator wannabe—Rudy Giuliani.⁵² Not that anyone's counting, but the ACLU has already won almost all of these.⁵³

50. *Id.*

51. *Id.* (recounting that University of Washington student, Todd Stedl, "was handing out copies of the text of the First Amendment . . . [when a] police officer confiscated his remaining copies and told him to leave the No Protest Zone." After Mr. Stedl had, he thought, moved outside the Zone, he asked for a receipt for the seized materials, but officers ordered him to get moving).

52. *E.g.*, New York Civil Liberties Union, *Cases, Freedom of Expression and Association*, available at <http://www.nyclu.org/docket.html> (last visited Oct. 27, 2000).

53. *Id.*

Some of these First Amendment lawsuits have received lots of nationwide publicity. For example, one highly-publicized incident was Mayor Giuliani's attack on the Brooklyn Museum last fall for displaying artwork that he personally considered "disgusting" and "blasphemous."⁵⁴

Our latest free speech battle against Mayor Giuliani was triggered when the city barred an advocacy group for public transit riders, the Straphangers' Campaign, from buying subway advertising space to place ads that dared to criticize Mayor Giuliani's public transit policies.⁵⁵ The ad showed an all-too-accurate photograph of a packed subway car with this headline: "With livestock it's called animal cruelty. With people it's called the morning commute."⁵⁶ We started this lawsuit just a week and a half ago, but—I am thrilled to report—we can already rack up yet another victory in the Rudy-versus-Free-Speech wars! A few days after the complaint was filed, the city capitulated.⁵⁷

There is a silver lining to the cloud of Mayor Giuliani's consistent repression of any expression with which he disagrees: It has raised enormous First Amendment consciousness in New York. For example, a few months ago when the city tried to block a KKK demonstration, for once, the ACLU was not reviled for defending the Klan's freedom to express its odious ideas.⁵⁸ At that point, so many other groups had also been victims of Mayor Giuliani's suppression—everyone from taxi drivers, to street artists, to young African-American men, to lesbian and gay rights activists—that they had all internalized the importance of the ACLU's, and the Constitution's, core tenet. We call this the "indivisibility" of free speech.⁵⁹ If we cede to the government the power to suppress one unpopular or offensive idea of one group, then it can, and will, use that power to suppress any other idea of any other group.

Never in my wildest dreams would I have imagined the Reverend Al Sharpton, leader of New York's African-American community, leading a demonstration in support of the Klan's free speech rights and against the Mayor's attempt to block these rights.⁶⁰ Yet, that is precisely what happened.

54. Beth Gardiner, *Museum Sues to Block Giuliani Threat*, THE RECORD (Bergen County, N.J.), Sept. 29, 1999, at A4.

55. The parties settled after the suit was filed. See Rod Dreher, *MTA Courting Trouble for Nixing Pro-Life Ad*, N.Y. POST, June 4, 2000, at 7.

56. Tom Topousis, *Crush-Hour Critics Rail as MTA Nixes Ad*, N.Y. POST, Mar. 7, 2000, available at <http://promotions.nypost.com/03072000/1671.htm>.

57. Press Release, American Civil Liberties Union, *In Victory for "Underground" Speech, NYC Transit Officials Back Down on Subway Advertisement Ban* (Mar. 17, 2000), at <http://www.aclu.org/news/2000/n031700a.html>.

58. See *Unmasked Klan Rallies in New York*, FACTS ON FILE WORLD NEWS DIGEST, Oct. 28, 1999, at 781, G1.

59. *Id.*

60. *Id.*

Reverend Sharpton and his followers were still smarting from the very same repressive tactics that the Giuliani Administration had used against their own demonstration just a short time earlier, when they were planning the Million Youth March in Harlem.⁶¹

As I said, I could spend the rest of the night just continuing to list the myriad of particular challenges to First Amendment freedoms we now face. Instead, though, I will use the rest of my limited time to comment on one major set of such challenges, at all levels of government all over the country—fighting for free speech in cyberspace. Since college and law students tend to spend a lot of time online, this topic has been especially hot on campus, as well it should be. What is at stake is not only your education, but also every aspect of your future, from economic opportunities to political empowerment.

If the ACLU continues to win its fights against cybercensorship, then the Internet can fulfill its potential as “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen[,]”⁶² to quote Judge Stewart Dalzell, who ruled in our favor in one of our cyberspeech cases. But if the many cybercensors have their way, then the Internet will be as restricted as the broadcast media.⁶³ Cyberspace would turn into another “vast wasteland,” to quote the famous description of television by former Federal Communications Commissioner Newton Minow.⁶⁴

I should note that the ACLU has always opposed the second-class treatment of broadcast expression under the First Amendment, a result of some dated Supreme Court decisions, when television was a relatively new medium.⁶⁵ And we are in good company here, since Justice Douglas also disagreed with these rulings.⁶⁶ This is one of his dissenting perspectives that might well be adopted by a Supreme Court majority in the relatively near future, judging by comments that a number of current Justices have been making in dicta.⁶⁷

In any event, even assuming for the sake of argument that the broadcast media should still be subject to second-class First Amendment status, that

61. Douglas Montero, *Rudy's Foes Rally Behind Evil Spirits*, N.Y. POST, Oct. 14, 1999, at 7.

62. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

63. See generally KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* (3d ed. 2000); see also Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm For Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

64. Alexander Cockburn, *Television Nation: How the Tube Glues Us Together*, SEATTLE TIMES, Dec. 14, 2000, at B7.

65. *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367 (1969).

66. *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964) (Douglas, J., concurring).

67. Laurence H. Winer, *The Red Lion of Cable, and Beyond?—Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 7 n.12 (1997).

status certainly should not be extended to the Internet. The ACLU has advanced this argument in our challenges to cybercensorship laws, and the courts—most importantly, the U.S. Supreme Court—have agreed.⁶⁸

I am so proud that the ACLU has been on the forefront of the struggle to maintain free speech in cyberspace, but it is a serious ongoing struggle. As most of you probably know, in 1997 the Supreme Court issued a landmark decision, its first concerning the Constitution in cyberspace.⁶⁹ In an essentially unanimous ruling,⁷⁰ the Court struck down the federal government's first attempt to censor the Internet, the Communications Decency Act ("CDA").⁷¹ I am so proud that this pathbreaking case, declaring cyberspace a free speech zone, will go down in history under the name of "Reno"—as in Janet—versus "ACLU."

Actually, we now have to call this case *Reno v. ACLU I* since we are now challenging the second federal cybercensorship law in a case called *ACLU v. Reno II*.⁷² The new law is named the Child Online Protection Act ("COPA").⁷³ With a name like that, it is not surprising that few politicians had the political courage to oppose it.

Fortunately, though, the only judge to rule on the law to date has agreed with us that it is not only unconstitutional, but also harmful.⁷⁴ The Child Online Protection Act is unwise and misnamed since it does not really protect children. Indeed, Judge Lowell A. Reed, Jr., concluded his opinion as follows: "[P]erhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."⁷⁵

Last November, the Third Circuit Court of Appeals heard oral arguments in the government's appeal from our lower court victory.⁷⁶ From the judges'

68. *Reno v. ACLU*, 521 U.S. 844 (1997).

69. *Id.*

70. Justice O'Connor wrote a partial dissent, joined by Chief Justice Rehnquist, which concluded that the challenged cybercensorship law, the Communications Decency Act, should be constitutional only concerning a tiny percentage of online communications: those involving one adult and one or more minors (but not more than one adult). *See id.* at 896-97. As the majority noted, however, many communications of this type would likely be between family members—e.g., e-mails between parents and their own children—thus raising constitutional problems even concerning this relatively narrow portion of the Act's scope. *See id.* at 866 n.32.

71. *Id.* at 849.

72. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

73. *Id.* at 165.

74. *ACLU v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000).

75. *Id.*

76. After this Douglas Lecture, a panel of the Third Circuit did indeed affirm the lower

questions and comments, I am optimistic that they will affirm that victory.

Essentially, COPA criminalizes any material that any community might find “harmful to minors,” a subjective and potentially all-encompassing concept.⁷⁷ In our ongoing lawsuit seeking to strike down this repressive new law, I am actually one of the complainants because I am a monthly columnist for a Webzine, *Intellectual Capital*, and my writings could definitely trigger severe criminal penalties under COPA.⁷⁸ That’s not because I am writing the online equivalent of *Screw Magazine*!

I do have to confess, though, that a couple of months ago I was filmed for a movie called “Dirty Pictures.”⁷⁹ These law school salaries are so low, it is tragic what some of us have to do to supplement our income. Actually, here is the real confession. I am not becoming a porn star, although I know that they are much better paid than law professors, not to mention ACLU officers. Seriously, this film is a documentary about the infamous prosecution of the Cincinnati art museum that displayed Robert Mapplethorpe’s controversial homoerotic photographs exactly ten years ago.⁸⁰ Alas, the very same constitutional and civil liberties problems that plagued that prosecution are still with us in this new millennium in many forms, including the ongoing cybercensorship campaigns. And, as always, major targets continue to be those who explore controversial themes, including lesbian and gay sexuality.

The reason why I am a plaintiff in *ACLU v. Reno II* underscores the law’s constitutional flaws. The concept of “harmful to minors” is so vague and expansive that it endangers all words and images that discuss any topic with any sexual overtones—even critically important topics about which I do write, such as abortion, AIDS and other sexually transmitted diseases, censorship of sexual expression, contraception, gender discrimination, lesbian and gay rights, sexual harassment, and rape and sexual abuse.

And I am in very good company because the other plaintiffs include individuals and organizations who publish a diverse array of important, valuable material online. Yet, they too are threatened by the federal

court’s ruling invalidating COPA. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000). As this publication goes to press, the United States has not yet decided what course it will pursue in response to the panel ruling. Among other things, it could seek a rehearing by the Third Circuit *en banc* or petition the Supreme Court for a *writ of certiorari*. See Press Release American Civil Liberties Union, *ACLU v. Reno II Victory! Appeals Court Rejects Congress’ Second Attempt at Cyber-Censorship* (June 22, 2000), at <http://www.aclu.org/news/2000/n062200b.html>.

77. 47 U.S.C. § 231(a)(1) (Supp. IV 1998).

78. 47 U.S.C. § 231(a) (Supp. IV 1998).

79. DIRTY PICTURES (Showtime 2000).

80. Isabel Wilkerson, *Clashes at Obscenity Trial On What an Eye Really Sees*, N.Y. TIMES, Oct. 3, 1990, at A5.

government's sweeping new ban. Let me cite just a few of the other plaintiffs in our new case, whose valuable online expression is now also endangered: the American Booksellers Association;⁸¹ Artnet,⁸² which is the leading vendor of fine art on the Web; BlackStripe,⁸³ which is an organization for lesbian and gay African-Americans; Condomania,⁸⁴ which is the leading online distributor of safer-sex information and condoms; the poet Lawrence Ferlinghetti;⁸⁵ a coalition of online news publications, including MSNBC,⁸⁶ *Time Magazine*,⁸⁷ and the *New York Times*,⁸⁸ because they published the Starr Report online; OBGYN.net,⁸⁹ an online resource center for professionals in obstetrics and gynecology and the women they serve; Philadelphia Gay News;⁹⁰ *RiotGrrl*,⁹¹ a magazine for young feminists; and another popular online magazine, *Salon*.⁹²

I stress the valuable types of expression that are threatened by COPA to counter the demonizing rhetoric that fuels these cybercensorship laws. Politicians and the media clamor about protecting our children against "cyberporn."⁹³ And, mind you, I and the ACLU happily defend free speech rights for pornography or sexually arousing expression.⁹⁴ But it is important to realize that this stigmatizing term hardly connotes the kinds of expression that our clients actually purvey.

It is also important to realize that no one, either on or off the Supreme Court, has ever been able to come up with a definition that would distinguish what some call "hard-core pornography" from other sexually-oriented expression. The only candid definition is the one that most of you have heard, from former Justice Potter Stewart, who said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ."⁹⁵

81. at <http://www.bookweb.org> (last visited Jan. 23, 2001).

82. at <http://www.artnet.com> (last visited Jan. 23, 2001).

83. at <http://www.blackstripe.com> (last visited Jan. 23, 2001).

84. at <http://www.condomania.com> (last visited Jan. 23, 2001).

85. at <http://www.levity.com/corduroy.ferling.htm> (last visited Jan. 23, 2001).

86. at <http://www.msnbc.com/news/default.asp> (last visited Jan. 23, 2001).

87. at <http://www.time.com/time/magazine> (last visited Jan. 23, 2001).

88. at <http://www.nytimes.com> (last visited Jan. 23, 2001).

89. at <http://www.obgyn.net> (last visited Jan. 23, 2001).

90. at <http://www.epgn.com> (last visited Jan. 23, 2001).

91. at <http://www.riotgrrl.com> (last visited Jan. 23, 2001).

92. at <http://www.salon.com> (last visited Jan. 23, 2001).

93. Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME July 3, 1995, at 38.

94. See generally NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (N.Y. Univ. Press 2000).

95. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

The problem is that everyone sees a different “it.” That is why we can never delegate to either the government or our fellow citizens the necessarily personal, subjective judgments about what we choose to see, and not to, and what we choose for our children to see, and not to.

As our pending lawsuit in *ACLU v. Reno II*⁹⁶ shows, cybercensorship is in one sense a very hot, current topic. On the other hand, though, it raises age-old questions. Throughout history, each time a new medium makes it easier, faster, and cheaper to convey ideas and information, it promises to enhance individual freedom and effective participation in democratic self-government. At the same time, though, these expanded communications opportunities always frighten those with an authoritarian or paternalistic outlook. So, throughout history, each new medium promptly triggers calls for censorship.

In this country, the single most controversial, embattled type of expression in cyberspace, as in all other media, is sexually-oriented expression. That is because of America’s Puritanical heritage. My fellow Minnesotan, Garrison Keillor, put it this way: “My ancestors were Puritans from England. They arrived here in 1648 in the hope of finding greater restrictions than were permissible under English law at that time.”⁹⁷

So, consistent with this long American tradition, when the Internet first hit the public and political radar screens, it was thanks to publicity about sexual materials, including exaggerated, distorted, and hysterical publicity. And that publicity immediately launched censorship crusades, which are still ongoing, at all levels of government, all over the country, with overwhelming support from politicians of both major parties.

To illustrate this pattern, let me cite some numbers about the CDA, which are all-too-typical. Out of 535 members of Congress, only twenty-one voted against it.⁹⁸ And even fewer than twenty-one opposed the CDA’s core provisions, which criminalized all “indecent” or “patently offensive” expression.⁹⁹ Some of the twenty-one supported those provisions but voted against the law only because of its additional provision, which was tacked on by Congressman Henry Hyde, that specifically outlawed any expression regarding abortion.¹⁰⁰ That special anti-abortion provision was not needed.

96. 217 F.3d 162 (3d Cir. 2000).

97. Garrison Keillor, *Thanks for Attacking the N.E.A.*, N.Y. TIMES, April 4, 1990, at A25.

98. 142 CONG. REC. H1179 (daily ed. Feb. 1, 1996); 142 CONG. REC. S. 720 (daily ed. Feb. 1, 1996).

99. 142 CONG. REC. § 652 (daily ed. June 14, 1995), available at <http://thomas.loc.gov/cgi-bin/query/D?r104:4::/temp/~r104fvi924::> (last visited Feb. 21, 2001); *United States Senate Roll Call Votes*, 104th Congress, S. Amendment No. 1362 (June 14, 1995), available at http://www.senate.gov/activities/104-1/vote_00263.html (last visited Feb. 21, 2001).

100. Peter Lewis, *Quixote’s Network*, HOME OFFICE COMPUTING, May 1996, at 114.

Sadly, experience shows that many communities consider any expression about abortion “indecent” or “patently offensive.” Therefore, the CDA’s core provisions already had the effect of stifling abortion-related expression.

Not only did the CDA get overwhelming congressional support from both sides of the aisle, but it was also championed by the Clinton Administration.¹⁰¹ Again, this same pattern has continued concerning COPA and the six state cybercensorship laws as well. From a free speech perspective, that is the bad news.

There is good news too, though. Just as elected officials have almost unanimously supported censorship of sexually-oriented online material, the courts have done exactly the opposite. The ACLU has now challenged eight cybercensorship laws and we have won every single one of these challenges.¹⁰²

Moreover, these cases have now been ruled on by two dozen different judges who span the entire ideological spectrum: They were appointed by the last six Presidents—going all the way back to Richard Nixon. Despite all their differences on constitutional issues, though, every single one of these judges, including the entire United States Supreme Court, has endorsed the ACLU’s position in these cases.

This points to a very important lesson about First Amendment rights and, indeed, constitutional rights more broadly: The courts have been fulfilling their intended constitutional role as the ultimate guardians of individual rights, and serving as safety nets for these rights when elected officials lack the political courage to do so. When we were lobbying against the CDA, many members of Congress said to us—sometimes in private, but sometimes openly, with surprising candor—“I know this law is unconstitutional. I know it is unwise. I know it is ineffective. But I dare not vote against it for fear of being accused of being soft on crime or, worse yet, soft on porn.”

Likewise, after we won our challenge to the CDA in the Supreme Court, many members of Congress congratulated us on the victory, even though they had voted for the CDA. And then they went on to vote for COPA. To add insult to injury, too many politicians have been attacking judges and threatening their independence, precisely because the judges do take seriously the oath to defend and uphold the Constitution, which all elected officials also take. A couple of years ago, House whip Tom Delay actually called for impeaching judges who had dared to strike down laws as unconstitutional. Congress has held repeated hearings on what it considers the “problem” of “judicial activism,” in other

101. President William J. Clinton, *Statement by the President*, June 26, 1997, at <http://clinton6.nara.gov/1997/06/1997-6-26-president-on-court-decision-on-communication> (last visited Jan. 30, 2001).

102. *E.g.*, ACLU Freedom Network, *Cyber-Liberties*, at <http://www.aclu.org/issues/cyber/hmcl.html> (last visited Jan. 23, 2001).

words, judges actively enforcing First Amendment and other constitutional rights. Some of us consider the problem to be that Congress is not doing likewise, and is not actively honoring the Constitution.

Worse yet, Congress has been considering various measures that would rein in this judicial “activism,” including a constitutional amendment that Robert Bork advocated in his recent best-selling book with that apocalyptic title, *Slouching Towards Gomorrah*.¹⁰³ Specifically, Robert Bork advocates empowering Congress to overturn any judicial ruling by a mere majority vote.¹⁰⁴ These attacks on our independent judiciary are also, in effect, attacks on our First Amendment rights. In fact, as you can see, they are the most far-reaching, most dangerous threats to these rights, along with all others.

Now, though, while our courts still are relatively independent, and relatively insulated from majoritarian political pressures, they have unanimously ratified the ACLU’s position in all of our cybersensorship cases, as I said a moment ago. In a nutshell, that position is this: Cyberspace should enjoy the same high level of free speech protection as the traditional print media.¹⁰⁵ Conversely, all of the judges in our cyberspeech cases have rejected the government’s position—that cyberspace should receive only the weaker free speech protection that our courts have extended to the broadcast media.¹⁰⁶

As I said earlier, Justice Douglas shared the ACLU’s view that the broadcast media should receive the same First Amendment protection as the print media. I would like to read from one of his opinions explaining why. Although it was written in 1973, long before the advent of the Internet, its prescient reasoning applies fully to cyberspace and all other “new media,” as well as broadcast. Here is what Douglas wrote:

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court’s only guideline; and one hard and fast principle . . . it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means . . . that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of “press” as used in the First Amendment and therefore are entitled to live under [its] laissez-faire regime. . . .¹⁰⁷

103. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* (Regan Books 1996).

104. *Id.* at 117.

105. *See generally* *Reno v. ACLU*, 521 U.S. 844 (1997).

106. *Id.*

107. *See* *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 160-61 (1973) (Douglas, J., concurring).

For detailed information about any of our cybersensorship cases, I highly recommend that you visit the ACLU's Website, at www.aclu.org. It is a treasure trove of information and resources concerning not only the statutes and judicial rulings, but also the pleadings and briefs and even transcripts of Supreme Court oral arguments.

As I said, the lodestar principle that the Supreme Court endorsed in *Reno v. ACLU* was that cyberspace should enjoy the same high level of free speech protection as the traditional print media.¹⁰⁸ So let me give you a very brief outline of these speech-protective standards that have long governed print media and now extend to cyberspace. They center around two cardinal principles. The first specifies what is *not* a sufficient justification for restricting speech and the second prescribes what *is*.

The first basic principle requires "content-neutrality" or "viewpoint-neutrality." With one exception,¹⁰⁹ this principle holds that government may never limit speech just because any listener—or even, indeed, the majority of the community—disagrees with or is offended by its content or viewpoint.¹¹⁰

In recent years, the Supreme Court has steadfastly enforced this fundamental principle to protect speech that conveys ideas that are deeply offensive to many, if not most, of us, such as burning an American flag in a political demonstration,¹¹¹ and engaging in racist "hate speech."¹¹²

You have no right to be shielded from hurt feelings or outrage, or even anxiety and distress, which speech undoubtedly can cause. That is not because these are not significant harms—they certainly are.

We defend freedom for speech, after all, precisely because speech is so powerful. The reason we do not let government suppress speech to redress the psychological or emotional harms it causes is that, to quote an old saying: "The cure is worse than the disease." Both for society as a whole and for individual citizens, having to hear upsetting and offensive expression is the lesser of two evils. Far worse would be empowering the government, or a majority of our fellow citizens, to take away from us our freedom to make our own decisions about what we ourselves and our own young children will say, see, or hear. After all, if we are offended by some expression, we have two recourses. We can refuse to listen to it or we can answer back.

To justify regulating the content of expression, then, the government must show more than disagreement with, or dislike of, its content or viewpoint. To the contrary, any content regulation is presumed to violate freedom of speech

108. See generally *Reno v. ACLU*, 521 U.S. 844 (1997).

109. E.g., *Schenck v. United States*, 249 U.S. 47 (1919).

110. See generally *Reno*, 521 U.S. at 844.

111. See generally *Bowles v. Jones*, 758 F.2d 1479 (11th Cir. 1985).

112. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

and the government can overcome that presumption only by making two showings: (1) that the regulation promotes a concern of “compelling” importance, such as public safety or national security;¹¹³ and (2) that the regulation is “necessary” to promote that concern—in other words, that no alternative approach, less restrictive of expression, would suffice.¹¹⁴ This second requirement is known as the “least restrictive alternative.”¹¹⁵

These two requirements are often summarized by a phrase most of you have heard: “clear and present danger.”¹¹⁶ In other words, government may restrict speech if, but only if, it can show a clear and present danger of concrete harm that can be averted only by the restriction.¹¹⁷

In most cases, the government can easily make the first showing, simply by citing an important goal. However, it is much harder to make the second showing—that any particular regulation is really necessary to promote that goal.

That typical pattern has held true in our Internet cases. In almost all of these, the government asserts a goal of protecting children from allegedly harmful material. Even if the courts do deem this goal sufficiently important, they have all held that restricting Internet content is not a necessary means for advancing it.¹¹⁸ In particular, the courts consistently have recognized that restricting Internet content is not the least restrictive alternative since it stifles adult access to the material as well.¹¹⁹

As I said earlier, there is one exception to this generally speech-protective approach of American law, and that is in the area of sexually-oriented expression.¹²⁰ At this point, I should inject a word about terminology. The public, media, and politicians tend to use a lot of words interchangeably that actually have different legal significance. The terms “obscenity,”¹²¹ “pornography,”¹²² “indecenty,”¹²³ and “smut”¹²⁴ all refer to sexually-oriented expression. But the Supreme Court has consistently rejected the notion that all

113. *New York v. Ferber*, 458 U.S. 747, 756-58 (1982).

114. *Id.* at 761-62.

115. *Id.*

116. *E.g.*, *Dennis v. United States*, 341 U.S. 494, 509 (1951).

117. *E.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997).

118. *Id.* at 874.

119. *Id.* at 875.

120. *See generally Barnes v. Glen Theatre Inc.*, 501 U.S. 560 (1991).

121. *Roth v. United States*, 354 U.S. 476, 486-87 (1957).

122. *Miller v. California*, 413 U.S. 15, 16 (1973).

123. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 740 (1978).

124. *Carlin Communications, Inc. v. Mountain States Tel. & Tel.*, 827 F.2d 1291, 1292 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

sexual expression should lack constitutional protection.¹²⁵ To the contrary, most such expression is constitutionally protected.¹²⁶

The Court stressed this point in its very first case reviewing government efforts to suppress sexual expression, *Roth v. United States*.¹²⁷ The Court said the following, which is surely one of its least controversial pronouncements ever: "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."¹²⁸

Having said that, though, the Court immediately proceeded to carve out a category of sexually-oriented expression it deemed beyond the First Amendment pale and labeled it "obscenity."¹²⁹ The Court has allowed obscene expression to be not only regulated, but also completely outlawed, without any evidence of a "clear and present danger," just because it offends the community's sensibilities.¹³⁰ In short, this type of sexual expression gets only second-class treatment under the First Amendment. This reflects America's Puritanical heritage, as I noted before, which deems anything to do with sex to be inherently dangerous.

At least in theory, though, the obscenity exception is relatively limited. To be found obscene, the material has to satisfy three criteria, one of which is that it lack serious literary, artistic, political, or scientific value, as determined by national standards.¹³¹ The ACLU has always opposed the obscenity exception as violating First Amendment principles. And we are in good company, since many respected Supreme Court Justices have also opposed this exception.

Here the preeminent example is none other than the namesake of this lecture series, William O. Douglas. He wrote many opinions explaining why the obscenity exception is contrary to both the letter and the spirit of the First Amendment. Let me share with you just a couple of powerful passages from some of these opinions. The first comes from Justice Douglas' 1973 dissent in the *Paris Adult Theater* case. He said:

125. See *City of Erie v. Paps A.M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991); *Schad v. Borough of Mount Ephraim*, 152 U.S. 61, 66 (1981).

126. See *City of Erie*, 529 U.S. at 289; *Barnes*, 501 U.S. at 565-66; *Schad*, 152 U.S. at 66.

127. 354 U.S. 476 (1957).

128. *Id.* at 487.

129. *Id.* at 488.

130. *Id.* at 484-85.

131. *Miller v. California*, 413 U.S. 15, 23-24 (1973); see generally *Pope v. Illinois*, 481 U.S. 497 (1987).

“Obscenity” . . . is the expression of offensive ideas. There are regimes in the world where ideas “offensive” to the majority (or at least to those who control the majority) are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

I am sure I would find offensive most of the books and movies charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me.¹³²

The second example of Justice Douglas’s compelling arguments against the obscenity exception comes from his dissent in the 1957 *Roth v. United States*¹³³ case:

The [Court’s] tests . . . [for criminal obscenity] require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college . . . women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said “music”; 29 said “dancing”; 40 said “drama”; 95 said “books”; and 218 said “man.”¹³⁴

In other words, Justice Douglas is arguing, according to the “logic” underlying the obscenity exception, we should outlaw everything from men to music.

Years ago, a colleague told me about a conversation he had with Justice Douglas that is directly relevant here. My colleague was having lunch in the Supreme Court cafeteria and when he saw Justice Douglas there, he struck up a conversation. The subject turned to obscenity law and Justice Douglas essentially said:

You know, I’ve become more and more opposed to this doctrine the longer I’ve sat on the Court. Some people think it’s because I’m getting more liberal and tolerant in my older age. But, as you know, this Court has held that for something to be obscene, it has to appeal to the prurient interest in sex—in other words, it has to be sexually arousing. And the older I get, alas, the harder it is for me to get sexually aroused.

Well, I have said more than enough about the obscenity exception for present purposes. That is because, in the cybercontext, this exception is beside the point. The battle that we in the ACLU are fighting in cyberspace is just to “hold the line” at that already-judicially-sanctioned First Amendment exception.

132. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting).

133. 354 U.S. 476, 508 (1957) (Douglas, J., dissenting).

134. *Id.* at 509.

We have not challenged Internet laws to the extent that they simply transplant to cyberspace existing free speech limits that have been upheld in print media—in particular, obscenity, child pornography, and solicitation of a minor for sexual purposes.

Rather, what we have actively opposed in these new laws is their creation of new, broader categories of expression that is unprotected only online, even though it would be constitutionally protected in print. For example, both the CDA and COPA outlaw expression that, in contrast to obscenity, does have serious literary, artistic, political, or scientific value.¹³⁵

Given the constitutional problems posed by direct censorial measures such as the CDA and COPA, their advocates are also touting indirect censorial measures, which threaten the same types of expression.¹³⁶ The prime example here is blocking software.

The ACLU has issued two reports explaining the inherent free speech problems posed by this software. Accordingly, cyberlibertarians often prefer the term “censorware.”¹³⁷ For one thing, these blocking programs are inevitably both under-inclusive and over-inclusive. They do not block all the material they purport to, nor do they block only that material.¹³⁸

You have all heard some of the countless absurd examples of software that is advertised as blocking only “hard-core pornography,” but then turns out to actually also block a wide range of non-pornographic sites with valuable political and artistic information.¹³⁹ For example, just a couple weeks ago, news stories revealed that blocking software denied access to the Website for a college in Philadelphia that happens to be called “Beaver College.” So many high school students research colleges only online, and so many blocking programs block the word “beaver” that the college is seriously considering changing its name!¹⁴⁰

I must stress that such examples are not aberrations, but rather illustrate an

135. Jack E. Brown, *Obscenity, Anonymity, and Database Protection: Emerging Internet Issues*, 14 NO. 10 COMPUTER LAW 2 (1997).

136. E.g., DONNA RICE HUGHES, *Creating a Digital Toolbox*, in KIDS ONLINE: PROTECTING YOUR CHILDREN IN CYBERSPACE 134-35 (1998).

137. *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries*, at <http://www.aclu.org/issues/cyber/box.html> (last visited Jan. 17, 2001); see also *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech in the Internet*, WHITE PAPER (American Civil Liberties Union, New York, N.Y.), Aug. 1997, at <http://www.aclu.org/issues/cyber/burning.html> (last visited Jan. 17, 2001).

138. *Censorship in a Box*, *supra* note 137.

139. E.g., Camillo Fracassini, *Internet Filters Failing to Protect Children*, THE SCOTSMAN, May 4, 2000, at 5; David Nakamura, *Web Filter Can't Block Criticism; Loudon Libraries Feel Heat for Effort to Screen Out Smut*, WASH. POST, Jan. 11, 1998, at B1.

140. Mary Huhn, *Leave it To Beaver - College Damned by Name*, N.Y. POST, June 1, 2000, at 42.

inherent problem with filtering software. Evaluating any expression, and determining whether it is appropriate or desirable for any potential recipient, is a highly complex, nuanced, and subjective process, requiring the weighing of many factors. No software can possibly substitute for this type of individualized judgment. The software will necessarily be overly simplistic and crude.

The problems resulting from the inevitably oversimplistic nature of blocking software are compounded by such software's lack of transparency. Almost all blocking software manufacturers refuse to disclose either the sites they block or the criteria they use to determine which sites they will block.¹⁴¹ Thus, the manufacturers are imposing their value choices on their customers. They are not facilitating the customers' exercise of their own freedom of choice.

Of course, individuals have the right to choose to install this software on their own home computers. That is a protected exercise of their own freedom of speech. Thus, in the home context, the software's problems raise consumer protection issues, not free speech issues. Consumers should receive complete and accurate information about exactly what the software can do and what its limitations are. Only then can they make informed choices about whether they really want to use it.

In contrast, serious free speech problems are posed when filters are installed, not by fully informed individual users, but rather by government officials who control the computers in public institutions.¹⁴² The first situation reflects freedom of choice by the individual user; the second eliminates such freedom of choice.

Across the United States, many officials are busily installing or advocating blocking software on computers in public libraries, schools, and universities.¹⁴³ Therefore, individual choice is stripped from the many members of the public whose only Internet access is through such computers. Installing filtering software on library computers has the same censorial impact as the removal of books from library shelves. Book banning is precisely the analogy that was invoked by the only court that has ruled on this issue to date, in a case from Loudoun County, Virginia, outside of Washington, D.C.¹⁴⁴

As I noted earlier, all of the cybercensorship laws that we have challenged have been struck down for one overarching reason: They reduced adults to the

141. Donna Ladd, *His So-Called Rights: Peacefire Founder Wages Arms Race Against Censorware*, VILLAGE VOICE, Sept. 19, 2000, at 35.

142. E.g., David Noack, *S.C. Libraries Get O.K. to Censor Net Porn*, at http://www.apbnews.com/newscenter/internetcrime/2000/04127/netfilters0427_01.html (Apr. 27, 2000).

143. See, e.g., Suzanne Robinson, *Schools Seek to Keep Kids From Web Porn*, STUART NEWS/PORT ST. LUCIE NEWS, April 3, 2000, at A1.

144. *Mainstream Loudoun v. Bd. of Trustees of Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

level of seeing only what was fit for children.¹⁴⁵ That rationale is, of course, persuasive as far as it goes. But Internet content regulations also violate freedom of speech for other, independently sufficient, reasons.

First, young people have free speech rights of their own. The Supreme Court repeatedly has recognized that minors have constitutional rights. For example, the Court has declared “[c]onstitutional rights do not . . . come into being magically only when one attains the state-defined age of majority.”¹⁴⁶ Moreover, the Court has expressly upheld minors’ free speech rights, including their rights to have access to sexually-oriented expression.¹⁴⁷ It has ruled that “[s]peech . . . cannot be suppressed solely to protect the young from ideas or images that a [governmental] body thinks unsuitable for them.”¹⁴⁸

A second added rationale for striking down laws suppressing online sexual expression—beyond the analysis that courts have already adopted—is that the government cannot in fact show that minors are harmed by the sexually-oriented material these laws have targeted.¹⁴⁹ Thus far, courts have essentially been assuming this material is harmful for the sake of argument; they have not needed to resolve this issue since the laws all fail the second prong of strict scrutiny, the least restrictive alternative test.¹⁵⁰

The government has not even bothered to introduce evidence that the targeted sexually-oriented expression really does harm minors. Again, this is consistent with our society’s and legal system’s general suspiciousness toward anything to do with sex or sexual expression; we just presume or assume that it must be dangerous. But the ACLU has introduced evidence that a lot of this expression, far from having a negative impact, would actually have a positive impact, at least on older minors.¹⁵¹

I will cite a few examples of on-line expression by our clients that our evidence has shown are at least potentially positive, at least for older minors, yet all of which has been outlawed by CDA, COPA, and other cybercensorship measures. Consider, for example, Planned Parenthood, which provides valuable

145. See also *ACLU v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000), *aff’g*, 31 F. Supp. 2d 473 (E.D. Pa. 1999); *ACLU v. Reno*, No. 98-5591, 1998 U.S. Dist. LEXIS 18546, at *6, 15-16 (E.D. Pa. Nov. 20, 1998) (granting plaintiffs’ motion for preliminary injunction enjoining enforcement of the statute); *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 178-79 (S.D.N.Y. 1997); *ACLU v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997); *Reno v. ACLU*, 521 U.S. 844, 875 (1997), *aff’g*, 929 F. Supp. 824 (E.D. Pa. 1996).

146. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

147. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975).

148. *Id.* at 213-14.

149. Brief for Appellees at *14, *ACLU v. Reno*, 521 U.S. 844 (1997) (No. 96-511).

150. *E.g.*, *Reno v. ACLU*, 521 U.S. 844, 878 (1997), *aff’g*, 929 F. Supp. 824 (E.D. Pa. 1996).

151. Brief for Appellees at *1, *ACLU v. Reno*, 521 U.S. 844 (1997) (No. 96-511).

online information about contraception and safer sex;¹⁵² Critical Path AIDS Project, which posts online information about HIV in language especially geared toward young people;¹⁵³ and a couple of sites designed for lesbian and gay teenagers, which are especially important for teens who live in physical communities where they are isolated at best, persecuted at worst, and denied access to information or support.¹⁵⁴ And let us not forget that most nefarious, porn-peddling client of ours: The High School Journalism Education Association, which is censored because of the allegedly “crude” or “vulgar” language contained in some of the student writings on its Website.

Since a majority of teenagers in the United States are sexually active,¹⁵⁵ information about sexuality is vitally important to them. Just think of the epidemic of unwanted teen pregnancies in this country, the tragic spread of HIV and other sexually-transmitted diseases among teenagers, and the sadly high number of suicides among lesbian and gay teens who feel alienated and rejected in their physical communities.¹⁵⁶ As you can see, then, the on-line information and communication that some of our clients offer, far from endangering minors’ welfare is, to the contrary, positive for their welfare; indeed, in many cases, it may even be lifesaving. But our government officials are criminalizing all such information, allegedly for the “benefit” of minors.¹⁵⁷

The major rationale cybercensors cite is the need to protect children from access to materials their parents do not want them to see, especially sexual material.¹⁵⁸ Cybercensors allege that they are facilitating parental or family control. I certainly sympathize with parents’ concern about shaping the education and upbringing of their children. Indeed, the Supreme Court long has held that parents have a fundamental constitutional right to do so.¹⁵⁹

However, far from empowering families, these measures simply increase the power of the government to interfere in the most intimate aspects of our lives, as I noted earlier. Parents may certainly discourage their children from visiting certain websites, and encourage them to visit others. On such deeply personal matters, though, just as government should not be “Big Brother” to

152. at <http://www.plannedparenthood.org> (last visited Feb. 2, 2001).

153. at <http://www.critpath.org> (last visited Feb. 2, 2001).

154. at <http://www.pe.net/~bidstrip/cool.htm> (last visited Feb. 2, 2001).

155. E.g., Liza Mundy, *Sex and Sensibility; Today's Young Teens Are Becoming Sexually Aware – And Active – At An Unprecedented Rate*, WASH. POST, July 16, 2000, at W16.

156. E.g., Kelli Conlan, *The Struggle for Identity: Gay Teens Find Telling Others Difficult Amid Social Pressures*, PLANO STAR COURIER, Apr. 25, 1999, at 1A.

157. 47 U.S.C.A. § 223(a)(d) (1997).

158. See Natasha Korecki, *Experts Tell Parents to Take Control*, CHICAGO DAILY HERALD, May 2, 1999, at 6.

159. E.g., *Troxel v. Granville*, 530 U.S. 57, 62 (2000).

adults, it likewise should not be “Big Daddy” or “Big Mommy” to young people.

If we really want to do something constructive to empower parents and families, we should champion the development of tools that would truly aid individualized decision-making. I think the most promising approach in this medium is what has worked in other media. Again, we should follow the Supreme Court’s core holding in *ACLU v. Reno*, that the same tried-and-true free speech principles that apply to books should also apply to cyberspace.¹⁶⁰

In this vein, the American Library Association has played the same constructive role for parents and children in cyberspace as it has concerning books, by issuing lists of recommended materials for children of certain ages, and also by issuing guides for parents and children to help them make the most constructive use of this exciting medium, while avoiding some potential hazards, such as adults trying to solicit minors for actual, in-person sexual encounters.¹⁶¹ That affirmative approach, more information rather than less, is more effective, as well as more consistent with free speech values, than the negative approach of blocking.

In conclusion, I want to stress the ACLU always has been a non-partisan organization. One of the reasons is that civil liberties violations cross all party and ideological lines, and that is certainly true for cyberliberties. Correspondingly, support for civil liberties, including cyberliberties, also crosses all partisan lines.

I will end by sharing one of my favorite e-mails ever, which illustrates precisely this point. It came from a supporter of the Christian Coalition, who wrote me after she had watched me on “Crossfire,” debating Ralph Reed, then the Executive Director of the Christian Coalition, about cybersensorship. Mr. Reed was advocating the CDA and I was opposing it. Still, my most enthusiastic fan-mail e-mail came from a member of Mr. Reed’s organization. She wrote:

Dear Nadine Strossen,

I am a mother of two, [a] Christian pro-lifer. . . . As you can imagine, I have very rarely agreed with the ACLU, until now.

I saw you on Crossfire. You knew what you were talking about. . . . I don’t like pornographic material, or some of the [other] speech on the net, but the First Amendment says that it can be there just as much as I can.

I have e-mailed Mr. Reed, the 700 Club¹⁶² and Newt [Gingrich] to let them know

160. *Reno v. ACLU*, 521 U.S. 844, 875 (1997), *aff’g*, 929 F. Supp. 824 (E.D. Pa. 1996).

161. *Am. Library Ass’n Libraries, Children and the Internet*, at <http://www.ala.org/parents/librariesandinternet.html> (last visited Jan. 17, 2001).

162. Pat Robertson, founder of the Christian Coalition, hosts the “700 Club” television

how I feel. The Internet is like cable. If you don't want it, don't subscribe to it. If you do but don't want the kids to see all of it then get the freeware of Surfwatch [a filtering program]. It is my responsibility to take care of my kids, not the government. We the voters said that in the last election. . . .

I know this is a very strange letter to get, and even stranger to write, knowing both our stands on issues, but I wanted you to know that not all Christians want to be Big Brother.

She ended her email by paraphrasing one of my favorite lines, from the philosopher Voltaire: "I may not agree with you, but I will defend to the death your right to say it."¹⁶³

On that note, I would like to turn the floor over to you, for your questions and comments—in short, for you to exercise your free speech rights.

program. See James G. McManus, *Christian Coalition Takes Aim at Boston*, NAT'L CATH. REP., Dec. 22, 1995, at 3.

163. This statement paraphrases French philosopher Voltaire's sentiments in his *Essay on Tolerance*. The original phrase holds: "I disapprove of what you say, but I will defend to the death your right to say it." COLUMBIA DICTIONARY OF QUOTATIONS 351 (Robert Andrews ed., Columbia Univ. Press 1993).

