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WHAT CONSTITUTES FULL PROTECTION OF FUNDAMENTAL FREEDOMS?

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The question with which we are dealing—Should the Bill of Rights fully protect fundamental freedoms?—is one that obviously demands an affirmative answer. Two more interesting and challenging questions remain, however. First, what constitutes full protection? Does it consist merely of governmental non-interference, as Professor Richard Epstein has suggested,[1] or does it consist further of affirmative government obligations, as Professor Robert Ellickson has discussed?[2] Second, what are fundamental freedoms? Are all such freedoms included in the Bill of Rights, or are some derived from other sources?

These basic questions have concerned and divided the Supreme Court and constitutional scholars throughout our nation's constitutional history. I suspect they have engaged the Federalist Society throughout its ten-year history. These questions certainly have concerned and divided members of the American Civil Liberties Union (ACLU) during the seventy-two years of its existence.[3]

Defining the appropriate nature and protection of civil liberties is central to the ACLU's mission, and the ACLU uses the term "civil liberties" as a synonym for fundamental freedoms. Our activities span hundreds of issues that impinge upon such fundamental freedoms. Nonetheless, ACLU leaders share no monolithic view about the appropriate definition and protection of civil liberties. National policies are adopted as a product of lengthy study and vigorous debate, and often reflect closely-split votes on the part of the Board of Directors.

The ACLU now consists of approximately 300,000 members and approximately fifty affiliates (mostly statewide). The affiliates may adopt their own policies, which may differ somewhat

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1. *See* Richard A. Epstein, *The Indivisibility of Liberty Under the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 35, 37 (1992).

2. *See* Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 17-20 (1992).

3. For a survey history of the ACLU, see SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

from those adopted by the National Board. The ACLU's philosophy is that different organizational units may espouse diverse viewpoints within unitary, but not absolutely uniform, consensus. Obviously, no thoughtful ACLU member could possibly agree with all the positions that the national ACLU and its affiliates throughout the country have taken during the past seventy-two years. Many of these issues are exceedingly difficult and complicated and, like Supreme Court decisions and congressional legislation, do not easily yield to unanimous results.

Notwithstanding differences among ACLU activists about specific civil liberties questions, there is a general ACLU approach to identifying civil liberties issues. This approach constitutes one means of resolving the question posed to this panel.

I must introduce the ACLU approach to identifying civil liberties issues by noting that the organization is neutral with respect to partisan politics, adhering to the dictates of no political party. Nor do we regard ourselves as "liberal" as distinct from "conservative." Indeed, we seek to conserve the Eighteenth Century values that were held by those who wrote the Constitution and the Bill of Rights. Adherents of both liberal and conservative politics regularly criticize the ACLU. Correspondingly, some ACLU positions coincide with those of both the left and the right on the political spectrum.

It should not be surprising, then, that I agree with some of the views expressed by each of the Symposium participants. Lately, in my academic travels, I have sometimes been seen as a relative conservative on panels or at conferences that were heavily influenced by the Critical Legal Studies movement. In contrast, I am seen as a relative liberal at this conference. This experience illustrates the political neutrality of civil libertarianism. We adhere to the ideology of liberty, as that term was understood in the late Eighteenth Century, and as it is modified in current circumstances, regardless of where that places us on the political spectrum.

Contrary to the charge of its critics from the right, the ACLU adheres to a classic view of civil liberties. Yet, contrary to the charge of its critics from the left, the ACLU does not rigidly define civil liberties in terms narrowly coextensive with the Bill of Rights. I will address each of these charges in turn.

The civil liberties the ACLU defends are essentially classic political and civil liberties, what some have called the "great rights." This is a limited set of rights in two important respects. First, the ACLU seeks to enforce limitations on government action—negative rights. The government may not interfere with our freedom of speech or the freedom of the press and so forth. The ACLU has not championed the affirmative entitlements that Professor Ellickson mentions,[4] except in narrowly defined circumstances where there is in our view a clear nexus to a traditional right. Second, the ACLU generally defends civil and political liberties rather than economic, social, and cultural rights, except insofar as the latter are connected to the former.

These limitations on the set of rights that the ACLU strives to preserve have resulted from a constant debate within the organization. Since the ACLU was founded, some of its leaders consistently have tried to move toward advocating broad economic and social rights, such as the right to shelter, the right to governmental economic benefits, and the right to a job. Just as consistently, the national ACLU has resisted that pressure, although a few affiliates have espoused some such rights from time to time.

An example used by Professor Ellickson, the right to shelter,[5] illustrates this internal ACLU debate. The ACLU National Board formulated its policy on homelessness and civil liberties in 1988-89.[6] A segment of the ACLU leadership argued, on substantive due process and state constitutional grounds, that the organization should advocate an affirmative right to shelter or housing. The National Board rejected that argument in favor of a position that focuses on the nexus between classic civil liberties and homelessness.

First, although the government has no obligation to get involved in the housing market, to the extent that it has chosen to enter that market, the ACLU maintains that the government must do so in a nondiscriminatory, nonarbitrary way; the government must not by its politics penalize a defined segment of our society, nor maintain policies that result in the denial of

4. *See* Ellickson, *supra* note 2, at 17-20.

5. *See id.*

6. *See* AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 370 (Policy #301), 409b (Policy #318) (rev. Nov. 27, 1990) [hereinafter ACLU POLICY GUIDE].

fundamental rights.[7] For example, in contemporary America, the government has entered the housing market through the tax program, which subsidizes middle-class and upper-income families, through housing subsidies of various kinds, and also through zoning laws.[8] In our view, such programs and laws must not result in discrimination.

Second, the ACLU maintains that homeless individuals should not forfeit basic civil and political liberties.[9] For example, the fact that people lack permanent addresses does not justify depriving them of the right to vote. Nor may homeless children be deprived of their rights to attend public schools and to have access to equal educational opportunities as the result of homelessness.

Two recent judicial decisions further illustrate the ACLU's classic approach to homelessness and civil liberties. In May 1991, a federal district judge in New Jersey struck down Morristown, New Jersey's public library rules on personal hygiene and appearance, which the ACLU had challenged on behalf of homeless library users.[10]

The ACLU argued that library regulations barring "unnecessary staring" and "patrons whose bodily hygiene is so offensive as to constitute a nuisance" were unconstitutionally vague, giving excessive discretion to the librarians charged with enforcing the policy.[11] Federal Judge H. Lee Sarokin agreed, explaining that a public library is a "living embodiment of the First Amendment," and therefore must tolerate "that which is offensive."[12] Characterizing the rules as endangering the rights of the poor and the homeless, Judge Sarokin stated:

> The greatness of our country lies in tolerating speech with which we do not agree; that same toleration must extend to people, particularly where the cause of revulsion may be of our own making. If we wish to shield our eyes and noses from the homeless, we should revoke their condition, not their library cards.[13]

The ACLU's advocacy of traditional civil liberties for the

7. *See id.* at 409-409c.
8. *See id.*
9. *See id.* at 409c.
10. *See* Kreimer v. Bureau of Police, 765 F. Supp. 181 (D.N.J. 1991).
11. *Id.* at 183-84.
12. *Id.* at 182.
13. *Id.* at 183.

homeless is also illustrated by another judicial victory. The Connecticut Supreme Court recently accepted the ACLU's argument that a homeless person has a constitutional right to be free from unreasonable searches and seizures in a public area where he customarily sleeps and maintains his personal possessions.[14]

Examining the ACLU's approach to civil liberties in the context of the international human rights movement reinforces my point that the ACLU adheres to a classic view of civil liberties. I refer to those rights to which the community of nations has widely agreed through the so-called International Bill of Rights:[15] the Universal Declaration of Human Rights,[16] the International Covenant on Civil and Political Rights,[17] and the International Covenant on Economic, Social and Cultural Rights.[18] Though the United States has not ratified these documents,[19] they are so widely accepted around the world that many international law scholars argue that they constitute customary international law,[20] which in the international legal system operates much like the common law in our domestic legal system.[21]

The rights recognized by the International Bill of Rights re-

14. *See* State v. Mooney, 588 A.2d 145 (Conn. 1991), *cert. denied*, 112 S. Ct. 330 (1991).

15. For the complete texts of the relevant United Nations resolutions, as well as a discussion of the history and significance of the International Bill of Rights, see THE INTERNATIONAL BILL OF HUMAN RIGHTS (Paul Williams ed., 1981).

16. G.A. Res. 217, U.N. Doc. A/810 (1948).

17. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

18. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

19. President Jimmy Carter, on behalf of the United States, signed the International Covenants on Human Rights in 1977. Without ratification, however, the United States has not committed itself to be bound by them under international treaty law. The Universal Declaration of Human Rights, a non-binding declaration, does not require ratification. *See* THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 15, at 101-03.

20. *See, e.g.*, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 68-71 (1981); Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 315-22 (1983); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1269-71 (1991); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980) (citing the International Bill of Human Rights as support for the content of customary international law).

21. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice"); Filartiga v. Pena-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980); *see also* Burke et al., *supra* note 20, at 315-22; Note, *supra* note 20, 1273-75.

veal by comparison how narrow is the ACLU's view of rights. In the international sphere, commentators frequently talk of three generations of rights.[22] The generation that we emphasize in the United States, the first, consists of classic political and civil liberties, and had its origin in the Eighteenth Century Enlightenment. A second generation of rights consists of economic, social, and cultural rights, which have been recognized in this century, particularly in socialist countries. Even the second generation, though, is passé in parts of the developing world. Some international human rights activists and scholars now embrace a third generation of rights: collective rights to security, peace, clean air, a healthy environment, and so forth.[23]

The ACLU, by contrast, concentrates on the first generation, the classic civil and political liberties of the type recognized in the International Covenant on Civil and Political Rights.[24] The ACLU does not endorse the broader, affirmative formulations of rights common in the international arena.[25] It does not endorse the rights set forth in the International Covenant on Economic, Social and Cultural Rights, much less any broader "collective rights."

The development and implementation of the ACLU's policies concerning homelessness and the contrast with the international human rights movement illustrate my first major point. The ACLU has resisted pressure to assert affirmative economic rights, focusing instead on classic civil and political liberties. At the same time, however, the ACLU has recognized that there may be links between economic status and civil liberties. Accordingly, the ACLU has insisted that government ac-

22. *See, e.g.*, Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 316 (1987).

23. *See, e.g.*, Brenda Cossman, *Reform, Revolution, or Retrenchment?: International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L.J. 339, 341-43, 348-51 (1991); Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 394 (1989) ("[T]he notion of environmental rights ought to be established on the international plane."). One convenient way to think of this progression is in terms of the French revolutionary slogan, "liberté, egalité, et fraternité": political and civil liberty, group equality, and finally collective rights.

24. The ACLU's general support for United States ratification of the International Covenant on Civil and Political Rights is qualified by urging that this ratification be accompanied by one reservation and one declaration, designed to ensure that ratification would not lead to a reduction of liberty in the United States. *See Hearings on the Ratification of the International Covenant on Civil and Political Rights Before the Senate Comm. on Foreign Relations* (Dec. 13, 1991) 102d Cong., 2d Sess. — (1991) (statement of the ACLU).

25. *See* ACLU POLICY GUIDE, *supra* note 6, at 429-33 (Policy #401).

tion may not cause or perpetuate poverty, and may not abridge the civil and political rights of poor people.[26]

Although the ACLU does not espouse far-ranging notions of affirmative economic or social rights, it does not rigidly confine civil liberties to those enshrined in the Bill of Rights.[27] This is my second major point: The ACLU follows a flexible approach in defining civil liberties.

Civil liberties are not necessarily coextensive with the Bill of Rights. As William Barr has noted, the mere structure of our government, with its system of divided and separated powers, can be a vehicle for protecting rights.[28] Additional evidence that civil liberties and the Bill of Rights are not coterminous is that some provisions of the Bill of Rights do not even address civil liberties. The Second Amendment, for example, protects the right to bear arms expressly in the context of a "well regulated Militia."[29] Consistent with the prevailing judicial interpretation of that constitutional amendment,[30] the ACLU does not view the Second Amendment as barring reasonable regulation of hand guns, for example.[31]

Conversely, there are many important civil liberties that are not found in the first ten amendments. For example, the ACLU maintains that the post-Civil War amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments—do protect basic civil liberties. From time to time, I hear the contention that the ACLU was once a good and pure organization, back in the good old days when it was only defending free speech. Then, according to this view, the ACLU took a wrong turn by recognizing that there is more to civil

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26. *See supra* text accompanying notes 6-9.

27. *See generally* ACLU POLICY GUIDE, *supra* note 6; WALKER, *supra* note 3 (describing the history of the ACLU and its many battles for expansive interpretations of civil rights).

28. *See* William P. Barr, *Three Levels of Human Decisionmaking and the Protection of Fundamental Rights*, 15 HARV. J.L. & PUB. POL'Y 11, 13 (1992).

29. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

30. *See, e.g.*, United States v. Miller, 307 U.S. 174, 178 (1939) (requiring a reasonable relationship between the possession of a firearm and the preservation of a well-regulated militia); United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (holding that the right to keep and bear arms applies only in the context of a state militia), *cert. denied*, 426 U.S. 948 (1976); *see also* United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (recognizing that courts have consistently held that the Second Amendment right only has meaning in relationship to a well-regulated militia).

31. *See* ACLU POLICY GUIDE, *supra* note 6, at 95-96 (Policy #47).

liberties than free speech.[32] Some find particularly objectionable the ACLU's insistence on enforcing the post-Civil War constitutional amendments.

First, such a comparison of the "good old ACLU" and the "bad modern ACLU" is historically fictional. The ACLU from the beginning focused on Fourteenth Amendment issues and did not focus exclusively on the First Amendment.

Second, the ACLU considers the Reconstruction amendments to be an essential part of the Constitution and an important enlargement of the fundamental freedoms that the Bill of Rights protects. First, they make the Bill of Rights enforceable against state and local governments, which is crucial in terms of individual freedom. Second, they ensure equality, a basic right that is not explicitly recognized in either the original Constitution or the Bill of Rights.

The ACLU goes further and maintains that there are civil liberties that are recognized nowhere in the Constitution or any of its amendments. These are statutory rights that protect the individual's relationship with some nongovernmental entities and certain powerful actors in the private sector.[33] Title VII of the Civil Rights Act of 1964,[34] for instance, prohibits certain private entities from discriminating in employment on the basis of race, gender, and other invidious classifications. The ACLU regards freedom from such discrimination as a civil liberty, although it does not derive from the Constitution.

One of the ACLU's latest initiatives is to protect workers' rights more broadly against the powers of their employers. People spend so much of their lives in an employment situation, and employers have such vast economic and practical power over their employees' lives, that to permit employers to deprive employees of free speech, privacy, or due process is, for all practical purposes, in large measure to strip working people of those rights.

I disagree with those who claim that Title VII of the Civil Rights Act should be repealed because only the government has sufficient power to deprive individuals of liberty. In reality, we do have a welfare state; we do have a government that has

32. *See, e.g.*, WALKER, *supra* note 3, at 317-18.

33. *See* ACLU POLICY GUIDE, *supra* note 6, at 106-106e (Policy #55), 205 (Policy #111).

34. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

massively intervened in the economic and social arrangements under which we live. As a consequence of government actions, there are private agglomerations of power capable of depriving individuals of liberty.[35] To some extent, some private actors can be viewed as government agents.[36] Even without a nexus to state action, the ACLU maintains that such agglomerations should have no more power than government agents to deprive individuals of basic rights.

In sum, the ACLU pursues a principled, non-partisan approach to the civil liberties questions before this panel. As I illustrated in my first major point, the ACLU focuses on the defense of classic civil and political liberties. My second point, however, reveals that the ACLU defines basic civil liberties with relative flexibility. Consequently, the ACLU protects individual liberties, but it does not limit those liberties to the ones enumerated in the Bill of Rights or infringed by government action. A vision of a world in which all individuals feel equally secure in their fundamental freedoms requires such an approach.

35. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (holding Due Process Clause inapplicable to termination of service by a privately-owned electrical monopoly); Watts v. Union Pac. R.R., 796 F.2d 1240 (10th Cir. 1986) (holding due process not offended by arbitrary and capricious employee firing); Elmore v. Chicago & Ill. M. Ry., 782 F.2d 94 (7th Cir. 1986) (holding due process not offended by denial of notice and procedural safeguards).

36. For a discussion of the development and status of the state-action doctrine, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to 18-7 (2d ed. 1988).