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Reflections on the Law Review Symposium on Women's Rights and Pornography: Big Sister, Big Brother, and the Role of Legal Scholarship in Affirming Human Rights

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NADINE STROSSEN

Reflections on the *Law Review* Symposium
on Women's Rights and Pornography:
Big Sister, Big Brother, and the Role
of Legal Scholarship in Affirming
Human Rights

ABOUT THE AUTHOR: Nadine Strossen is a Professor of Law at New York Law School and the President of the American Civil Liberties Union. For assistance with the footnotes for this piece, the author wishes to thank her Chief Aide, Steven Cunningham (NYLS '99), and her Assistant, Danica Rue (NYLS '09). This essay is an edited version of Professor Strossen's breakfast talk delivered to students on the *New York Law School Law Review* and on the New York Law School Moot Court Association, as well as faculty, to kick off Faculty Presentation Day on March 21, 2006.

I. THE CONNECTION BETWEEN SCHOLARSHIP AND ADVOCACY

Since I am both a full-time law school faculty member and a full-time human rights advocate, I am frequently asked to share with readers some of my experiences that underscore the vital connection between scholarship and advocacy. All of my professional experiences have underscored this essential link throughout all phases of my legal career, going back to my own days as a law student.¹ I began my dual professional life back then. I was not only pursuing scholarly efforts as a student editor of the *Harvard Law Review*, where I worked with such outstanding classmates as New York Law School's own Associate Dean, Steve Ellmann, but I was also active in several campus groups that worked for justice on various fronts, including the Legal Aid Bureau, the Prisoners' Legal Assistance Project, the Voluntary Defenders, and the Women's Law Association.

I have had no greater joy than being able to apply my legal education, and my scholarly and advocacy efforts, to advance my own vision of justice. It is my wish that all of my students and colleagues experience the same joy, whatever their personal visions of justice might be. I am thankful for the actions of many politicians, across the political spectrum. Because of their actions, all of us will always have endless opportunities to rectify injustice!² How is that for seeing a silver lining to the cloud? One cannot possibly be an activist without being an optimist. As Winston Churchill put it: "The pessimist sees the difficulty in every opportunity. But the optimist sees the opportunity in every difficulty."³

In the spring of 2005, the *New York Law School Law Review* editors decided to circulate the published version of my last Faculty Presentation Day breakfast talk⁴ to new *Review* members. The editors told me they thought it would help to inspire the new members to carry out their demanding new responsibilities by underscoring that through all of their work on the *Law Review*, they are making valuable contributions not only to our understanding of the law, but also to our aspirations for justice.

In my own professional life, the concepts of legal scholarship and human rights advocacy are so integrally intertwined that it seems artificial even to try to distinguish them. For one thing, scholarship and advocacy rely on, and flow from, the very same essential bedrock foundations for excellence and effectiveness:

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1. See generally Nadine Strossen, *Wearing Two Hats: Life as Activist and Scholar*, TULSA L. REV. (forthcoming 2007).
 2. See, e.g., Nadine Strossen, *Safety and Freedom: Common Concerns for Conservatives, Libertarians, and Civil Libertarians*, 29 HARV. J.L. & PUB. POL'Y 73, 74-77 (2005) (explaining that there is common ground between the ACLU and the Federalist Society because conservatives as well as libertarians have agreed that too many post-9/11 measures have unjustifiably sacrificed freedoms); Nadine Strossen, *Speech and Privacy*, in THE RULE OF LAW IN THE WAKE OF CLINTON 69-83 (Roger Pilon ed., 2000); Carl Hulse, *Senate Debates Flag Bill; Backers Seem Near Success*, N.Y. TIMES, June 27, 2006, at A15.
 3. QuotesandPoem.com, Winston Churchill, http://www.quotesandpoem.com/quotes/showquotes/author/winston_churchill/5134 (last visited Nov. 11, 2006).
 4. See Nadine Strossen, *Reflections on the Essential Role of Legal Scholarship in Advancing Causes of Citizen Groups*, 49 N.Y.L. SCH. L. REV. 505 (2004-2005).

thorough research into all the pertinent facts and law; open-minded consideration and logical analysis of all plausible perspectives on all issues; building on past precedents to develop new legal arguments that will support new legal doctrine and law reform; cogent presentation of analysis and conclusions; and scrupulous attention to details. All of these elements are reflected in every excellent piece of scholarship and advocacy alike, whether it be a law review note or article; a brief for either a moot court competition or actual litigation; legislative testimony; or a press release, op-ed piece, media interview, or live debate.

In March 2006, I participated in a panel debate that New York Law School students had organized about the Patriot Act and other post-9/11 issues.⁵ Many students in that audience were kindly complimentary about my contributions to that program, stressing that my statements reflected thorough research into the pertinent legal and factual issues. It is nice to be able to articulate your knowledge and views coherently, or even eloquently, but there is no substitute for solid knowledge and sound analysis!

No matter how gifted one might be in rhetorical skills, it is not possible to be an effective advocate for human rights, or anything else, unless you have a substantively persuasive message, and that depends on the same type of scholarly skills and labors that one would invest in a law review note or moot court brief. Therefore, the skills and work habits that *Law Review* and Moot Court Association members hone in their roles will well serve them, and will well serve their future clients and colleagues in all of their future lawyering endeavors, whatever those might be. By becoming better scholars, these students will, necessarily, become better advocates.

I am thankful to the many New York Law School students who have worked as Research Assistants for myself and for any of my faculty colleagues. Through this work, these students are not only aiding their own development as scholars and advocates, but are also facilitating the scholarly and advocacy work of New York Law School faculty members.

II. A ROLE MODEL FOR INTERRELATED SCHOLARSHIP AND ADVOCACY: RUTH BADER GINSBERG

March is Women's History Month, and so every year at that time I make a concerted effort to honor women who have made contributions to women's rights. In March of 2006, I was especially eager to acknowledge one of my heroines who has made historic contributions to women's rights through both superb scholarship and superb advocacy, carried out in tandem. I am referring to Ruth Bader Ginsburg.

5. Symposium Panel, *Curious George Taps the Phones: Lives, Liberty, and the Law Five Years After 9/11* (Mar. 14, 2006).

During the 1970s, she divided her time between Columbia Law School, where she was a distinguished professor and scholar,⁶ and the American Civil Liberties Union, where she was the founding Director of the ACLU's Women's Rights Project,⁷ spearheading path-breaking litigation that persuaded the Supreme Court to recognize constitutional rights of gender equality for women,⁸ and for men too.⁹ Contractually, Ginsburg was supposed to be working half-time for Columbia and half-time for the ACLU. Knowing what a workaholic she is, though, it is probably more accurate to say that she worked full-time for both institutions, bringing to bear in both roles the same perfectionistic standards for research, analysis, and writing.

In 2006, Ruth Bader Ginsburg marked the 25th anniversary of her appointment as a federal judge. President Carter appointed her to the U.S. Circuit Court of Appeals for the D.C. Circuit in 1980. To honor her first quarter-century on the federal bench, the ACLU Women's Rights Project dedicated its Annual Report to her.¹⁰ It was published in March 2006, and it includes many tributes to Justice Ginsburg from those of us who had the stimulating experience of working with her at the ACLU, a unique opportunity for furthering both scholarship and human rights. One of the contributors was Isabelle Katz Pinzler, who worked at the Women's Rights Project from 1978 to 1994, and who has also taught at New York Law School. Isabelle and others who worked closely with Ginsburg at the ACLU all stressed that her work was consistently distin-

6. American Civil Liberties Union, Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff, <http://www.aclu.org/womensrights/gen/24351pub20060302.html#attach> (last visited Nov. 11, 2006).

7. *Id.*

8. *See generally* Duren v. Missouri, 439 U.S. 357 (1979) (holding that the systematic exclusion of women that resulted in jury venires that averaged less than fifteen percent female violated the United States Constitution's fair cross-section requirement); Califano v. Goldfarb, 430 U.S. 199 (1977) (holding that the gender-based distinction made by the Federal Old-Age, Survivors, and Disability Insurance Benefits program violated equal protection when supported by no more than overbroad generalizations or assumptions as to dependency that are not consistent with contemporary reality); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding that a statute's gender-based distinction was irrational, violating equal protection, because it was based on an archaic and overbroad generalization about the contributions to family support made by male and female workers); Kahn v. Shevin, 416 U.S. 351 (1974) (holding that differing treatment of widows and widowers for tax purposes rested upon grounds that had a fair and substantial relation to the object of the legislation); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that the statutory difference in treatment of male and female military personnel for purposes of determining dependent benefits violated equal protection because it drew a sharp line between the sexes, solely for the purpose of achieving administrative convenience); Reed v. Reed, 404 U.S. 71 (1971) (holding that the probate court's mandatory preference for appointing males over females as administrators of estates merely for administrative convenience violated equal protection); *see also* Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 315 n.25 (2005).

9. *See, e.g.,* Weinberger, 420 U.S. at 637; Kahn, 416 U.S. at 352.

10. ACLU WOMEN'S RIGHTS PROJECT, WOMEN'S RIGHTS PROJECT ANNUAL REPORT 2005 vii–xiii (2005), available at <http://www.aclu.org/pdfs/wrannualreport2005.pdf>.

guished by rigorousness and carefulness, hallmarks of excellence in both scholarship and advocacy. The following is a pertinent passage from the Report:

Isabelle Katz Pinzler . . . recalls being somewhat intimidated by [Ginsburg] at first. She remembers that the staff would work very hard on a brief, but would hand it to Ginsburg labeled “rough draft” because they had learned that even the most thoroughly edited brief would come back as “a sea of red.” [Another ACLU colleague] Jill Goodman also admits that at times “it was scary” working for Ginsburg, describing her as “meticulous about everything she did.” Ginsburg acknowledges that she is . . . “fussy about the quality of the product.” . . .

It was not that Ginsburg did not appreciate their work, Pinzler was quick to explain; rather, Ginsburg taught them to write crisp sentences and get to the heart of a matter. “She taught me so much about using words precisely, to mean exactly what I want them to mean, no more, no less,” agrees Goodman. Overall, Goodman felt that she had learned much about the profession from Ginsburg. “She has an aura about her, of intelligence and care — care about the law, and the craft of lawyering, and the trajectory of the law.”¹¹

What better description of a consummate scholar, and advocate, as well as teacher, mentor, and colleague? These are exactly the kinds of qualities that all *Law Review* and Moot Court Association members and officers acquire, and in turn transmit to their colleagues and successors.

Justice Ginsburg is also a role model for all New York Law School students in another sense. Despite her strictness and seriousness about her work, and despite how very hard she works, she has always been one of the most considerate, gracious people I have ever had the pleasure of knowing, always taking the time to encourage and thank anyone who is carrying out the human rights work to which she is so deeply committed. To cite just one example: After Justice Ginsburg saw the new ACLU Women’s Rights Project Annual Report, with its tribute to her, she immediately wrote warm thank-you notes to everyone who had helped to produce it. Since I had co-authored an introduction to the Report,¹² she wrote to thank me for that, and to convey her wishes for “continuing strength and courage for today’s and tomorrow’s challenges.”¹³

I should also note that Justice Ginsburg is constantly generous toward law students, sharing with them her precious time, expertise, and inspiring presence. To illustrate this special characteristic, I will cite an example that is especially close to home. Justice Ginsburg graciously accepted my invitation to address the

11. *Id.* at 19–20.

12. *Id.* at viii–x.

13. Letter from Justice Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, to author (Mar. 8, 2006) (on file with author).

Annual Banquet of the *New York Law School Law Review* in 1999.¹⁴ Consequently, given my commitment to ideological diversity, I had to invite Justice Scalia to address the 2006 *Law Review* banquet! (I am also happy to have recruited Supreme Court Justices for Moot Court Association events: Justice Scalia for the Froessel Competition and Justice Thomas for the Wagner Competition — twice. To liberals, I apologize for what is apparently my conservative slant in this context!)

III. THE SIGNIFICANCE OF THE *LAW REVIEW'S* 1993 SYMPOSIUM ON PROTECTING WOMEN'S RIGHTS AND FREE SPEECH CONCERNING "PORNOGRAPHY"

The 2006 *Law Review* banquet, of course, celebrated the *Review's* Golden Anniversary. In the spirit of reflecting on the *Law Review's* past achievements, Dean Ellmann asked me to comment on the *Review's* historic symposium, on which I worked closely with the editors, back in 1993.¹⁵ It was a compendium of pieces by an impressive array of leading scholars and activists, addressing women's rights and free speech in connection with controversies about sexually oriented expression, or "pornography."

All of the contributors to the "Symposium on Protecting Women's Rights and Free Speech Concerning Pornography" concurred that freedom of speech, including sexual speech, is especially important for advocates of women's rights, safety, and dignity.¹⁶ Correspondingly, we all agreed that censorship of sexual expression especially endangers those rights.¹⁷ At the time, this anti-censorship wing of the feminist movement was not nearly as well known to the public, the press, and politicians as our pro-censorship counterparts were, led by law professor Catharine MacKinnon and writer Andrea Dworkin.¹⁸ Indeed, the feminist pro-censorship faction was especially dominant within the legal academic world, as I documented in my contribution to the New York Law School symposium.¹⁹ Therefore, by publishing so many feminist anti-censorship works, by so many

14. Justice Ruth Bader Ginsburg, Remarks: New York Law School Law Review Dinner (Feb. 12, 1999), in 44 N.Y.L. SCH. L. REV. 7 (2000); see also Nadine Strossen, New York Law School Law Review Dinner: Introduction of Justice Ruth Bader Ginsburg (Feb. 12, 1999), in 44 N.Y.L. SCH. L. REV. 1 (2000).

15. Symposium, *The Sex Panic: Women, Censorship, and "Pornography,"* 38 N.Y.L. SCH. L. REV. 1 (1993).

16. Nadine Strossen, *Preface: Fighting Big Sister for Liberty and Equality*, 38 N.Y.L. SCH. L. REV. 1, 7-8 (1993).

17. *Id.*

18. See, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 24-27 (1985) (setting forth the text of the model anti-pornography ordinance introduced by Dworkin and MacKinnon); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). In the ordinance proposed by MacKinnon and Dworkin, they define "pornography" as, *inter alia*, "the graphic sexually explicit subordination of women through pictures or words." *Id.* at 22.

19. See Strossen, *supra* note 16, at 4.

leading professors in law and other fields, as well as so many women's rights activists, the symposium made a significant contribution to the subsequent shift on this issue.²⁰

Since then, the feminist advocates of censorship have greatly receded from public view and influence.²¹ Accordingly, the *New York Law School Law Review* Symposium was not only a noteworthy scholarly contribution, but it also contributed to women's rights and human rights more generally. It has been cited in opposition to, and helped to forestall, censorial measures that many politicians have proposed, allegedly for women's benefit.²²

Although the MacDworkinites' alleged justification for censorship has essentially faded away, we still face continuing pressures to suppress sexually oriented expression from politicians across the political spectrum.²³ Therefore, all of us who support free speech and women's rights must continue to channel our scholarly and activist efforts against these ongoing censorial pressures, to carry on in the spirit of the historic *New York Law School Law Review* Symposium. Indeed, all of us who support any human rights must continue to combat censorial pressures, since free speech is an essential prerequisite for asserting any rights.²⁴

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20. Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure* 7 (U. Penn Law Sch., Pub. Law Working Paper, Paper No. 06-31, 2006), available at <http://papers.ssrn.com>.
21. See, e.g., NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS*, at xxviii–xxxi (N.Y. Univ. Press 2000) (1995). In particular: “Journalists have chronicled the rise of a new breed of feminists, increasingly prominent both in women’s studies programs and in academia more generally, as well as on the wider cultural scene, who hardly eschew sexuality and sexual expression.” *Id.* at xxix; see also Jodi Rudoren, *The Student Body*, N.Y. TIMES, Apr. 23, 2006, at A4 (stating that college “[s]tudent editors, administrators and experts on adolescent sexuality” view the recent appearance of campus sex magazines and sex columnists in campus newspapers as reflecting the fact that “many feminists are adopting a ‘sex-positive’ approach that views pornography as expression not exploitation”). In her article, Rudoren also quotes Pamela Paul, author of a 2005 book that was critical of pornography, as saying:
 College women have really bought into both the pornography industry’s way of spinning porn — this is hip, sexy, harmless entertainment and women should really get in on it — and the new academic perspective on pornography — as long as we own our sexuality and it’s our choice, then, great, more power to us.
Id.
22. See, e.g., Keth A. Ditthavong, *Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms*, 4 AM. U. J. GENDER & L. 455 (1996).
23. See, e.g., Jim Puzanghera, *Lawmaker Sees Both Sides of Broadcast Legislation: Rep. Greg Walden has a Unique Perspective in Congress as Owner of Five Small Radio Stations*, L.A. TIMES, July 5, 2006, at C1 (discussing the dramatic increase in broadcast indecency fines in 2006 that was overwhelmingly supported in the House, with 400 members approving, a large majority of Republicans and Democrats (only 34 Democrats and 1 Republican voted against the measure)); Editorial, *The Big Chill Becomes Law*, BROADCASTING & CABLE, June 19, 2006, at 42 (noting that all five FCC commissioners supported the Broadcast Decency Enforcement Act). The FCC commissioners are a bipartisan group consisting of three Republican and two Democratic members. See Federal Communications Commission, <http://www.fcc.gov/commissioners/> (last visited Nov. 3, 2006).
24. See generally STROSSEN, *supra* note 21.

Working on that symposium certainly stimulated more of my own scholarship and advocacy, most importantly, my first trade press book, which was originally published in 1995 by Scribner.²⁵ New to the industry, I was taken aback by the deliberately provocative, in-your-face title on which the commercial publisher insisted, since it was so different from the kinds of titles I was used to seeing on law review articles: *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights*.

When I first quoted that title to one of my colleagues, who had published works on similar topics, but with typically formal academic titles, her reaction was dripping with sarcasm, but maybe also a little envy; she said, "Gee, Nadine, why couldn't they work in the word 'orgasm' too?!"

Seriously, all of those provocative words really do belong in the book's title, because they underscore its major point — that throughout history, censorship of sexual expression has been especially damaging to women, and advocates of women's rights, including reproductive freedom.²⁶ It also has been especially damaging to lesbians and gay men, and advocates of their rights.²⁷ Accordingly, those of us who advocate equality in the realms of gender and sexuality have the biggest stake in the freedom of sexual expression.

Sexually oriented expression has always been the most demonized speech in the United States. Many cultural commentators trace this pattern back to our Puritan heritage. For example, my fellow Minnesotan, Garrison Keillor, made this point when he said: "My ancestors were Puritans from England, [who] arrived here in 1648 in the hope of finding greater restrictions than were permissible under English law at the time."²⁸

Given the persistent American fears of sexual expression, the ACLU is constantly defending it against censorship in all media and other contexts, including the broadcast media, where an ongoing crackdown was sparked by the infamous "wardrobe malfunction" at the Super Bowl in 2004,²⁹ and is now threatening cable and satellite expression too.³⁰ Censorship is also abounding in our nation's classrooms, where government-funded "abstinence-only sex education" programs

25. *Id.*

26. *Id.* at 225–29.

27. See, e.g., *id.* at 167–70; Lisa Guernsey, *Sticks and Stones Can Hurt, but Bad Words Pay*, N.Y. TIMES, Apr. 8, 1999, at G1; Judith Lynne Hanna, *Dance: Wrapping Nudity In a Cloak of Law*, N.Y. TIMES, July 29, 2001, section 2, at 14; Jennifer 8. Lee, *Cracking the Code Of Online Filtering*, N.Y. TIMES, July 19, 2001, at G9; Nadine Strossen, *Big Sister is Watching You*, ADVOC., Nov. 14, 1995, at 62.

28. STROSSEN, *supra* note 21, at 37 (quoting Garrison Keillor, statement to the Senate Subcommittee on Education, Mar. 29, 1990).

29. See, e.g., David Carr, *When a TV Talking Head Becomes a Talking Body*, N.Y. TIMES, Nov. 25, 2004, at E1.

30. See, e.g., David Halonen, *Indecency Debate Broadens; Watchdog Redoubling Efforts to Expand Reach of Penalties*, TELEVISION WK., June 12, 2006, at 4.

require censoring all information about contraception and prevention of sexually transmitted infections.³¹

IV. THE ONGOING RELEVANCE OF THE 1993 SYMPOSIUM IN THE ONLINE WORLD

I will discuss only one example here of the continuing censorship of sexual expression, which warrants countering through scholarship and advocacy. Specifically, I would like to address what has happened with the Internet since it first burst onto the public and political radar screen about a dozen years ago — amazingly recently, considering how deeply it has been woven into our lives since then.

Just a bit more than a decade ago, the Internet was a completely new phenomenon for most government officials, and they reacted to it the same way that government has reacted to all new communications media throughout history: by passing censorship laws.³² And, true to U.S. tradition, these Internet censorship laws have targeted sexually-oriented expression.³³ That is true, for instance, of all three federal laws restricting cyber-speech.³⁴

I am so proud that the ACLU had the foresight to form a Cyber-Liberties Taskforce in the early 1990s,³⁵ long before most people had even heard of cyberspace. The work of that taskforce vividly demonstrates my general point about the integral interrelationship between scholarship and advocacy. Our taskforce members had to simultaneously study all arguably analogous existing bodies of law, and advocate for a new body of law, drawn from and building upon precedents that would protect civil liberties in this important new arena.

The ACLU spearheaded the constitutional challenges to all three federal cyber-censorship laws, all of which we fought all the way to the Supreme

31. See, e.g., Hazel Glenn Beh & Milton Diamond, *Children and Education: The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk about Sex*, 15 COLUM. J. GENDER & L. 12 (2006).

32. See, e.g., Communications Decency Act, 47 U.S.C. §§ 223(a)(1)(A), (b)(1)(A) (1996).

33. See, e.g., Michigan's Cyberporn Law, MICH. COMP. LAWS § 722.675 (2003) (making it a crime to disseminate "sexually explicit matter to a minor" over the Internet because it is considered harmful to minors); New Mexico's Cyberporn Law, N.M. STAT. ANN. § 30-37-3.2(a) (1998) (banning the "dissemination of material" to minors over the Internet that "depicts actual or simulated nudity, sexual intercourse or any other sexual conduct").

34. The three federal laws restricting cyber-speech are: 1) The Communications Decency Act (CDA), 47 U.S.C. § 223 (1996) (seeking to protect minors from "indecent" and "patently offensive" communications on the Internet); 2) The Child Online Protection Act (COPA), 47 U.S.C. § 231 (1998) (imposing criminal penalties of a \$50,000 fine and six months in prison for the knowing posting, for commercial purposes, of content that is harmful to minors); and (3) The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763A-336 (2000) (stating that a public library cannot receive federal assistance to provide Internet access if it does not have software to prevent the dissemination of obscenity, child pornography, or in the case of minors, material harmful to them).

35. See ACLU's Cyber-Liberties webpage, <http://www.aclu.org/cyberliberties/index.html> (last visited Nov. 8, 2006).

Court.³⁶ In fact, our challenge to the Child Online Protection Act, or “COPA” is still ongoing. In June of 2004, we won our second Supreme Court ruling in that case, upholding an injunction against the enforcement of COPA.³⁷ However, the Court for a second time remanded the case to give the government yet one more chance to try to show that the law satisfies constitutional strict scrutiny.³⁸ So, as this article goes to press in January 2007, our lawyers are concluding their third trial in the COPA case.³⁹ The ACLU’s challenges to COPA and the other two federal cyber-censorship laws have so far generated four important Supreme Court decisions, including the Court’s landmark 1997 ruling, *Reno v. ACLU* — the Court’s very first ruling about the Constitution in cyberspace.⁴⁰ I am thrilled that the Court agreed with us in that key case that cyberspace is entitled to the highest level of First Amendment protection, and rejected the government’s position that cyberspace should be relegated to the same second-class status, under the First Amendment, that broadcast TV and radio have received.⁴¹

All three federal cybercensorship laws — the Communications Decency Act,⁴² the Child Online Protection Act,⁴³ and the Children’s Internet Protection Act⁴⁴ — are badly misnamed, since they are as bad for young people as they are for adults. Given these names, no wonder almost no politicians had the political courage to vote against them, on either side of the aisle.⁴⁵ However, almost every

36. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (holding that Internet content providers and civil liberties groups were likely to prevail on a claim that COPA violated the First Amendment because the Act burdened adults’ access to some protected speech); *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (rejecting a challenge to Children’s Internet Protection Act brought by a group of public libraries, library associations, library patrons and web site publishers, and holding that CIPA did not violate the free speech clause of the First Amendment and did not impose unconstitutional regulations on public libraries); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002) (holding that COPA’s use of the term “contemporary community standard” to define what was harmful to minors was not unconstitutionally overbroad under the First Amendment); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (holding that provisions of Communications Decency Act prohibiting transmission of obscene, indecent, or patently offensive material by means of telecommunications device to persons under the age of eighteen were content-based blanket restrictions on speech, and were facially overbroad in violation of the First Amendment).

37. *Ashcroft*, 542 U.S. at 656.

38. *Id.* at 673; *see also Ashcroft*, 535 U.S. at 586.

39. *See, e.g.*, *Am. Civil Liberties Union, ACLU Returns to Court to Defend Right to Online Free Speech* (Oct. 23, 2006), <http://www.aclu.org/freespeech/internet/27144prs20061023.html>.

40. *Reno*, 521 U.S. at 864. The Court stated that the Internet is “a unique and wholly new medium of worldwide human communication.” *Id.* at 850 (citation omitted).

41. *Id.* at 868.

42. Pub. L. No. 104-104, § 502, 110 Stat. 56 (1996), *invalidated by* *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (current version at 47 U.S.C. § 223 (2000)).

43. Pub. L. No. 105-277, § 1402, 112 Stat. 2681-736 (1998), *invalidated by* *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004).

44. Pub. L. No. 106-554, 114 Stat. 2763A-336 (2000).

45. The Children’s Internet Protection Act was passed as an amendment to an appropriations bill in the Senate on June 27, 2000 by a vote of 95-3 (the only “nay” votes were cast by three Democratic Senators).

judge to rule on these laws has agreed with us that they actually cause young people more harm than good by “protecting” them from information that benefits them, including information promoting their health and safety.⁴⁶ One prime example is information about contraception and preventing sexually transmitted infections.

Moreover, there is an even more direct connection between these cybercensorship cases and the themes of the *New York Law School Law Review*'s 1993 Symposium. The cybercensorship cases have underscored that prime targets of these Internet laws include any expression concerning women's sexual and reproductive health options, as well as lesbian and gay sexuality.⁴⁷ This fact is illustrated by considering some of the clients that the ACLU has represented in our challenges to these laws. One prominent example is Planned Parenthood Federation of America.

In the spirit of honoring women's history, I should point out that the founding mother of Planned Parenthood, Margaret Sanger, was also an ACLU client, way back when we were first founded, more than 86 years ago. She was repeatedly harassed and prosecuted under the Victorian-era Comstock Law,⁴⁸ the first federal anti-obscenity law, which criminalized the information she conveyed about women's reproductive health and options.⁴⁹ Sadly, more than three-

Dep't of Labor, HHS, and Education Appropriations Act: Senate vote on HR 4577, 106th Cong. (2001) (voting on McCain Amendment No. 3610). The conference report for the amended appropriations bill passed the House on December 15, 2000 by a vote of 292-60 (all but fifty-one Democrats and nine Republicans supported the bill). *Dep't of Labor, HHS, and Education Appropriations Act: House vote on HR 4577*, 106th Cong. (2001) (voting on conference H.R. 4577). It was passed in the Senate on December 15, 2000 by unanimous consent. The Child Online Protection Act passed the House by a voice vote on October 7, 1998 and a similar measure passed the Senate on the same day by a vote of 98-1 (Pat Leahy, D-Vt, was the only “nay” vote, all other Democrats supported it). *Internet Tax Freedom Act: Senate vote on Coats Modified Amendment No. 3695*, 105th Cong. (1998). The Communications Decency Act was an amendment to the Telecommunications Reform Act, which passed the Senate on June 14, 1995 by a vote of 84-16 (all but 14 Democrats and 2 Republicans supported the bill). *Telecommunications Act of 1996: Senate vote to adopt Exon/Coats Amendment No. 1362*, 104th Cong. (1995). The bill, as amended, was passed in the House by voice vote with no objections on October 12, 1995. The conference report passed the Senate (91-5, with 4 Democrats and 1 Republican opposed), *Telecommunications Act of 1996: Senate agreed to Conference Report on S. 652*, 104th Cong. (1996), and House (414-16, with fifteen Democrats and one Independent opposed) on February 1, 1996. *Telecommunications Act of 1996: House agreed to Conference Report on S. 652*, 104th Cong. (1996).

46. See *Am. Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999) (“[P]erhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.”), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *aff'd sub nom. Ashcroft*, 542 U.S. 656; see also *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 852 (E.D. Pa. 1996) (“[A]t least some of the material subject to coverage under the ‘indecent’ and ‘patently offensive’ provisions of the CDA may well contain valuable literary, artistic or educational information of value to older minors as well as adults.”), *aff'd*, 521 U.S. 844 (1997).
47. See *Reno*, 31 F. Supp. 2d at 491; *Reno*, 217 F.3d at 171.
48. Comstock Law, 17 Stat. 598 (1873) (suppressing trade and circulation of obscene literature and articles of immoral use).
49. STROSSEN, *supra* note 21, at 226–27.

quarters of a century later, the ACLU had to defend the organization that Sanger founded against the Internet era's first federal cybercensorship law, the Communications Decency Act, which criminalized the very same information.⁵⁰

Planned Parenthood, and the ACLU's other online clients, are hardly what springs to mind when you hear that demonizing term, "cyberporn." Yet their cyberspeech would indeed be criminalized under the federal laws, including COPA, which we are still litigating against, right now.

Consider just a few other examples of these embattled online speakers: the American Association of University Women, which promotes equity in education for all woman and girls; Full Circle Books, one of the oldest and largest feminist bookstores in North America; Human Rights Watch, the largest U.S.-based international human rights organization, which fights the sexual abuse of women around the world; Obgyn.net, a comprehensive online resource center about obstetrics and gynecology; PlanetOut, which serves as an online community for gay, lesbian, bisexual, and transgendered people; Queer Resources Directory, one of the largest online distributors of LGBT resources; *Riotgrrl*, a magazine aimed at young feminists; and *Salon*, a leading online magazine whose feature articles address sexuality, among other topics.⁵¹

I am actually one of the original complainants in the ACLU's currently ongoing challenge to COPA. I have been a columnist for two webzines, and the courts have agreed that these columns could definitely be considered harmful to minors in some communities.⁵² The concept of "harmful to minors" is so vague and expansive that it endangers all words and images that discuss any topic with any sexual overtones,⁵³ even critically important topics about which I write, such as abortion, AIDS and other sexually transmitted infections, censorship of sexual expression, contraception, gender discrimination, lesbian and gay rights, rape, and sexual harassment.

A few years ago, I received some concrete evidence that my writings have in fact been deemed harmful not only to minors, but even to adults, in at least one community. I was sent an article from the *Pittsburgh Post-Gazette*, about a book-burning that was being organized by a local church. Its minister, the Rev. George Bender, had been urging everyone in the area to burn certain books as a type of spring cleaning. In his words: "Cleanse your house from ungodly . . . and demonic books"⁵⁴ The items that Rev. Bender planned to burn himself

50. *Reno*, 929 F. Supp. at 827 n.2 (naming Planned Parenthood Federation of America as one of the plaintiffs).

51. See STROSSEN, *supra* note 21, at xvii–xix.

52. See generally *Reno*, 31 F. Supp. 2d at 480–81.

53. *Ashcroft*, 542 U.S. at 675 (Stevens, J., concurring) ("Attaching criminal sanctions to a mistaken judgment about the contours of the novel and nebulous category of 'harmful to minors' speech clearly imposes a heavy burden on the exercise of First Amendment freedoms.")

54. Dennis Roddy, *A Hot Fire Can Consume Most Anything*, PITTSBURGH POST-GAZETTE, Mar. 24, 2001, at D1.

included the Book of Mormon, back issues of *Humanist Magazine*, and of course the Harry Potter series,⁵⁵ the most widely suppressed books all over the United States in recent years.⁵⁶ Also, as the article reported: “Nadine Strossen’s book ‘Defending Pornography’ will join . . . in the big burn.”⁵⁷ Considering the company, that is one of the best book reviews I have ever received. (I was also quite surprised to learn that the Rev. Bender actually owned a copy of my book!)

V. CONCLUSION

I hope that I have encouraged all law school students to make the most of their opportunities while in law school to develop their scholarly skills. I hope this not only for the sake of scholarship, important as that is, but also for the sake of advocacy on behalf of free speech, women’s rights, human rights, or any other cause that they might choose. Let me end with the words of a female writer and activist, another nod to Women’s History Month. As Alice Walker said, “Activism is the rent I pay for living on this planet!”⁵⁸

55. *Id.*

56. Press Release, Am. Library Ass’n, Harry Potter Series Tops List of Most Challenged Books Four Years in a Row (Jan. 13, 2003), *available at* <http://www.ala.org/Template.cfm?Section=archive&template=/contentmanagement/contentdisplay.cfm&ContentID=9404>.

57. Roddy, *supra* note 54.

58. PeaceQuotes.net, Quotes for Living a Life of Compassion, <http://www.people4peace.net/quotes/living-quotes.htm> (last visited Nov. 11, 2006).