

Has The ACLU Lost Its Mind?

By taking on truly bizarre cases—from defending tobacco companies to child molesters—the old left's favorite interest group is undermining its reputation and cheapening free speech

BY AMITAI ETZIONI

Foes of the American Civil Liberties Union believe it has veered off to the left; friends argue that friends should not criticize a beleaguered champion of the freedom of speech. But only those who keep close tabs realize that the ACLU has gone silly.

The ACLU used to play an important role in our nation, particularly in the protection and expansion of First Amendment rights. Many of the principles for which it fought are now taken for granted. Prior to 1920, the year the ACLU was founded, the Supreme Court had never upheld a free speech claim under the First Amendment. In its first year, the ACLU helped gain the release of hundreds of prisoners whose only crime had been that they spoke out against World War I. During World War II, the ACLU provided one of the few voices that condemned the relocation of Japanese-Americans to internment camps. In the fifties, the ACLU was a leader in the battle against the McCarthy era "loyalty oaths." Even these days, occasionally it still gets the job right. A case in point is the ACLU endeavor to protect the jobs of whistleblowers.

But even ACLU aficionados did a double take when they read that the organization had marshaled its legal big guns to protect the rights of lawyers to file misleading bills. The case involved none other than Senator Alfonse D'Amato's brother Armand, who was convicted of fraud in a plan to influence the senator. Armand collected money from a corporation by billing it for legal services that were never performed. In exchange, Armand promised the corporation access to Senator D'Amato. Several bar associations attacked the ruling on the flimsy grounds that such a billing practice is common among lawyers and that it is protected by client-lawyer privilege. When New York ACLU representative Arthur Eisenberg was asked what the hell possessed the ACLU to side with Armand, he explained: The ACLU is concerned that D'Amato would be convicted, not of influence peddling, but under a Federal mail fraud statute, and the ACLU believes the wording of these statutes is not sufficiently precise. Got it?

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When the new mayor of New York City, Rudolph Giuliani, tried to get kids back into school by drawing on new community police officers to help locate truants, the ACLU protested. The executive director of the New York Civil Liberties Union, Norman Siegel, told a reporter that "the cops see these kids as criminals; educators see them as consumers of school services. You have two different views, [and] this is not the way to go." It is far from self-evident what is wrong if, indeed, it is the case that police and teachers see things differently; I bet that the fire department and sanitation officers look at the same kids in still different ways. Actually, the facts are that the police, far from arresting the truants, simply shepherd them to schools, where everyone agrees they belong.

Some recent ACLU peculiarities have explanations, but you will not find them in legal textbooks. The ACLU is fighting to preserve the right of the tobacco industry to advertise cigarettes. The ACLU argues that all it is doing is sticking to its traditional defense of commercial free speech, a fundamental part of the First Amendment. Legal scholars may well raise some questions about the standing of commercial speech as distinct from political and social speech. But all in the know will raise at least one eyebrow when they learn that the ACLU also fought a congressional bill that would have cut the tax deductibility of tobacco promotions. And they'll raise the other eyebrow—and much more—when they learn that the ACLU received more than \$500,000 in contributions from the tobacco industry—and did not disclose this to the public or its members. If some other group, say, one that favors a ban on pornography, pocketed \$500,000 on the q.t. from, say, the Christian Coalition, you can bet the ACLU would be in its face.

To be fair, the ACLU is at least consistent. While Common Cause, People for The American Way, Congress Watch, The Communitarian Network, and practically all other reform-minded groups strongly oppose the unlimited flow of private money into the coffers of elected officials in the form of campaign contributions to politicians, the ACLU maintains that the flow should go on uninhibited on the ground that "money is speech." In effect, it accepts and le-

gitimizes the self-serving arguments of special interest groups that use PACs to sway legislators—that this money gives citizens opportunities to participate in democratic politics. The fact is that contributions are collected from individuals who are *not allowed* to designate which politician will receive the PAC money. Funds are granted to whomever is favored by the *managers* of PAC associations (such as the National Rifle Association, various banks, and several labor unions). As a rule, contributors to PACs are not told even after the fact who got their bucks. Some democratic participation.

But more importantly, the ACLU has never been able to explain satisfactorily how its position in support of unbounded money bags is compatible with a free give-and-take of ideas. Private money in politics is often compared to a person who brings a huge, expensive amplifier to a town meeting and drowns out everybody else. Money buys consultants, studies of the hidden crevices of the public's mind, and massive TV ads. Candidates without deep pockets do poorly in elections dominated by money, no matter what the content of their messages. Champions of free speech should seek to ensure that all are able to speak freely.

When it comes to metal detectors in schools, the ACLU is truly daffy. The detectors are a measure of the desperation of schools that face, on an average day, 135,000 children who come to school with loaded guns. While the detectors do not solve the problem, and clearly much more needs to be done to stem violence, screening reduces gun fatalities. The opposition to this measure is led by the Southern California chapter of the ACLU, which opposes not merely the gates but also the expulsion of students caught carrying guns. Expulsions, it argues, may consign students "to a life even more disadvantaged than it might have been otherwise." In other words, it's better for all students to learn in fear of being shot than to expel the ones carrying guns.

Even if the ACLU has a good case, you can rest assured that it will find a way to ride it *ad absurdum*. Its protection of the right of youngsters to wear T-shirts that display social and political slogans is a sound part of its protection of free speech. However, its active opposition to

dress codes in schools and shopping malls is stretching matters too far. The ACLU's regional director in Texas questioned the constitutionality of dress codes imposed by malls that discourage certain clothing items favored by gang members, such as bandannas and baggy pants. The ACLU's argument, absurd as it sounds, is that baggy pants and bandannas are forms of political expression. Personally, I can't see much political content in any kind of pants.

President Clinton proudly waved in front of the nation the symbol of his universal health care plan—a national health security card. The card could facilitate compilation of national statistics on the uses of health care resources, vital if waste is to be curbed. It could also allow potential patients to carry in their pockets their medical histories and other relevant information on the cards' magnetic strips, *to be "read" by whomever the cardholders choose.*

Not so fast, says the ACLU. Jan Lori Goldman, head of the organization's project on privacy and technology, explains: "The problem is that the databases are enticing. People want to use them for other purposes." What are these other nefarious purposes? Seeking deadbeat dads, university graduates who welshed on their student loans, and illegal immigrants. But these people violated the law, and the public is clearly in need and fully entitled to find them and help ensure that they will make amends (pay up, ship out, etc.). It's far from evident why such applications of a database are troubling to the point that we should forgo the health care card. Moreover, would anybody be better off—other than maybe computer staffers—if we apprehended these offenders by drawing on a separate database for each subgroup instead of a single comprehensive database?

You may know that the ACLU is fighting for the rights of cigarette companies to advertise their products. What you may not know is that the group has accepted more than \$500,000 in contributions from the tobacco industry.

The ACLU recently honed its long-standing talent to find, in a world full of the downtrodden, the most bizarre cases. In New York City, a teacher is openly advocating having sex with young boys. He is a leader of NAMBLA (North American Man/Boy Love Association), a national association whose slogan is "sex after eight is too late." And the reference is not to eight in the evening. The teacher has been suspended until hearings are completed about his future assignment; the ACLU argues that his right to speak is being violated. However, even the ACLU acknowledges that one may not shout fire in a crowded theater (though it often adds, "unless there really is a fire"). Presumably the reason the ACLU is willing to tolerate an exception to the First Amendment

is that the "proximity" of the cause (shouting) to public harm (being trampled) is closer than in the teacher's classroom.

But this is far from self-evident. Just as not every time one shouts fire do scared crowds overrun people, so not every time a teacher advocates molesting young children are they actually abused. However, the probability may well be just as high and the crime at least as hideous. Unless you believe that the only value we care about is free speech, we are entitled to wonder whether parents should be expected to leave their children with an advocate of pedophilia. It's like allowing those who advocate arson to be in charge of fire safety in schools. Meanwhile, if the ACLU tries, it may be able to find at least somewhat more worthy causes to assign to its lawyers.

The ACLU trivializes rights and adds to litigiousness when it pursues many of these cases. Our liberties would be better protected if the ACLU would focus its zeal where it matters, rather than on drummed up, far out, or indefensible cases. □