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Children's Rights vs. Adult Free Speech: Can They be Reconciled Colloquy

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Children's Rights vs. Adult Free Speech: Can They Be Reconciled?

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I'm delighted to participate in this important symposium.

It is a wonderful tribute to the memory of Milton Sorokin, who did so much to promote the First Amendment. I'm truly sorry I never had the pleasure of meeting him in person. It has been most inspiring, though, to meet his lifelong partner in law and in life, Ethel Sorokin.

Despite my own passionate commitment to the First Amendment, I have to engage in lots of self-censorship to comply with our time limits for our opening presentations! Tonight's timely topic is so broad that I can only discuss a small facet of it in such a short time. I decided that the particular facet that would be the most timely and interesting is the very hot topic of censorship of the Internet. This is the most current specific context in which tonight's broad question is being debated.

In the asserted interest of protecting children from "indecent" and "patently offensive" expression in cyberspace, Congress passed the Communications Decency Act or "CDA"[1] in February, 1996. No sooner was the ink dry on President Clinton's signature, on February 8, 1996, than the ACLU went to court to challenge it on behalf of not only ourselves, but also a large, diverse coalition of other providers and users

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* *Professor of Law, New York Law School; President, American Civil Liberties Union.* *For research assistance with this essay, Professor Strossen would like to thank her Chief Aide, Raafat S. Toss. This essay is based on Professor Strossen's oral presentation at the Third Annual Symposium sponsored by The Center for First Amendment Rights, at the University of Connecticut Law School, on April 30, 1996. The written version has been updated to reflect significant intervening legal developments—most importantly, the June 12, 1996 decision of the three-judge federal court in ACLU v. Reno, holding the Communications Decency Act unconstitutional.*

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. §223 (a) to (h)).

of on-line information.

Even though Congress passed the law by overwhelming margins (the votes were 414-16 in the House and 91-5 in the Senate), many members of Congress recognized that it had severe constitutional flaws. The CDA itself therefore set up a special, expedited judicial procedure for constitutional challenges to it. It provided for a special three-judge federal court and a direct appeal to the U.S. Supreme Court.

On June 12, 1996, the lower court issued a unanimous decision in *ACLU v. Reno*,[2] holding that the CDA violates the First Amendment. While each judge wrote a separate opinion and reached somewhat differing issues and conclusions, they all celebrated the importance of free speech in cyberspace and condemned the CDA's breach of it, in strong and eloquent language. Considered together, the three opinions adopted almost all of our many, independently sufficient, arguments in support of the conclusion that the CDA is unconstitutional. One of the three judges, Stewart Dalzell, even went so far as to explain that not only the CDA itself, but also *any* law restricting the content of cyber-communications, would be unconstitutional.[3]

In response to this lower court ruling, President Clinton promptly reiterated his view that the CDA was constitutional, and the Justice Department appealed to the Supreme Court. The high Court's ruling will be issued before the end of its next term, by late June or early July 1997.

Although the CDA and *ACLU v. Reno* involve the newest communications medium, they also raise this Symposium's age-old questions about protecting children *and* free speech, which have arisen with respect to every communications medium throughout history. The major asserted rationale for censoring cyberspace is to protect children from access to materials their parents don't want them to see—in particular, sexually-oriented material.

Mike Godwin, General Counsel of the Electronic Frontier Foundation (one of our co-plaintiffs in *ACLU v. Reno*), has trenchantly observed that Americans are always nervous about technology, about children, and about sex; therefore, when all three come together, as they do in the "cyberporn" context, they make us *extremely* nervous![4] Indeed, some of the "discussion" about sexually-oriented expression in

2. 929 F. Supp. 824 (E.D. Pa. 1996).

3. *ACLU*, 929 F. Supp. at 865.

4. *See, e.g.*, Scott W. Wright, *Onramp Drops Limits on Sex Sites*, AUSTIN-AMERICAN STATESMAN, July 13, 1995.

cyberspace, including the Congressional debate that culminated in the CDA, would more accurately be labeled "hype" or "hysteria." For example, last summer's massive press and political attack on "cyberporn"—which led to the Senate's overwhelming passage of the bill that ultimately became the CDA—was heralded by lurid images of children being unwittingly bombarded by sexual images on the computer screen. *Time* Magazine's July 3, 1995 cover, for instance, featured a horror-stricken, zombie-like child mesmerized by a computer screen. The headline blared: "CYBERPORN: EXCLUSIVE: A New Study Shows How Pervasive and Wild it Really Is. Can We Protect Our Kids—and Free Speech?"[5] One of the article's graphics depicted a man having sex with a computer. Yet the alleged "study" that triggered this over-reaction was promptly and widely debunked, and the author of the *Time* cover story apologized for it.[6]

Certainly the goal of protecting our nation's young people is both laudable and important. But cyber-censorship, while assertedly serving this purpose, actually suffers the same double-flaw that characterizes all censorship measures: it is both unprincipled and ineffective. All censorship schemes are touted as advancing some important public purpose, such as protecting children or other groups in our society. In fact, though, censorship always masks and diverts us from the actual underlying societal problems and the constructive solutions to them. It allows politicians to offer the public a purported "quick fix" to pressing social problems, which in fact fixes nothing at all.

Cyber-censorship is no exception to this general pattern. It violates not only the rights of the assertedly benefited children, but also the rights of adults, all without doing anything meaningful for children's welfare. The CDA deprives parents of the right to shape the upbringing of their own children by making their own decisions as to what material their children will or will not be allowed to see. It also deprives older and mature minors of their own First Amendment freedoms, which the Supreme Court recognized in the landmark case of *Tinker v. Des Moines School District*.[7] (I'm very proud that the ACLU represented the students in this historic case.) In *Tinker*, the Court upheld First Amendment rights of students in not only senior high school, but also junior high school. In fact, our lead plaintiff, Mary Beth Tinker, was

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5. Philip Elmer-Dewitt, *Cyberporn: Exclusive: A New Study Shows How Pervasive and Wild it Really Is. Can We Protect Our Kids—and Free Speech?* TIME, July 3, 1995, at 38.

6. Phillip Elmer-De Witt, *Fire Storm on the Computer Nets*, TIME, July 24, 1995.

7. 393 U.S. 503 (1969).

only 13 years old at the time in question. Yet the Court strongly affirmed the free speech rights even of such young people, even in the school context. It declared: "It cannot be argued that . . . students . . . shed their constitutional rights to freedom of speech at the schoolhouse gate."[8]

The Communications Decency Act infringes the free speech rights of not only junior and senior high school students but, worse yet, of college students too. Its ban applies directly to all minors—everyone under eighteen. Yet 123,000 college students in this country are under eighteen.[9]

Moreover, the CDA also deprives all adults of the right to decide what they will or won't look at; all of us are relegated to seeing only the material that the government deems fit for some children. Due to the nature of online communications, many content providers simply have no technologically or economically feasible way of screening out minors. That's true, for example, for all nonprofit organizations. Therefore, for all practical purposes, the CDA operates as a total criminalization of all "indecent" or "patently offensive" speech, even for adults.

The Supreme Court has repeatedly condemned such an approach as unconstitutional, in the context of other media. For example, back in 1957, the Court unanimously struck down a Michigan statute that made it an offense to make available to the general public any book or other publication with a potentially adverse impact on minors.[10] The Court condemned the law in memorable words, which are fully applicable to the CDA as well: "The State insists that, by thus quarantining the general reading public . . . in order to shield juvenile innocence, it is . . . promot[ing] the general welfare. Surely, this is to burn the house to roast the pig."[11] In *ACLU v. Reno*, Judge Dalzell built upon the same metaphor, denouncing the CDA's censorship of the Internet because it "burned the global village to roast the pig."[12]

This is also precisely the point that Newt Gingrich made during the summer of 1995 in speaking out against the CDA. Unfortunately, he ultimately joined the overwhelming majority of his colleagues who

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8. *Id.* at 506.

9. *See ACLU v. Reno*, Petitioner's Brief, available in ACLU Website at http://www.aclu.org/court/exonote.htm.

10. *See* Butler v. Michigan, 352 U.S. 380 (1957).

11. *Id.* at 383.

12. ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996).

voted for the CDA. Still, his indictment of it stands unrefuted. He said:

> It's clearly a violation of free speech and it's a violation of the right of adults to communicate with each other . . . . I don't think it's a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?[13]

In answer to Newt Gingrich's question, we can in fact maintain adults' free speech rights while also protecting children in this medium which is available to both. I've already explained that censorship in fact *subverts* both of these goals. Conversely, non-censorial approaches *promote* both of them.

Specifically, there are an increasing range of software programs that allow individual parents to monitor and block their children's access to whatever they don't want their children to see.[14] Many such software programs are already available and are becoming more sophisticated, and easier to use, every day. Some examples of these cleverly named programs are Net Nanny, Surfwatch, Cybersitter, and Cyberpatrol. Some of this software can be activated by a phone call, so that even computer-illiterate parents can take advantage of it. And there is even software that automatically shuts down computers if children get certain questions that indicate their safety might be jeopardized—for example, "What's your name?"; "What's your address?"; or "Are your parents home?"[15]

One of our expert witnesses at trial was a director of the MIT Computer Laboratories, who is working on something called "PICS," the Platform for Internet Content Selection. This will allow any individual or organization to rate on-line material, and allow parents to block according to rating systems that reflect their own values. Parents could, for example, use ratings provided by the Boy Scouts, *Parents Magazine*, the Christian Coalition, or People for the American Way—what-

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13. Edmund L. Andrews, *Gingrich Opposes Smut Rule for Internet*, N.Y.TIMES, June 21, 1995, at A20.

14. I don't mean to suggest that the rights of minors would always be subordinate to those of their parents. The ACLU has defended rights of mature minors to make certain basic choices, including the decision to terminate a pregnancy, independent of their parents. But potentially difficult questions about determining the relative weight of parents' and minors' rights don't arise in considering the constitutionality of the CDA, since it violates the rights of *both* parents *and* their children.

15. ACLU v. Reno, 929 F. Supp 824, 839 (E.D. Pa. June 11, 1996).

ever they choose.

On cross-examination, the government's own expert witness conceded that the PICS approach is *more* effective than the CDA in helping parents to shield their children from material *they* deem inappropriate for *any* reason. The CDA depends on content providers to do their own rating and blocking, focusing only on "indecent" and "patently offensive" material. Parents might understandably find these self-ratings less helpful than those that are done by third parties—especially expert organizations whose views and values the parents share. Moreover, under the PICS system, parents could block *whatever* material they feel is inappropriate, far beyond the sexual realm that is the focus of the CDA. For example, parents could block certain violent, religious, or political expression that is inconsistent with their own values or approach to raising their children.

The CDA is also completely ineffective in dealing with the large and growing number of on-line content providers that are based outside the U.S. They are not subject to the CDA at all, and hence can't be expected to engage in any rating or blocking. At the time of the trial in *ACLU v. Reno*, during the spring of 1996, 40% of all Internet sites already were foreign-based, and that number was expected to soon hit 50%.[16] By contrast, user-based technologies such as Surfwatch and PICS can effectively block foreign sites. Under PICS, for example, a parent could choose simply to block all unrated sites.

For all of these reasons, the CDA fails one of the two basic First Amendment requirements for any law that suppresses speech based on its content: it is not the least restrictive means for advancing the government's asserted interest. The CDA also fails the second of these two fundamental First Amendment requirements: it does not promote a government interest of compelling importance. The government has merely asserted that there is a compelling interest in shielding minors from indecent or patently offensive expression—whatever that might be. However, throughout the lower court proceedings, it didn't offer even a shred of evidence that minors are actually harmed by exposure to such material.

In contrast, we offered much evidence that these vague epithets cover a vast range of material that not only is not harmful, but to the contrary, is valuable to minors, especially older minors. This includes much information that could be very beneficial in terms of minors'

16. *Id.* at 848.

health, safety, welfare, and even life itself. This is true, for example, of information about safer sex, given the high percentage of teenagers who are sexually active and the epidemic among them of sexually transmitted diseases, including AIDS. Another important example is information about contraception, given the large number of unwanted teen pregnancies in the U.S. Additionally, in light of the tragically high number of suicides among lesbian and gay teenagers, on-line information about homosexuality, and on-line forums that allow young gay people to communicate with each other, can literally constitute life-lines for them. One final example of information that could well be branded "indecent" and "patently offensive," but which could preserve the mental and physical health of young people, is information about sexual abuse. Too many children are victimized precisely because they lack information about the nature of sexual abuse and about what steps they can take to protect themselves against it.

Some of the many valuable aspects of sexually-oriented cyber-communications, specifically from the viewpoint of children, were summarized by my New York Law School colleague, Professor Carlin Meyer, as follows:

> [W]e should accept cybersex as an opportunity for our youth to anonymously explore, in the privacy of their rooms and in the anonymity of conversation in which they are both invisible and unknown, what other children and adolescents are feeling and thinking about their bodies and sexuality. Rather than focusing, as the mainstream media does, on the lone pedophile who lures children into close encounters of unsavory kinds, we should remember that it is far less likely that pedophiles will succeed in luring children via the Internet than in a local park. If we encourage children to talk about their growing and changing bodies; about physical contact with others (or the lack of it); about differences between the sexes; and about advances from teachers, priests, and relatives, we are likely to protect them not only from the relatively uncommon stranger-pedophile but also from the far more ordinary scourge of intrafamilial incest.[17]

For all of the reasons I've laid out, the alleged desire to shield children from certain material falls flat as a rationale for curbing con-

17. Carlin Meyer, *Reclaiming Sex from from the Pornographers*, 33 GEO. L. J. 1969, 2007 (1995).

tent in cyberspace. What's really at stake here, as is so often the case in these censorship crusades, is the desire to deprive adults of access to that material too. When I debated Christian Coalition Executive Director Ralph Reed on this issue on CNN's "Crossfire" last summer, he essentially admitted as much. He said he wanted to make cyberspace "family friendly," thus raising the spectre of imposing "traditional family values" on everyone in the U.S. This point was made by an article in *The American Spectator* (interestingly, a conservative journal):

> Ralph Reed grew so testy on "Crossfire" that he accused Nadine Strossen of advocating "bestiality." The ACLU President, of course, had done no such thing, and it may be that Reed was angry because only minutes before he had been made to look foolish and perhaps even sinister. Michael Kinsley had asked him whether he wanted to keep smut away from adults as well as from children. Reed gave an ambiguous answer, and so Kinsley asked him again. In fact, he repeated the question three times, but Reed remained ambiguous.[18]

The tendency to use a purported protection of children as a smokescreen for directly curbing adults' rights is accompanied by blatant hypocrisy as far as children themselves are concerned. Politicians are eager to cite their devotion to children as an excuse for limiting the free speech (as well as other) rights of young and old alike. But they are far less eager to adopt constructive measures that will actually advance young people's current well-being or future prospects.

Our recent budget-slashing frenzy in the U.S. has been particularly devastating to education. Also prominent on the budgetary chopping-block have been all programs to benefit poor women and their children, including those that advance health and nutrition. A study released last summer revealed that poor children in the U.S. are poorer than the children in most other Western industrialized nations.[19] In the U.S., proportionately more children live in poverty than in other affluent countries.[20] Moreover, poor children in America get the least government assistance.[21]

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18. John Corry, *Salty V-Chips*, THE AMERICAN SPECTATOR, Sept. 1995, at 43.

19. Calvin Milam, *Treasury Secretary Outlines Economic Plan for Revitalizing Inner Cities*, CITY NEWS SERV. OF L.A., July 29, 1996 (discussing 1996 study by the Organzation for Economic Cooperation and Development.)

20. *See id.*

21. *See id.*

Let me cite just one example of the many prominent politicians who assert their concern for children as an alleged justification for censorship that violates rights of children and adults alike, while simultaneously opposing constructive measures that would provide real protection to children. Last summer, then-Senate Majority Leader and Republican Presidential contender Bob Dole gave a well-publicized speech assailing violence in the media and its asserted negative impact on our nation's youth.[22] Yet, while Dole is thus leading the charge to ban images of guns from TV, he has also led the charge to repeal the recently-enacted ban on real assault weapons on the street!

This misplaced focus on images as the purported problem, and censorship as the vaunted solution—I want to stress again—is typical of all advocates of all forms of censorship. It also crosses all party and ideological lines. I cite Bob Dole only as an important illustration of a much broader pattern. His Presidential rival, Bill Clinton, has also crusaded against media images, also citing a concern for children.

One of the major reasons why the ACLU has always been a nonpartisan organization is precisely because violations of civil liberties cross all other lines. Censorship for the ostensible benefit of children—including cyber-censorship—is no exception. Very few members of Congress, in either party, voted against the CDA, and both President Clinton and Vice President Gore have championed it.

Just as civil liberties violations cross party and ideological lines, the same is true of adherence to civil liberties. Some of the strongest opponents of cyber- and other forms of censorship are Republicans and conservatives. After all, isn't it a conservative premise to minimize the role of government in our lives? And shouldn't the government's role be especially small in our living rooms, our bedrooms, and the other private places where we and our children use our computers? I'd like to end by sharing one of my favorite E-mails I've ever received, because it illustrates this important general point in the particular context of cyberliberties. I received it from a supporter of the Christian Coalition after she saw my "Crossfire" debate against Christian Coalition Executive Director Ralph Reed; to my pleasant surprise, though, she was completely on my side. She wrote:

Dear Nadine Strossen,

I am a mother of two, Christian pro-lifer . . . . As you can

22. Bob Dole, "Hollywood" speech, L.A. May 31, 1995, *in* COLLECTED SPEECHES, JAN.-OCT. 1995, FED. DOC. CLEARING HOUSE.

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 Club and Newt to let them know how I feel. The internet is like computer 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. 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. We are told to be caring and show by our lives the peace Jesus gives us. The action of many Christians today doesn't show that. This makes me very sad, because it only hurts the cause of Christ . . . .

She then ends, as I will, by paraphrasing a famous quote from Voltaire, which is one of my favorites too: "I may not agree with you, but I will defend to the death your right to say it."[23]

23. The original phrase in French philosopher Voltaire's essay on Tolerance is "I disapprove of what you say, but I will defend to the death your right to say it." *See* THE DICTIONARY OF QUOTATIONS 351 (Robert Andrews, ed. 1993).

Children and the First Amendment

STANLEY FISH*

For the question "can children's rights and free speech be reconciled?" I would like to substitute another question: "can education and free speech be reconciled?" and I would like to answer with a simple "No!" Now of course I don't mean "no" as a matter of empirical report—we do have a First Amendment and we do have education, so in some important sense they are reconcilable—rather I mean "no" as a matter of philosophical logic. If you assume (as most commentators do) that one of the important values supported by the First Amendment is freedom of choice, you will be suspicious of any form of instruction whose intention or effect is to indoctrinate rather than to illuminate. That is why the Association of American University Professors, the self-anointed guardian of academic freedom, has always looked askance at religiously-based colleges and universities; for rather than being committed to the disinterested play of ideas, they turn out to be very interested in the promulgation of some ideas and in the exclusion of some others. Such institutions, the AAUP declared in its 1915 statement of principles, should be allowed to exist, but they should not be allowed to "sail under false colors" as true centers of education, for "[g]enuine boldness and thoroughness of inquiry, and freedom of speech, are scarcely reconcilable with the prescribed inculcation of a particular opinion . . . ."[1]

"Inculcation" might be thought of as a prophetic word here since it will figure prominently in those First Amendment cases that address the rights and needs of children. "Inculcate" means "to teach by forceful urging, to instill" and the question debated in these cases is, first,

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1. *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), 53 LAW & CONTEMP. PROBS. 393, 394 (1990).

whether or not it is a good thing to have education without inculcation—education that stops short of instilling anything except, perhaps, the conviction that nothing is to be instilled—and, second, whether or not it is a *possible* thing to have education without inculcation. To both these questions liberalism—by which I mean not a set of specific policies but a theory of government which requires the state to maintain neutrality in the face of competing moral visions—answers "yes." Education without inculcation is the American way because it allows students to make up their minds and decide for themselves, without the pressure of orthodoxy and authority.

The point is made vigorously and with an easy confidence in these oft-cited sentences from a 1967 case, *Keyishian v. Board of Regents*:[2]

> The classroom is peculiarly the 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues rather than through any kind of authoritative selection.'[3]

But this cannot mean what it says; for without "authoritative selection," education, whether public or private, would be impossible. As one commentator has observed, elected and appointed representatives of the state control almost all aspects of public education, the membership of school boards, the selection and accreditation of teachers, the purchasing of texts, the design of the curriculum, the administration of tests, the granting of degrees, the form and content of ceremonies, and on and on.[4] Moreover, not only is the requirement of "no authoritative selection" impossible so long as education is, in any sense, *organized*, it also runs up against the competing requirement—which goes without saying but is often said—that education prepares students to participate usefully in the business of a democratic society by instilling in them the appropriate democratic values. Here is an early statement by Noah Webster: "Education . . . forms the moral characters of men, and morals are the basis of government. Education should therefore be the first care of a legislature" and "should be watched with the most scrupulous

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2. Keyishian v. Board of Regents of the Univ. of the State of New York, 385 U.S. 589 (1967).

3. *Id.* at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

4. *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV., 477, 497 (1981).

attention."[5]

It would seem, then, that the ideal of education without inculcation suffers from two fatal defects; either it is an ideal compromised the moment the first lesson plan is implemented (for then "authoritative selection" will have already occurred) or it is an ideal at odds with the very reason for having a system of education in the first place (the fashioning of good citizens). The answer to either of the questions I posed a few moments ago—is "education without inculcation possible?" and "is education without inculcation a good thing?"—would seem to be "no." And if the answer to both of these questions is no, then the answer to the question posed by the original title of our panel—"Protection of Children and the First Amendment: are they Compatible?" is also "no"; for since it is precisely the purpose of education to protect children from bad—i.e. undemocratic—ideas by introducing them forcefully (an adverb that hovers nicely between a style of emphasis and coercion) to good ideas. This purpose cannot be carried out without compromising a child's First Amendment rights, traditionally thought to include the right to form one's own opinions, to make up one's own mind, and to have unrestricted access to information, opinions and expressions of belief. In short, if there is no education without inculcation, then there is no education that is compatible with the First Amendment and its preferred metaphor of the marketplace of ideas.

Now, I am not the first person to have posed the dilemma in these terms, and theorists of liberal education have devised a spirited reply to formulations like mine. Here is what they typically say. It may be that education cannot proceed without inculcation, but not all efforts at inculcation are the same; nor are their effects. Surely there is a difference between the inculcation aimed at by a regime that pronounces certain views orthodox and beyond challenge and one that welcomes all points of view to the table so long as they submit themselves to the interrogation of rational deliberation. And isn't the difference that in this second regime, inculcation, rather than undermining autonomy and the freedom of democratic choice, invites students to exercise and grow in them? In the words of two recent commentators, a curriculum that introduces students to many points of view without authorizing any "encourage[s] them to think critically about the goals and values they choose to pursue through life";[6] "[b]y exposing the student to diverse

5. *Id.* at 499 (quoting Noah Webster, *On the Education of Youth in America*, *in* THE EARLY REPUBLIC 41, 64 (F. Rudolf ed., 1965)).

6. Tyll van Geel, *The Search for Constitutional Limits on Government Authority to Incul-*

ideas . . . we build up his ability to engage in free inquiry and critique, thus preparing him for future 'autonomous' decisionmaking."[7]

The idea then is that the right kind of education, faithful to the First Amendment, gives you practice in making up your own mind about values and agendas, while the wrong kind of education captures your mind and binds it to values and agendas that go unexamined. The problem with this idea is that it is itself an agenda informed by values that are themselves unexamined and insulated from challenge. The name of the agenda is "free and open inquiry" and despite that honorific self-description, it is neither free nor open because it is closed to any line of thinking that would shut inquiry down or route it in a particular direction. It is closed, for example, to most forms of religious thought (which it will stigmatize as dogmatic) or to any form of thought that rules some point of view—for instance that the Holocaust did not occur—beyond the pale and out of court. To put it in a way that may seem paradoxical: openness is an ideology in that, like any other ideology, it is slanted in some directions and blind (if not downright hostile) to others.

Now, to say that openness is an ideology is not necessarily to criticize it, much less reject it, but merely to deprive it of one of its claims. Openness (or free inquiry) may still be the ideology we choose, but if my analysis is right, we cannot choose it as an alternative to ideology. What, after all, is the difference between a sectarian school which disallows challenges to the divinity of Christ and a so-called "non-ideological" school that disallows serious discussion of that same question? In both contexts something goes without saying and something else cannot be said (Christ is not God or he is). There is of course a difference, not however between a closed environment and an open one, but between environments that are differently closed.

If this seems counterintuitive, consider the case of *Mozert v. Hawkins*.[8] The cause of action was brought by Vicki Frost, a born-again Christian mother of a sixth-grade child who had been assigned a Holt-Rinehart text as part of a program in "critical reading." The books used in this program, the court tells us, "are aimed at fostering a broad tolerance for all of man's diversity," and, accordingly, "[t]hey intention-

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cate Youth, 62 TEX. L. REV. 197, 253 (1983).

7. Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV., 497, 517 (1983).

8. Mozert v. Hawkins, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1987).

ally expose . . . readers to a variety of religious beliefs, without attempting to suggest that one is better than another."[9] It was the contention of Mrs. Frost and the other parents who joined in her suit that the free exercise rights of their children were infringed when they were required to study views that contradicted and undermined their most cherished convictions. In a series of trials and appeals, Frost and her colleagues were finally unsuccessful and what defeated them was the argument put forward by the superintendent of the Hawkins County school district. He maintained that "plaintiffs misunderst[ood] the fact that exposure to something does not constitute teaching, indoctrination . . . or promotion of the things exposed."[10]

But what the superintendent and the judges who agreed with him fail to understand in their turn is that the distinction between exposure and indoctrination is an artifact of the very liberalism Vicki Frost rejects. That is, the distinction only makes sense if you assume, first, that the mind is a cognitive machine that can always draw back from the ideas presented to it and assess them by independent rational criteria; second, that this is what the mind, if it is working properly, is supposed to do; and, third, that a conviction held in any other way, held in conformity with authority rather than as the conclusion of a process of critical reasoning, is not a conviction worth having. These are the assumptions that underlie liberalism (Locke articulates them in *A Letter on Toleration*[11]), liberal theories of education, and the First Amendment, but they are decidedly not the assumptions of Vicki Frost who doesn't care how her child comes to hold her beliefs so long as they are not shaken, and who fears that they will be shaken if the young girl is compelled to read and discuss the arguments of error. When Vicki Frost hears someone invoke the distinction between exposure and indoctrination it doesn't sound to her like common sense, but rather the presumptuous and arrogant attempt of a non-believer to prescribe for her the conditions and nature of her belief. The value assumed by the court that denied her relief—the value of developing the ability to see the many sides of every question—is not only not her value; it is in her eyes the way and vehicle of all evil.

9. *Id.* at 202.

10. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987).

11. Author: We will provide cite.

Now there are two conclusions to be drawn from the Vicki Frost example. The first is the conclusion that matters most to her: making up your own mind independently of an external authority—be it state, church, or bible—is an ideological program and a bad one. The second is the conclusion that matters most to us on the occasion of this symposium: making up your mind independently of any external authority is a program impossible to execute. If exposure *is* indoctrination, in the sense that an idea introduced into the mind becomes part of its equipment, one of the lenses through which and with which the world is processed and configured, then the declared goal of liberal education, the goal of preparing students for "autonomous decisions making," is not achievable and in fact has been rendered unavailable in the first moment of consciousness. Indeed, if you think about it, the requirement that people be allowed "to form their own opinions, beliefs, concepts, hypotheses"[12] makes no sense. You cannot form a belief in a vacuum, in the absence of an already-in-place framework of norms, distinctions, and hierarchies. And it cannot be *you* who puts that framework in place, or who chooses it, for prior to its institution the notion of choice could not possibly have a content. Indeed, you couldn't even have a thought if the range of possible thoughts had not already been established and imprinted on your brain before you took your first mental step. Just as you can't have education without authoritative selection, so you can't have consciousness without authoritative selection, and one *you* didn't make. According to one scholar, the First Amendment requires that one's beliefs be shaped by "one's own rational considerations rather than by . . . coercion."[13] What I am saying is that this requirement is incoherent and cannot be met.

Because it cannot be met, the condition liberal education and the First Amendment is supposed to save you from, the condition of being subject to the influences of indoctrination, is the condition you are always and already in. The choice is never between indoctrination and free inquiry but between different forms of indoctrination issuing from different authorities. Moreover, once you see this, the usual way of talking about the relationship between the First Amendment and children gets stood on its head. Traditionally, the withholding from children of full First Amendment rights has been justified by what has been assumed to be "a child's lack of capacity for 'autonomous'

12. van Geel, *supra* note 6, at 250.
13. *Id.* at 253.

choice."[14] The reasoning has been that, until children mature and become capable of deciding for themselves, parents and educators (and behind them, the state) must decide for them, at least in the area of what they must study, how long they must study it, under what conditions, and with what restrictions on personal behavior, including, sometimes, verbal behavior. The problem with this line of reasoning is as obvious as the contradiction between a regime of *enforcement* and its declared goal of producing *free* agents. How can a course of study that is designed to foreground some ideas and marginalize some others produce young adults who are open to all ideas and capable of assessing them disinterestedly? The answer is that it cannot, and therefore the theory of liberal education has a hole right in the middle of it since there seems to be no way of getting to the desired state (autonomous free choice) through the designated means (education).

John Stuart Mill, the great apostle of autonomy, saw this and did not shrink from the conclusion it suggests: if you want to maximize freedom of choice and opinion, education is not the solution but the problem. Mill advises that we deal with the problem by removing the state from direct control over education, for a "general state education is a mere contrivance for molding people to be exactly like one another; and . . . the mold in which it casts them is that which pleases the predominant power in the government."[15] If the state has to be involved in education, he says, it should be only as one competitor among many others (how up-to-date and "1997" this is) so that the diversity we prize will be reflected in our pedagogical institutions. Ideally, the state's function should be limited to assuring the maintenance of high standards and this it could best do by administering public examinations which would not "exercise an improper influence over opinion" because they would "be confined to facts and positive science exclusively."[16] Mill instances as an example of what he has in mind the testing of a student's knowledge of various religions—their tenets, their rituals—without in any way requiring him "to profess a belief in them." Here it is again (or, rather, first), the dream of education without inculcation, this time to be realized by a program of instruction limited only to the facts and therefore neutral. But the dream, and its imagined realization, fade into gossamer before the onslaught, first, of the Vicki

14. *State Indoctrination and the Protection of Non-State Voices in the Schools, supra* note 7, at 516.

15. JOHN STUART MILL, ON LIBERTY 98 (D. Spitz, New York, ed., 1975).

16. *Id.* at 99.

Frost objection—exposure is indoctrination and will exercise an improper influence over my children—and, second, of the objection from epistemology—there are no facts without a framework and any framework you have will have you in the sense of limiting in advance what you can see and think. (There is also the objection Vicki Frost might make if she thought of it, that a superficial or external knowledge of her religion was really no knowledge at all.) Even a minimalist educational scheme constrains beliefs, and if you want to preserve freedom the only alternative would seem to be no education at all. But even that option—granted reluctantly and as a one time exception to the Amish in *Wisconsin v. Yoder*[17]—wouldn't do the trick because in the absence of formal education, the business of shaping, influencing, inculcating and indoctrinating would be done by television, advertising, street gangs, graffiti, and rock lyrics.

The bottom line conclusion is that freedom has always and already been lost. The real problem is not that you can't get from education to autonomous decision making (although that is certainly the case), but that autonomous decision making is an unimaginable state. This is what I meant when I said a moment ago that the usual way of talking about children and the First Amendment must be stood on its head. If autonomy is compromised by the shaping force of culture, and if consciousness cannot exist without having a shape it did not choose, and if our exposure to shaping forces increases as we get older, then what adulthood and maturity bring is not more but less autonomy, and not less but more indoctrination. Children are not a special case, and if they are not a special case, the argument for subjecting them to inculcation becomes an argument for subjecting everyone. If care must be taken lest children go down wrong paths in wayward directions, that same care must be taken for adults who are no more capable of self-direction than any first grader, and are indeed less capable because they have been subject to more shaping influences. If indoctrination is necessary at any point, it is necessary forever, and the only question is from whom shall we receive it.

Liberalism tells us that we shouldn't receive it from the state, but the state is already dispensing it every time it invokes the First Amendment in the name of openness and freedom. This is exactly what Vicki Frost objects to. She complains not that her child is being inculcated, but that she is being inculcated in the name of values—diversity, crit-

17. 406 U.S. 205 (1972).

ical thinking, flexibility of mind—she abhors. The court replies by hitting her with those same values and telling her that she doesn't understand that exposure is not inculcation and that her daughter's freedom is in no way curtailed simply because she is required to read certain texts. It would have been more honest (although politically inadvisable) to say to her "Right, inculcation is what we do in the service of values we believe in and so long as we have the political power we will continue to do it *our* way." (This is in essence what Justice Stevens said in *Employment Division v. Smith*[18] to those Native Americans who insisted that peyote was an integral part of their religious worship and that by penalizing them for its use the state denied them free exercise.)

This brings me to a final point, one I have made in other venues: the First Amendment is a political instrument; not an apolitical principle to which you can be faithful or unfaithful. It is a vocabulary and a set of formulas which are conceptually incoherent, but which *by virtue of that very incoherence* can be turned to the advantage of any policy decision you might want implemented. Indeed, it is the incoherence of First Amendment doctrine that makes it so useful. An incoherent doctrine is never going to frustrate your desires, for it will always be flexible enough to accommodate your agenda if you are skillful enough to take advantage of its flexibility. I mean nothing cynical by this. I mean only that the relationship between policy desires and so called "principles" is the reverse of what is usually maintained. The desires come first and last, and the principles, appropriately tailored, piece out the middle. The right way—no the *only* way—to proceed is to figure out what you think should happen and then look around for principles, First Amendment ones or any others, that will help you to get there. Take the issue of school uniforms, one of the more recent chapters in the history of the relationship between the First Amendment and children's rights. Pundits earnestly wonder whether the gains in discipline and the blunting of potential conflict are worth the resulting constraints on creativity and free expression. But the appeal of uniforms is precisely that they constrain creativity and expression in areas educators find distracting. Rather than worrying about whether this appeal fits with the requirements of the First Amendment they should be quarrying the First Amendment—which to repeat is not a thing but a grab bag of useful slogans and formulas—so as to fashion something noble sound-

18. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 (1988).

ing that will fit with the appeal. It will be immediately said that this is to allow outcomes to skew the process, to justify the means by the end, to make the principle serve the policy and not the other way around. But as Vicki Frost knows too well, that is what is always being done and the only real issue is who gets to do it.