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Civil Liberties

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CIVIL LIBERTIES

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As the President of the American Civil Liberties Union, I am often asked what exactly the term "civil liberties" signifies. It is not a legal term of art. Having examined United States Supreme Court opinions in the civil liberties area, and having reflected upon the civil liberties perspective that pervades the ACLU's work, I have concluded that the concept of "civil liberties" essentially consists of five basic principles:

1) all human beings have inherent, fundamental rights;

2) rights may be restricted only when necessary to promote an extremely important countervailing interest;

3) individual liberty serves as a check on democratic or majoritarian decision-making power;

4) federal courts — in particular, the Supreme Court — have a special responsibility to protect individual and minority group rights; and

5) rights are indivisible — *i.e.*, all rights for all people are mutually interdependent.

These five broad principles provide an underlying, unifying theme for all of the American Civil Liberties Union's work. They tie together the ACLU's various efforts on a wide range of issues that might otherwise seem to have little in common — from A to Z, or from abortion to zoning. These five broad principles also constitute a major theme in U.S. constitutional law — in particular, the Supreme Court's decisions that interpret and enforce the Bill of Rights.

The first fundamental civil liberties principle — that all human beings have inherent, fundamental rights — is the central idea underlying our entire system of government. It is set out in clear, simple, powerful terms in our government's founding document, the Declaration of Independence: "[A]ll [persons] are created equal [and] . . . are en-

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dowed by their Creator with certain unalienable Rights . . . . [T]o secure these rights, Governments are instituted . . . ."[1] This language reflects the "natural rights" philosophy of the eighteenth-century Enlightenment, the notion that people are born with rights simply by virtue of being human.[2]

In modern-day parlance, we usually describe the same concept by referring to inherent or fundamental "human rights." We have these rights because we are human beings, and not because the government *gives* them to us. Neither the government nor the government's laws *create* rights; all persons already *have* rights merely by virtue of our humanity. Accordingly, the role of government and of laws is not to *grant* rights, but rather, to *protect* them. The great Supreme Court Justice Louis Brandeis captured these notions in the following, much quoted declaration: "Those who won our independence believed that the final end of the state was to make men free."[3]

Consistent with the natural rights philosophy of our nation's founders, our fundamental law, our Constitution, did not create rights. Rather, it created a structure of government that was designed in large part to secure pre-existing natural rights. This central governmental function was clearly stated in the Constitution's Preamble: "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[4]

The special importance of individual liberty in our pantheon of national values was underscored by the addition to the Constitution, only four years after it was ratified, of the Bill of Rights. A number of states conditioned their ratification of the Constitution on the prompt addition of these explicit liberty-protecting guarantees.[5]

Even those who opposed the Bill of Rights did not do so because

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 54 (1930).

[3] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111 n.40 (1873) (Field, J., dissenting) (quoting 1 SHARSWOOD'S BLACKSTONE 127 n.8) ("Civil liberty, *the great end of all human society and government*, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." (emphasis added)).

[4] U.S. CONST. pmbl.

[5] Leonard W. Levy, *The Bill of Rights, in* THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 295, 313 (J. Jackson Barlow et al. eds., 1988).

they rejected the notion that the government should protect basic human rights. To the contrary, there was a consensus about the government's duty to respect and preserve rights, and a disagreement only as to the necessary or desirable means for effectuating this duty. Opponents of the Bill of Rights saw it as at best unnecessary and at worst counterproductive in terms of fostering rights.[6] The argument that the Bill of Rights was not necessary flowed from the fact that the Constitution had created a government with only the limited powers that it specifically enumerated, and these powers did not extend to suppressing individual rights. The argument that the Bill of Rights could actually be counterproductive reflected the related fear that the enumeration of certain rights could give rise to a negative inference about unenumerated rights — namely, that they were not protected.

Given the limited nature of the powers specifically vested in our national government, there is considerable force to the view that the Bill of Rights would not have been necessary as a bulwark against governmental infringement on freedom. Nevertheless, significantly, the founding generation chose to err on the side of caution in ensuring that the new government would not infringe on individual liberty, by providing the reinforcement added by the Bill of Rights.

Our founders similarly erred in favor of over- rather than underprotecting liberty by including the Ninth Amendment in the Bill of Rights, to avoid the potential negative inference that some feared the Bill of Rights might create. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[7]

In light of this history, I never understand how anyone can seriously argue that certain rights cannot be protected just because they are not explicitly set out in the Constitution. This is an argument that is often made, for example, about the constitutional right to privacy, including reproductive freedom. One can certainly make good faith arguments in favor of limiting such rights, but I fail to see how one could credibly argue that these rights completely lack any protection merely because they are not expressly set out in the Constitution.

Every Supreme Court Justice has in fact recognized that the Constitution does protect some rights that are not expressly set forth —

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[6] *Id.* at 310-11.

[7] U.S. CONST. amend. IX.

even the most conservative Justices, and even those who say that they interpret the Constitution only according to its plain language. Many people are surprised to learn that a number of rights that the Supreme Court has long and unanimously held to be constitutionally protected, without any controversy, are not expressly guaranteed by the Constitution's text itself — for example, the right to vote, the right to interstate travel, and freedom of association. Accordingly, the real issue is not *whether* the Constitution secures unenumerated rights, but rather, *which* unenumerated rights it secures.

Our constitutional system's robust theory of inherent individual rights, and of government's responsibility to protect them even against pressing countervailing community concerns, is underscored by the broad, unqualified language in the Bill of Rights. The Bill of Rights does not contain any express limitations upon the enumerated rights in order to preserve public safety or order, or some other community concern. In contrast, the corresponding provisions in the constitutions of other nations, and of international human rights agreements, do contain such explicit limitations.

For example, the free speech clause of our Constitution's First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[8] In contrast, the free speech guarantee in the Canadian Charter of Rights and Freedoms — along with all rights guarantees in that document — is preceded by the following qualifying language: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[9] Similarly, the International Covenant on Civil and Political Rights contains the following express limitation upon its counterpart to the First Amendment's free speech clause: "The exercise of the rights provided for . . . may . . . be subject to certain restrictions . . . as are provided by law and . . . necessary [f]or respect of the rights or reputations of others [and] [f]or the protection of national security or of public order . . . or of public health or morals."[10]

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[8] *Id.* amend. I.

[9] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

[10] *International Convenant on Civil and Political Rights*, U.N. GAOR, 21st Sess., Annex, Supp. No. 16, at 49 (1966).

The unqualified nature of the Bill of Rights' guarantees is underscored by contrasting their open-ended, rights-protective language not only with the qualified language in the corresponding guarantees in other legal systems, but also with the sole U.S. constitutional provision that does expressly limit a right. Article I, Section 9 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[11] In short, the Constitution provides that only one right, access to the writ of habeas corpus, may be limited because of countervailing community concerns. Furthermore, the Constitution decrees that even this right may be curtailed only for strictly limited countervailing concerns of an extraordinary, emergency nature — namely, in cases of rebellion or invasion.

The fact that the framers chose to impose limitations upon one right, but not upon others, strongly suggests that they envisioned the other rights as being expansive. This fact demonstrates that the framers saw government's overriding responsibility as ensuring individual rights, not as suppressing such rights in order to advance some other common goal. Accordingly, it leads directly to the second core civil liberties concept I have identified: that rights may only be restricted if necessary to advance a very important countervailing goal. As is the case concerning all these civil liberties principles, I want to underscore that this one too is a fundamental tenet of American constitutional law.

No one has ever contended that any or all individual rights are *absolute* in nature — in other words, that the government may *never* restrict them, under *any* circumstances. Such an extreme position has never been taken even by the ACLU, or even by the Supreme Court Justices who, along with the ACLU, have been described as "absolutists" on individual rights. Along with everyone else, civil libertarians also believe that rights may be limited under certain circumstances.

What separates civil libertarians from others in this regard is our insistence that the government must bear a heavy burden of proof before it can justify measures that restrict rights. It is not enough for the government to claim that a rights-restrictive measure would save money, or be convenient, or that it might possibly have some beneficial effect, such as reducing crime or increasing our national security. Rather, civil libertarians demand weighty and demonstrated reasons

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[11] U.S. CONST. art. I, § 9, cl. 2.

for limiting rights, and the Supreme Court has also, in most cases, done the same. To use the exact language that the Supreme Court employs, government may not enforce a measure that limits rights unless it is "necessary" to advance an interest of "compelling" importance.[12]

Controversies as to whether any liberty-constricting measure is justified focus on whether the government can show the necessary causal relationship between the measure and the countervailing interest. There is generally not much debate on the other civil libertarian prerequisite for curbing rights: the requirement that the governmental interest at stake must be of compelling importance. The interests that the government usually cites as underlying measures that restrict some rights are public safety, national security, or protecting other rights. Civil libertarians agree that such governmental concerns meet the "compelling" standard.

The recently burgeoning controversies about campus speech codes, which curb racist and other forms of "hate speech," illustrate that controversies about rights-curbing measures tend to center on whether such measures would sufficiently advance the government's asserted countervailing interest, not on whether that interest is sufficiently important. Advocates of campus hate speech codes argue that they would reduce discrimination and advance equality of opportunity for members of minority groups and for women. No one — least of all the ACLU, which has long worked to counter discrimination and to promote equal opportunity — disputes that these goals are of supreme importance. Even the most diehard opponents of hate speech codes do not oppose them on that basis.

Far from opposing hate speech codes because we reject the importance of their asserted equality-oriented goals, the ACLU maintains instead that such codes are not necessary to advance these important goals. Experience shows that restricting hate speech, far from being necessary to reduce discrimination, is not even effective in doing so. Worse yet, much evidence indicates that curbing hate speech may actually be counterproductive and undermine the aim of promoting equality, for the following reasons: censoring hate speech increases attention to, and sympathy for, bigots; censorship drives racist and other hate speech underground, thus making response more difficult; it reinforces paternalistic stereotypes about members of minority groups, suggesting

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[12] *See, e.g.*, Shaw v. Reno, 113 S. Ct. 2816, 2831-32 (1993).

that they need special protection from offensive speech; such censorship measures always have been used disproportionately to suppress the speech of the very minority groups who hope to be benefited by them; they could well generate resentment against the minority groups that are their intended beneficiaries; and last, but far from least, such measures divert resources from constructive steps that could meaningfully address discriminatory attitudes and conduct.[13]

Another current free speech controversy also centers around this same issue that is at the heart of the hate speech debate: whether restricting expression is even effective, let alone necessary, to promote the important goal in question. I am referring to the argument that is made by many people, including many feminists and many traditional conservatives, to justify restricting certain sexually-oriented materials that they label "pornography." Their argument is that suppressing pornography would reduce violence and discrimination against women. I doubt that anyone would seriously dispute the overriding importance of these goals — least of all the ACLU, which has from its very beginning devoted substantial resources to the women's rights cause, when almost no one else was doing so.[14]

Important contributions to the ACLU's women's rights work were made, for example, by Ruth Bader Ginsburg, now a Supreme Court Justice. As founding director of the ACLU Women's Rights Project in the early 1970s, Ruth Bader Ginsburg brought landmark lawsuits that persuaded the Court to recognize that women have some constitutional equality rights. Unfortunately, the Court was not persuaded to recognize that women have full constitutional equality. To this day, the Court never has explicitly held that the Constitution prohibits gender-based discrimination to the same extent that it prohibits race-based discrimination. For example, in cases on which the ACLU Women's Rights Project is currently working, federal courts have thus far failed to hold that the Equal Protection Clause bars public educational institutions that are "separate but equal" on the basis of gender.[15] In con-

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[13] I have discussed these points at greater length in Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. *See also* HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX (1995).

[14] *See* Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1946 (1991).

[15] *See, e.g.*, United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992); Faulkner v. Jones, 858 F. Supp. 552, 563 (D.S.C. 1994).

trast, more than forty years ago, the Supreme Court unanimously invalidated the "separate but equal doctrine" in the racial context.[16] In short, as we approach the twenty-first century, women are still second-class citizens under the U.S. Constitution. At the ACLU, we consider this a major scandal, so our Women's Rights Project is redoubling its efforts to carry forward the work that it began under the leadership of Ruth Bader Ginsburg.

In light of the ACLU's historic and ongoing commitment to women's rights, if it could be demonstrated that suppressing pornography were necessary to promote these rights, that would obviously change our positions on the issue. In fact, though, no credible evidence has shown that suppressing pornography would have any such impact. No credible evidence has shown a clear causal connection between exposure to even violent, misogynistic pornography and the commission of violent or discriminatory acts.

Moreover, as in the hate speech situation, censoring pornography may be worse than ineffective in promoting equality; it could well actually subvert that goal. For this reason, many feminists have vocally opposed censoring pornography specifically on feminist grounds.[17] They argue that such censorship would undermine women's rights and interests. Many prominent feminist lawyers, scholars, activists, writers, artists, and others have formed organizations specifically to assert this viewpoint, because it is not as well-known as it should be. These groups include the Feminist Anti-Censorship Task Force, Feminists for Free Expression, and the National Coalition Against Censorship's Working Group on Women, Censorship, and "Pornography."[18]

Some of the reasons why so many prominent feminists conclude that censoring pornography would undermine, rather than advance, women's rights and interests include the following: any censorship scheme would inevitably encompass many works that are especially valuable to feminists; any censorship scheme would be enforced in a way that discriminates against the least popular, least powerful groups in

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[16] Brown v. Board of Educ., 374 U.S. 483 (1954).

[17] *See* Joan K. Taylor, *Does Sexual Speech Harm Women? The Split Within Feminism*, 5 STAN. L. & POL'Y REV. 49, 52 (1994) (describing in general the feminist anti-censorship movement).

[18] The Working Group's title and publications consistently put the word "pornography" in quotation marks to underscore the fact that it is not a legal term of art, that it has vague and subjective meanings, and that it tends to be used pejoratively.

our society, including feminists and lesbians; censorship is paternalistic, perpetuating demeaning stereotypes about women, including that sex is bad for us; censorship perpetuates the disempowering notion that women are essentially victims; censorship distracts from constructive approaches to countering anti-female discrimination and violence; censorship would harm women who make their livings in the sex industry; censorship would harm women's efforts to develop their own sexuality; censorship would strengthen the extreme right, whose patriarchal agenda would curtail women's rights; and by undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality.[19]

One convenient way to capsulize the second general civil liberties principle, which I have been discussing, is in terms of the classic philosophical debate about whether the ends can justify the means. There are strong arguments that some rights-restricting means are inherently intolerable under our system of government, given its solid foundation in protecting and respecting human rights. For example, most people would agree that our government should never torture criminal suspects, and that such a means should be absolutely prohibited, no matter how effectively it might advance the important goal of reducing crime. In other words, most people would agree that some anti-human rights means could never be justified by any ends.

Even if some rights-restricting means are less repugnant than torture, and therefore could in theory be justified in terms of the important ends they served, they still could not be justified on this ground unless they *in fact* did promote the asserted ends. Mere speculation or hope that they *might* do so would not be enough. In other words, before the end could ever justify the means in principle, it would have to do so in fact. For the reasons outlined above, though, the supremely important ends of advancing equality and safety for women and minority groups are not in fact promoted by censoring pornography and hate speech.

Let us move now to the third fundamental civil liberties principle: that individual liberty serves as a check on democratic or majoritarian

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[19] For an elaboration of these points concerning the pornography debate, see Nadine Strossen, *A Feminist Critique of 'the' Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993). *See also* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

decision-making power. Our form of government reflects two fundamental concepts: the concept of democracy and the concept of liberty. Unfortunately, the democracy concept tends to be much better understood than the liberty concept.

The notion of democracy means, of course, that the majority rules and that most policy decisions are made by elected government officials who represent the majority will. However, our constitutional framers deliberately did not construct a "pure" democracy, a system where *all* decisions are made by the majority or their elected representatives. Such a pure democracy would be diametrically inconsistent with the notion of inherent individual rights which, as I previously explained, is at the core of our governmental system. After all, if a democratically-elected government could make any decision it wanted, it could decide to deny some fundamental rights to some people.

To be sure, a democratically-elected government is probably less likely to violate many rights than a non-representative government. At a minimum, elected officials would be unlikely to deny rights to a majority of their constituents, for fear of being voted out of office. Even in a democracy, though, some rights, of some people, are still vulnerable. For every majority, there is also a minority. While it would run counter to elected officials' self interests to deny rights to the majority of their constituents, these officials might well be tempted to deny rights to a minority.

Our Founding Fathers wisely recognized that the rights of individuals or minority group members could well be endangered by what James Madison called the tyranny of the majority.[20] Our Founding Fathers also believed that some rights are so fundamental that no majority, no matter how large, should be able to deny them to any minority, no matter how small. As I have already indicated, the whole purpose of adding the Bill of Rights to the Constitution was to reinforce this crucially-important tenet.

In addition to enunciating human rights principles in such constitutive documents as the Bill of Rights and the Declaration of Independence, our founders took another important step to protect civil liberties; they designed a system of federal courts that have special responsibilities and abilities to preserve individual rights against majoritarian pressures. This is what I refer to in the fourth civil liber-

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[20] *See* THE FEDERALIST No. 39 (James Madison) (New Amer. Lib. ed. 1961).

ties principle: that federal courts — in particular, the Supreme Court — have a special responsibility to protect individual and minority group rights.

The Constitution provides important job security for federal judges to make sure that they are insulated from majoritarian political pressures and thus are better able to protect individual and minority group rights against the potential tyranny of the majority. The Constitution essentially gives federal judges lifetime tenure. It provides that they hold their office "during good Behaviour"[21] and that they may be removed only through the extraordinary process of impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors."[22] Impeachment requires a two-thirds vote of the Senate.[23] Moreover, the Constitution specifically provides that federal judges' compensation "shall not be diminished during their Continuance in Office."[24] Consequently, Congress may not put pressure on judges by cutting back on their compensation. Through these provisions, the Constitution creates a branch of government that is specially equipped to serve as a bulwark of individual and minority group rights against majoritarian pressures: an independent federal judiciary.

The special role of the federal courts, and of the rights that they protect, was eloquently set forth in one of the Supreme Court's most famous opinions, *West Virginia State Board of Education v. Barnette*,[25] decided in 1943:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[26]

I would like to recount some of the facts underlying the *Barnette* case, to show what the wonderful abstract ideals that the Court enunciated in the foregoing passage actually meant in that particular setting.

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[21] U.S. CONST. art. III, § 1.
[22] *Id.* art. II, § 4.
[23] *Id.* art. I, § 3, cl. 6.
[24] *Id.* art. III, § 1.
[25] 319 U.S. 624 (1943).
[26] *Id.* at 638.

The *Barnette* case arose during World War II, when patriotic fervor was at its height. As an expression of that patriotic zeal, many states passed laws requiring all public school students to salute the American flag. These laws presented a problem for students who were members of the Jehovah's Witnesses religious faith — and not because they were at all unpatriotic. Hardly.

The problem was that these students held a sincere religious belief that it would be sacrilegious to salute the flag. They had a strict view of the Biblical prohibition on idolatry, and believed that it extended to saluting *any* image, including the U.S. flag. They believed this so strongly that they were willing to pay a high price. As you can imagine, it did not make them very popular with their fellow students to refuse to pledge allegiance, especially in the midst of war. In fact, the Jehovah's Witness school children and their families suffered horribly for their beliefs. All over the country, they were persecuted, tormented, and assaulted. In many places, they were tortured by their fellow citizens, who tried brutal measures to force the flag salute out of their unwilling mouths. One Jehovah's Witness was even castrated. This ugly, violent display of religious intolerance was a graphic example of the "tyranny of the majority" that our Founding Fathers had feared.

In the *Barnette* decision, the Supreme Court stripped all legal basis for the brutal persecution that the Jehovah's Witnesses had endured, by holding that the mandatory flag salute laws were unconstitutional, and that any flag salute program had to include an exemption for any individuals with a conscientious objection, such as the Jehovah's Witnesses.

The Court's stirring language in *Barnette* is among the most often quoted, in many other contexts, because of the important, universal principles it enunciates. It is an eloquent statement of the principle of liberty, and of the federal courts' special institutional responsibility to ensure liberty against the tyranny of the majority. As such, it applies not only to religious liberty, but also to every other form of liberty. Moreover, this statement applies not only to persecuted Jehovah's Witness school children, but also to every unpopular or controversial individual or group. In essence, the Court said, in our society, it should be easy to be free and safe to be different. Here is how the Court expressed that important idea:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to

> differ as to things that touch the heart of the existing order. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[27]

The important civil liberties concept that is expressed in this powerful statement is something of which I often have to remind people when discussing current civil liberties issues. Most people are completely willing to defend free speech for people who agree with them, or who disagree as to matters that they do not consider important. The problem comes, though, when the offending message concerns something that is considered deeply important, even revered.

I can illustrate this phenomenon through two of the Supreme Court's most controversial, least popular decisions in recent years: its rulings in 1989 and 1990, holding that freedom of speech extends to burning the American flag to express political protest.[28] Those decisions were greeted with a firestorm of protest. After the first such decision, then-President George Bush immediately proposed to amend the First Amendment to make an exception for flag-burning, and large majorities of both the public and elected officials supported that effort. But the reason for the fierce opposition to this decision was precisely the reason why it was correct: the Court was protecting freedom to differ as to the very important matters of patriotism and reverence for the U.S. flag. In the words of the *Barnette* decision, it was protecting the substance, and not merely the shadow, of freedom.

I would like to apply this notion to another, even more current, controversy — whether lesbians and gay men should be allowed to serve openly in the U.S. military. I continue to be baffled and saddened by the rampant homophobia in our society, and by the extent to which it continues to be tolerated under our legal system. Lesbians and gay men still encounter blatant discrimination merely because of their sexual orientation — in other words, merely because of who they are, rather than because of what they do and how they act. Surely this is directly contradictory to the Declaration of Independence's stirring guarantee that all of us are equal in terms of our fundamental legal

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[27] *Id.* at 642.

[28] United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

status and rights.

The apparent explanation for the distressingly widespread discrimination on the basis of sexual orientation is the sense that lesbians and gay men differ from the majority in a very important way — namely, sexual orientation, something that is basic to our individual sense of identity. Under the reasoning of the *Barnette* decision, though, this is precisely why the federal courts should intervene on behalf of lesbians and gay men. The federal courts must ensure that majoritarian fears and stereotypes and prejudices will not deprive members of the sexual-orientation minority of their fundamental rights just because they are different from the majority, even in a respect that the majority sees as vitally important. That is precisely what the ACLU hopes the federal courts will do in the lawsuit that we instituted, together with the Lambda Legal Defense and Education Fund, challenging the military exclusion of lesbians and gay men under the current "don't ask, don't tell" policy, adopted by the Clinton administration.[29] This lawsuit is one concrete application of the third and fourth civil liberties principles I have been discussing: that in our society, the federal courts must ensure that it is easy to be free and safe to be different.

I will now turn to the last fundamental principle underlying civil liberties: that rights are indivisible. If the government is allowed to violate one right of one person or group, then no right will be safe for any person or group. History has certainly taught us this lesson over and over again. It was forcefully stated by the great early-American patriot, Thomas Paine: "He that would make his own liberty secure, must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach to himself."[30]

It is this concept of the indivisibility of rights that explains why the ACLU defends all fundamental rights for all people, regardless of

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[29] Able v. United States, 1994 U.S. Dist. LEXIS 13519 (E.D.N.Y. Sept. 14, 1994). Six gay and lesbian members of the United States Armed Services brought an action against the United States and William J. Perry, Secretary of Defense, for a declaration that the Service's newly-promulgated policy as to homosexuals, contained in section 571 of the National Defense Authorization Act for the Fiscal Year 1994 (10 U.S.C. § 654), was invalid under the First and Fifth Amendments. *Id.* at 1-2. The United States moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(6). *Id.* at 2. The court dismissed plaintiffs' third claim, based on the right of intimate association, and fourth claim, alleging that the Act was unconstitutionally overbroad and vague. *Id.* at 6-12. However, the court denied defendants' motion to dismiss the first and second claims, respectively based on equal protection and free speech grounds. *Id.* at 2-6, 12.

[30] 2 THE COMPLETE WRITINGS OF THOMAS PAINE 788 (Foner ed. 1945).

their politics, regardless of their beliefs, and regardless of whichever societal groups they might belong to. Adherence to this concept is why the ACLU defends free speech for speakers whose ideas are abhorrent, offensive, outrageous, and even anti-civil libertarian. For what is at stake is not whether any particular ideas are right or wrong — good, bad, or ugly — but rather, whether the government should have the power to suppress any idea merely because it is unpopular. The ACLU's answer, and the Constitution's answer, is that the government does not have this power.

If we allow the government to exercise the censorial power against an idea that is unpopular in one community at one moment in time, then it will inevitably exercise that power against a very different idea that is unpopular in a different community at a different point in time. What is viewed as extreme or dangerous or offensive varies enormously from time to time and from place to place. Therefore, a decision protecting speech that conveys a particular message in one context can be used in a different setting to shield speech that conveys a diametrically-opposed message.

For example, in a series of cases that the Supreme Court decided in the 1930s and 1940s, the ACLU defended free speech rights for racist bigots and hatemongers whose views were abhorrent to many listeners. These cases created legal precedents on which we could then rely in the 1960s and 1970s, to protect free speech for civil right demonstrators. Their pro-civil rights and anti-racist messages were extremely unpopular and inflammatory in various Southern towns and other racially-segregated localities where they sought to demonstrate. The white-dominated governments in those communities would gladly have suppressed the civil rights demonstrators' messages if the Supreme Court and other federal courts had not protected them.[31]

Again, I want to underscore that this civil liberties principle, the indivisibility of rights, along with the other four, is not just an ACLU concept, but is essentially the law of the land. In particular, the Supreme Court has repeatedly held that speech may never be suppressed merely because the majority of the community finds it offensive or upsetting. The Court enforced that principle, for example, in the flag-burning decisions that I have already mentioned. In 1992, the Court reaffirmed that principle yet again in unanimously holding that even as

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[31] *See* HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

abhorrent an expression as a burning cross on the lawn of an African-American family could not be suppressed merely because of the repugnant nature of the racist ideas it conveyed.[32]

Although this concept, which lawyers designate "viewpoint-neutrality" or "content-neutrality," is well established as a legal or constitutional principle, it is hard for most people to accept at a common-sense level, at least on first impression. I can illustrate that point by recounting a story involving my own father, who has retired to San Diego. A few years ago, I was invited to give a lecture in San Diego about why the ACLU defends free speech even for racist and religious bigots, and why we win those cases under the First Amendment. My father — who is not, I should note, a card-carrying ACLU member! — came to hear my talk. At the end of it, he came up to me and made the following comment: "Thank you for that excellent explanation of the ACLU's positions and of constitutional law. You've persuaded me that the ACLU is correctly interpreting the First Amendment. I now realize that the problem is the First Amendment."

I do not mean to pick on my father unfairly. To the contrary, his reaction in that situation was quite typical. Often, people do not realize the importance of defending free speech for ideas that they find offensive or abhorrent until their own ideas are subject to censorship, because *other* people find them offensive or abhorrent. This point was made in a column by Bill Maxwell, which appeared in *The Gainesville* (Florida) *Sun*, in 1991, entitled *The ACLU Serves as Ultimate Protector of Freedom*:

> Like millions of other Americans, I have a love-hate relationship with the American Civil Liberties Union.
>
> . . . I donate money to [it] because I support its "absolutist" positions [on civil liberties].
>
> Often, though, I curse this . . . high-minded group and swear I'll never give it another dime. The [last] time I fell out of love and canceled my membership was in 1977, when the group defended the right of the American Nazi Party to demonstrate in Skokie, Illinois.
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> . . . .
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> Ironically, I needed the ACLU a year later when three [other] black teachers and I tried to distribute a handbill critical of our university's hiring

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[32] R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992).

policies. No other teachers or administrators supported us.

In fact, placards — produced by our colleagues — labeled us "racists," "niggers" and "educated monkeys." But the ACLU took our case and won. Our attorney explained that although the university community saw us as "obnoxious subversives," we had a constitutional right to speak. Suddenly, I recalled the Skokie Nazis . . . . The next day I mailed a check to the ACLU.[33]

The notion of indivisibility extends beyond free speech to all other rights. People are generally much more supportive of rights that they can imagine being exercised by themselves or by people like them. Therefore, the ACLU's least popular cases and causes are on behalf of people who are the most different, the most despised, the outcasts of society — namely, those who are accused of crime. It is very difficult for most people to look beyond the facts of a particular case — for example, a heinous murder — and to see the overarching constitutional principles that are at stake. It is even harder for most people to empathize with the importance of those principles, to contemplate that they themselves might be in a situation where they would want to be protected by the same principles.

That people's appreciation of the constitutional rights of those accused of crime increases dramatically if they should face criminal charges themselves, is vividly illustrated by the experience of Lyn Nofziger, a top aide in the Reagan Administration. Along with others in that Administration, while he was in government, Nofziger did not champion either the portions of the Bill of Rights protecting accused criminals, or those organizations and individuals — including the ACLU — who sought to enforce such guarantees. Recall that Ed Meese, while Ronald Reagan's Attorney General, denounced the ACLU as "the criminals' lobby" and opined that you would not be accused of a crime unless you were guilty.[34]

While apparently sharing similar views during his service in the Reagan Administration, Nofziger underwent a conversion after he left that Administration and was subject to a criminal prosecution himself. He was charged with violating a law that imposed criminal penalties on

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[33] Bill Maxwell, *The ACLU Serves as Ultimate Protector of Freedom*, GAINESVILLE SUN, Sept. 7, 1991, at 7A.

[34] Charles R. Babcock, *U.S. Crime War: More Zeal Than Jurisdiction*, WASH. POST, Aug. 5, 1981, at A4.

certain lobbying activities by former government officials, and he was convicted under that law. At that point, Nofziger's lawyers urged the ACLU to submit a brief supporting their argument on appeal that the lobbying restrictions violated vital First Amendment freedoms. We did so, and the appellate court cited our brief in overturning the conviction.[35] We thereupon received a moving thank you letter from Nofziger, expressing his new-found appreciation for the Bill of Rights protections for even such despised societal pariahs as individuals accused of crime, and for the ACLU in seeking to enforce those protections. The letter, which was addressed to an ACLU staff attorney, Kate Martin, read as follows:

> Dear Ms. Martin,
>
> This letter is to thank you . . . and all those other members of the ACLU who agreed that your organization should intervene on my behalf. I am most appreciative . . . .
>
> Although, as you can imagine, there are many times when I have not agreed with the ACLU, I have never doubted your willingness to stand up and be counted on issues and cases where you believe the Constitution is being violated. I am greatly pleased that you believe mine is one of those cases.
>
> Over the last two years and $1.5 million, I have learned more about our legal system than I ever wanted to know. I have also learned that the courts and the Congress only sometimes believe that the Constitution, including the First Amendment, means what it says. That is why it is important to have organizations such as the ACLU watch dogging those who believe that their ideas of what constitutes the common good override the words of the Constitution.
>
> I'm sure many of my conservative friends will look askance at your involvement in my case and my appreciation of your involvement. They have not been caught in the toils of the American legal system; I have.
>
> Thank you once again.[36]

Even those of us who will never have the direct personal confrontation with the criminal justice system that Lyn Nofziger endured still have a direct personal stake in the fairness and protection of rights in that system. Given the indivisibility of civil liberties, every one of us is

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[35] United States v. Nofziger, 878 F.2d 442, 451 (D.C. Cir. 1989).

[36] Letter from Lyn Nofziger to Kate Martin, Staff Attorney, American Civil Liberties Union (Sept. 29, 1988) (on file with author).

affected by the treatment that our police, prosecutors, courts, and prisons mete out to our fellow citizens. This point was powerfully made by Supreme Court Justice William J. Brennan in a case involving the rights of a particularly forgotten and despised group of individuals: Death Row inmates who are members of racial minorities. Noting that members of racial minorities disproportionately receive the death penalty even for crimes that are otherwise indistinguishable from those for which white defendants receive life imprisonment, Justice Brennan stated:

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined . . . . The way in which we choose those who will die reveals the depth of moral commitment among the living.[37]

So now I hope you understand the fifth basic civil liberties principle that defines the ACLU's mission: in essence, that all rights for all people are mutually interdependent, so that if we care about our *own* favorite rights, we had better be sure the government does not get away with violating anyone *else's* favorite rights. Consistent with this principle, the ACLU seeks to defend all fundamental rights for all people. This unique mission sets us apart from all other human rights organizations. All other organizations either defend particular rights — for example, free speech or religious freedom — or the rights of particular people — for instance, members of certain racial or religious groups. In striving to defend the whole spectrum of fundamental rights for all individuals, the ACLU faces a daunting task, indeed. It is one, though, that is essential, in light of the indivisible, interrelated nature of all rights.

In conclusion, I would like to quote from a speech by one of my civil liberties heroines, which powerfully summarizes many of the principles I have discussed. The speech was by the leading abolitionist and suffragist, Susan B. Anthony. After the Civil War, our Constitution was amended to add the following language: "All persons born or naturalized in the United States . . . are citizens . . . . No state shall . . .

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[37] McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

abridge the privileges or immunities of citizens . . . ."[38] Anthony forcefully argued that this language clearly recognized that women are entitled to vote. After all, women are persons and therefore citizens; and what could be a more fundamental privilege of citizenship than the franchise? Accordingly, Anthony led a group of women in Rochester, New York to the polls to vote in the 1872 elections. Not only were Anthony and her sister suffragists not allowed to vote, though; worse yet, they were arrested, indicted, convicted, and fined for the crime of unauthorized voting.

In trying to garner support for her case, Anthony gave a speech that convincingly argued that women should in fact have the right to vote, not only under the newly-added, post-Civil War constitutional language, but also consistent with the notion of natural human rights that has infused our governmental system from the beginning.

I find Anthony's speech a very eloquent defense not just of women's suffrage rights and women's rights more broadly, but also — even more broadly — of inherent, fundamental human rights in general. In short, it provides a fine summary of the civil liberties precepts that I have laid out in this essay. The fact that Susan B. Anthony's declaration is as relevant and persuasive today as it was when she gave it, more than a century ago, underscores the timelessness of these fundamental principles:

> Our . . . government is based on the idea of the natural right of every individual member thereof to a voice and a vote in making and executing the laws. . . . We throw to the winds the old dogma that government can *give* rights. . . . The preamble of the Federal Constitution says: "We, the people of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution." It was we, the people, not we, the *white male* citizens, nor we, the *male* citizens; but we, the whole people, who formed this Union. We formed it not to *give* the blessings of liberty but to *secure* them; not to the *half* of ourselves and the half of our posterity, but to the *whole* people — women as well as men . . . . [Because women are denied the franchise,] the blessings of liberty are forever withheld from [us] and [our] female posterity. We ask the judges to render unprejudiced opinions of the law, and wherever there is room for doubt to give the benefit to the side of liberty and equal rights for women, remembering that,

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[38] U.S. CONST. amend XIV, § 1.

as Senator Charles Sumner says, "The true rule of interpretation under our National Constitution . . . is that anything *for* human rights is constitutional, and everything *against* human rights unconstitutional."[39]

[39] THE AMERICAN READER, WORDS THAT HAVE MOVED AMERICANS 160 (Diane Ravitch ed., 1990).