

The ACLU at 100

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The ACLU will celebrate its centennial on January 20, 2020. Always contentious, it has become the most influential civil liberties organization in the nation. Today it boasts more than 1.5 million members and employs nearly 300 staff attorneys; it also has thousands of volunteer lawyers. Its presence at the nation's elite law schools is testimony to its clout. Most important, it has won many historic cases before the U.S. Supreme Court.

Its reputation as a non-partisan organization that vigorously defends the free speech rights of all Americans, independent of their ideology or political leanings, is well known. However, it is a reputation that can be seriously challenged. Indeed, as I detailed in *The Politics of the American Civil Liberties Union* (Transaction Press, 1985), it would be more accurate to say that the Union is the legal arm of the liberal-left.

Its reputation as a force for freedom can also be seriously challenged. As I argued in *Twilight of Liberty: The Legacy of the ACLU* (Transaction Press, 1994; new material was published in the 2001 edition), the Union entertains a vision of liberty that is increasingly libertine: its promotion of radical individualism works to undermine the kind of moral consensus that is a bedrock of free societies. In doing so, it ineluctably increases the power of the state, allowing individual rights to eviscerate the authority of such mediating institutions as the family, school, church, and voluntary associations.

The Founding of the ACLU

Today the ACLU leadership contends that the organization has been a consistent non-partisan catalyst for freedom since it was founded by ten distinguished Americans: Jane Addams, Elizabeth Gurley Flynn, Morris Ernst, Crystal Eastman, Helen Keller, Roger Nash Baldwin, Arthur Garfield Hays, Felix Frankfurter, Albert DeSilver, and Walter Nelles.¹

This is factually wrong. There was only one founder of the ACLU: Roger Baldwin. Only in recent times has the organization made the case that the other nine co-founded the ACLU. No one has been

more unfairly elevated than Crystal Eastman. She is now known as "The ACLU's Underappreciated Founding Mother"; this is what ACLU president Susan N. Herman calls her.² Even Samuel Walker, the house author of the ACLU's history, admits that it was Baldwin, not Eastman, who founded the ACLU.³

In the spring of 1917, two years after the founding of the American Union Against Militarism (AUAM), Baldwin joined its national directing committee (he had joined the local AUAM in St. Louis in 1916). He was given a leading role in launching it, and in his first six months he doubled the size of the organization. Within it, he created a "Civil Liberties Bureau." Internal disagreements among senior officials eventually led to a formal split. On October 1, 1917, Baldwin left to command the National Civil Liberties Bureau (NCLB).⁴

After spending a year in jail for refusing the draft, Baldwin returned to the NCLB. In 1919, when World War I was over, Baldwin, realizing that the mission of the NCLB was now moot, announced that he would found a new organization, one that was dedicated to the rights of labor. In 1920, the ACLU was born, with Baldwin as its director; he founded three other organizations that same year.⁵

On the National Executive Committee, later renamed the Board of Directors, were 64 members, all of them associated with the cause of labor. Eastman was one of the sixty-four. But if there was any one of the nine "co-founders" who shared the duties with Baldwin, it was Albert DeSilver (who died at age thirty-six), not Eastman.⁶ As Walker notes, Eastman withdrew from the fight for civil liberties, due to health issues, two years before Baldwin founded the Union.⁷

The ACLU's Marxist Beginnings

The ACLU was nominally founded to defend free speech rights, but its real interest was the rights of labor. It was so committed to that cause that it never addressed the Volstead Act and the wholesale deprivation of civil liberties that Prohibition fostered.

When I interviewed Baldwin in his home in New York City in June 1978, I asked him about this. "We thought the Volstead Act was none of our business since it didn't touch on democratic liberties," he said. "We were wrong. We should have read the Bill of Rights."⁸

Baldwin pushed the ACLU to the radical fringe of the labor movement, leading Samuel Gompers, head of the American Federation of Labor, to accuse him of aiding and abetting revolutionary movements.⁹ Was Baldwin a Communist? Not in a formal way—he never joined the Party.¹⁰ But his philosophical leanings were clearly Marxist, and he was definitely a fellow traveler.

No sooner had the Soviet Union been founded when American radicals adopted it as the home of freedom and the enemy of oppression. Emma Goldman, one of the champions of radicalism, couldn't wait to see the promised land when she left on the *Buford* for Russia in 1920. But her expectations fell flat. In 1922, she wrote a caustic note to Baldwin about "the Bolshevik superstition." The next year, he left for Russia to see for himself; it would be the first of two trips there.¹¹

In 1928, Baldwin wrote a glowing account of what he saw. The title of his book, *Liberty Under the Soviets*, accurately conveyed his message. He was a true believer, so much so that the abolition of class privilege was far more important to him than civil liberties. Goldman let him have it. "Unless you have become an apologist for dictatorship I cannot understand how you can cry out indignantly against the horrors going on under the capitalistic regime and only whisper your protest against the crimes committed in the name of Revolution and Socialism."¹²

Baldwin was unfazed. Nothing could stop him from embracing communism. In 1934, he wrote an article for *Soviet Russia Today* that made plain his sympathies; they were not civil libertarian. "I champion civil liberties as the best non-violent means of building the power on which workers' rule must be based....When that power of the working class is once achieved, as it has been only in

the Soviet Union, I am for maintaining it by any means whatever....The Soviet Union has already created liberties far greater than exist elsewhere in the world....It is genuine, and it is the nearest approach to freedom that the workers have ever achieved."¹³

Though Baldwin later came to regret this article, in 1935 he told the editor of Harvard's class book, "Communism is the goal."¹⁴ The ACLU was so radical that it actively opposed the Wagner Act, or what was formally known as the National Labor Relations Act. It did so because of the belief that the government was a tool of the "propertied class." However, after President Franklin D. Roosevelt signed the law in 1935, the ACLU came under fire by labor leaders for opposing it. It finally yielded and got on board, but not before the Communist Party switched sides.¹⁵

Then, in 1939, Baldwin experienced the "biggest shock of my life." That was when he learned of the Nazi-Soviet pact. He told me that the pact meant that "the distinction between Communism and Fascism [was] no longer tenable."¹⁶ It also meant that he had to seriously reconsider the propriety of having members of the Communist Party on its board of directors.

The ACLU Moves to the Center

In 1940, Elizabeth Gurley Flynn, one of the ACLU's original directors, was expelled from the Union for her affiliation with the Communist Party. Baldwin authored the resolution to oust her. It was her refusal to resign that forced the vote to expel her. She remained a defiant Communist until the end.¹⁷

Throughout the 1940s and the 1950s, the ACLU adopted a more moderate posture, one that sought to balance civil liberties and national security interests. Hitler had to be defeated, and that weighed heavily on Baldwin. Today this chapter in the ACLU's history is a source of embarrassment to its leaders. A more generous view—events changed and that demanded the ACLU change as well—could easily be offered.

During World War II, President Roosevelt ordered the internment of 110,000 Japanese Americans. Today the ACLU likes to brag how it challenged this initiative. On its website it lists over twelve highlights in its history. One of them reads, "The ACLU stood almost alone in denouncing the federal government's internment of more than 110,000 Japanese Americans in concentration camps."¹⁸

More mythology. First, these were not concentration camps: the Japanese were allowed to leave the internment camps to attend college.¹⁹ No Jews were allowed such privileges in Dachau. Second, the ACLU's position was remarkably different from what the organization claims it was today.

It is true that the Northern California affiliate opposed the internment,²⁰ but the national organization took a different position. The official policy of the ACLU read as follows: "The government in our judgment has the constitutional right in the present war to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law."²¹

I asked Baldwin to explain why the ACLU took this position. "That is probably the most debatable question you could raise. It was a very tough one. And, of course, the government was all wrong about it. But the fears that were expressed of Japanese submarines off the Pacific Coast—and there had been one after Pearl Harbor—was so profound on the Pacific Coast that you just could not tolerate it—they would not tolerate it—the presence of the people they suspected of being sympathetic with the Japanese."²²

After thirty years of service, Baldwin stepped down as executive director in 1950. Patrick Murphy Malin replaced him and continued the more cautious approach that was adopted during the war years. The authorities knew the ACLU had a left-wing reputation, and some were bent on probing more deeply into the organization. This made the Union move to the center.

For about seven years in the 1950s, the ACLU developed a close relationship with the FBI.²³ I read the FBI files on the Union during this period (interestingly, the FBI made them available to me before the ACLU did). It was during the McCarthy era that the ACLU courted the FBI by supplying it with information about itself, its members, and its activities.

The most famous officer of the ACLU who established an ongoing relationship with the FBI was Morris Ernst. Ernst had at one time successfully defended James Joyce's *Ulysses*, which the Customs Service was trying to ban as obscene. He cultivated a close relationship with FBI director J. Edgar Hoover.²⁴

Irving Ferman, who ran the Union's Washington office, regularly supplied Hoover with sensitive information on ACLU officers. Malin was no bystander: he worked with Herbert Monte Levy, staff counsel for the ACLU from 1949 to 1955, asking the FBI for help in identifying members of the Communist Party who served on the board of some of its state affiliates.²⁵

Malin's successor, John de J. Pemberton, Jr., did not develop an incestuous relationship with the FBI but he did ask the FBI for help in accessing information about a suspected Communist in the Georgia affiliate. That was in 1964, after the McCarthy era.²⁶

It was the *New York Times* that broke the story about the ACLU-FBI connection in 1977. The ACLU had obtained approximately 10,000 documents from the FBI on the ACLU between the period of 1943-1976. Two weeks after the story broke, Corliss Lamont, a far left-wing activist and an ACLU board member in the early 1950s, took issue with the stance of executive director Aryeh Neier. Neier was playing damage control, contending that only five men in the Union were involved with the FBI. Lamont said the entire board knew about the ACLU-FBI transactions.²⁷

The expulsion of Flynn from the board and the ACLU-FBI connection are condemned by today's ACLU leadership. But should they? The central issue is as relevant today as it was then: Should an organization dedicated to the civil liberties of all

Americans employ senior officials who support totalitarian ideologies or regimes? They surely would not hire Klansmen. Why, then, would communists, and those like them, be welcomed?

The ACLU Moves Left Again

Once the Vietnam war began in the 1960s, the ACLU resorted to its more radical ways. It had no interest in balancing civil liberties and national security—the latter was no longer its concern. This same vision has guided it ever since, and was made manifest in its multiple lawsuits involving U.S. initiatives in Grenada, Libya, Panama, and the Persian Gulf. Over the past few decades, it has taken on the FBI and the CIA on many occasions. Most notably it battled the administration of President George W. Bush, especially after 9/11. It fought hard for the rights of suspected Muslim terrorists.

In the late 1970s, while poring through voluminous documents at the ACLU's national headquarters in New York City, I was asked by an ACLU staff member what I was doing. I said I was working on my Ph.D. dissertation at New York University, "Organizational Change Within the ACLU." He wanted to know more about it, so I told him I was studying why the ACLU changed its policies on various issues over the years. Still curious, I offered women's rights by way of example. The ACLU was opposed to the Equal Rights Amendment (ERA) for decades, I said. He got angry and told me that I had better state in my work that the Union no longer opposes the ERA.

The ACLU opposed the ERA when it was first introduced in 1923. It continued to oppose it in the 1930s, as did Eleanor Roosevelt. In the 1940s, the "radical" judge, Dorothy Kenyon, who chaired the Union's Committee on Women's Rights, lobbied hard to have it defeated. In the 1950s, the League of Women Voters and the American Association of University Women joined the ACLU in opposing the ERA. The ACLU said discriminatory laws against women are "definitely on the way out." It added that "Only the remnants of feudalism remain." It even said that "the practice of

unequal pay for equal work... is nothing but a universally bad habit."²⁸

In September 1970, Judge Kenyon did an about-face and succeeded in having the ACLU change its policy: it now insisted that women's rights could not be achieved without the ERA.

The women's right that the ACLU treasures above all is abortion. As late as 1966, it considered abortion a non-issue for the Union, but in 1967 that began to change.²⁹ It soon became one of the nation's greatest champions of abortion-on-demand, through term. It became so rabid in its defense of abortion rights that it trampled on the First Amendment rights of those who opposed it.

In the late 1970s, Rep. Henry Hyde authored a bill restricting the federal funding of abortion. The ACLU, determined to cast his effort as an attempt to shove Roman Catholic doctrine down the throats of the public, summoned a lawyer to follow him into church on Sunday.

The spy noted that "pregnant women and children" bore "gifts of life." Hyde was caught praying and going to Communion. These behaviors were entered into a 301-page brief, which got nowhere. When asked about this, Hyde said, "I suppose the Nazis did that—observed Jews going into the synagogues in Hitler's Germany—but I had hoped we would have gotten past that kind of fascistic tactic."³⁰

The ACLU has a reputation of defending the rights of everyone from Communists to Nazis, but when it comes to anti-abortion protesters, it gets the chills. Its record is weak at best and embarrassing at worst. Some of its affiliates have gone so far as to invoke the RICO statute against them, an act written to undermine the mafia (and one that the ACLU formally opposes). Nat Hentoff, longtime ACLU board member who was also pro-life, condemned the Union's use of RICO to punish anti-abortion demonstrators. "Why do they still call it a civil-liberties union?"³¹

If abortion was the premier sexual-rights issue for the ACLU in the 1960s and 1970s, the rights of homosexuals soon became its front and center issue. It did not issue a policy on homosexuals until 1957, holding that it was not a serious civil liberties issue.³²

The board of directors said it was not its business "to evaluate the social validity of laws aimed at the suppression or elimination of homosexuals." Regarding laws that made homosexuality a felony, the ACLU said, "there is no constitutional prohibition against such state and local laws on this subject as are deemed by such states or communities to be socially necessary or beneficial." It considered homosexuals to be a "socially heretical" and "deviant group."³³

In 1973, the National Sexual Privacy Project was founded by the ACLU to fight for the rights of prostitutes, homosexuals, bisexuals, transvestites and transsexuals. Two years later it issued a new policy, one that supported equal rights for homosexuals in every aspect of society. What about laws that protected minors from adult sexual advances? A debate ensued on this issue, with Ruth Bader Ginsburg arguing that statutory rape laws were of dubious constitutionality.³⁴

Aside from some gay rights organizations, there is no entity more demanding of gay rights today than the ACLU. It even goes so far as to oppose laws that criminalize the intentional transmission of the AIDS virus to innocent unsuspecting persons.

In 1989, I asked ACLU official and gay activist Gara LaMarche about this. He answered, "homosexuals have rights." But the issue was murder, I said, not gay rights. I then asked if it should be illegal for someone to intentionally pour a toxic substance into the water supply of a city. He nervously conceded it would be. I then asked him to explain the moral difference between the two issues and all he could say was that "homosexuals have rights."³⁵

With the right of two men to marry now being a moot issue, the ACLU has taken up the cause of transgender persons. But not everyone is pleased with its extremism. In 2016, Maya Dillard Smith, an African American, was alarmed when she learned that

three men over six feet tall invaded a women's bathroom in Atlanta, scaring the daylights out of her young daughters. She was furious.

The ACLU defended the aggressors, claiming the men no longer consider themselves to be men; they called themselves transgender persons. Ms. Smith then stunned the Union. She was the interim president of the ACLU's Georgia chapter, and after this experience, she quit.³⁶

In August 2019, the Connecticut chapter of the ACLU said that high school boys who consider themselves to be girls should be allowed to compete in athletic sports reserved for girls. "Girls who are transgender are girls," the ACLU said.³⁷ It did not say how this position was fair to girl athletes or how it advanced women's rights.

Contentious Rights

The rights of the dispossessed have been a staple of ACLU activities since the 1960s. The rights of minorities and the homeless occupied much of its time throughout the latter part of the twentieth century, yielding important victories for African Americans; more suspect victories for the homeless and the mentally ill were granted. Today it is embroiled in the rights of illegal immigrants, and is a strong proponent of reparations for African Americans.

The ACLU is supposed to be concerned about individual rights, but when it comes to racial equality, those rights take a back seat. Its strong defense of affirmative action, which often undermines the civil liberties of white men and women who are discriminated against, has alienated many of its members. One prominent person who objected to the Union's embrace of equal results, as opposed to equality of opportunity, was Aaron Wildavsky, the esteemed political scientist who wrote the preface to my first book on the ACLU.

I asked Baldwin about this issue, citing the lawsuit brought by Allan Bakke, a white male, who succeeded in his case against the Regents of the University of California. Bakke claimed he was a victim of discrimination because he was denied admission to the medical school at the University of California at Davis simply because he was white; his scores were higher than all the minority applicants.

The ACLU opposed him. "I think the ACLU is wrong," Baldwin said. "I'm on the other side. I'm on the Bakke side. I think it was a great mistake."³⁸ It is a mistake the Union continues to make.

Egalitarians on the ACLU's board started lobbying for economic rights in the 1980s. They eventually succeeded in developing a policy in 1984 declaring poverty, which is a social and economic issue, to be a civil liberties issue.³⁹ There is a continuous debate among ACLU officials regarding the limits of economic rights. By casting the issue as one of economic rights, as opposed to economic interests, the egalitarians seek to move the organization away from its purported mission. The rights of the homeless are another controversial issue.

Does a homeless person have the right to sleep on sidewalks? What if the temperature falls below freezing and the police ask him to seek shelter, and he refuses to move? The ACLU takes the side of the homeless, saying they have a constitutional right to sleep on sidewalks and refuse help even when it is freezing. It is not easy to see how this policy advances freedom, but to the ACLU, it does. That three homeless persons froze to death in New York City—as a direct result of the Union's "Project Freeze"—does not seem to matter.⁴⁰

The rights of the accused are a central civil liberties issue. The ACLU enjoys a reputation for standing by the due process rights for all Americans. It made an exception, however, for President Richard Nixon.

In the spring of 1974, when it appeared that there may be a Senate trial of Nixon, a majority of the ACLU's board of directors voted

that he should not be given the right to claim his Fifth Amendment privilege against self-incrimination. It was the first time in the Union's history it went on record favoring the suppression of someone's constitutional rights.⁴¹

Over the past few decades, many states have passed legislation suspending the statute of limitations for crimes involving the sexual abuse of minors. These laws have rarely been aimed at the public schools; they are granted special rights under the doctrine of sovereign immunity. The laws are aimed at the Catholic Church. The ACLU, which sees the statute of limitations as a fundamental civil liberties right,⁴² has done virtually nothing to defend the rights of accused priests. That job is left to organizations like the Catholic League. Yet it is quick to defend the rights of Gitmo detainees.⁴³

Following 9/11, the ACLU kicked it up several gears defending the rights of accused Muslim terrorists. It showed so much favoritism to Muslims that when the Danish cartoons that offended Muslims were refused publication in American newspapers, the ACLU said not a word.⁴⁴

The need to balance the rights of the accused and the need for order are a perennial problem. Baldwin once said he would not serve on a jury because he did not want to be part of convicting anyone. When I asked him how society could exist without punishing anyone, he said, "That's your problem."⁴⁵

I asked Aryeh Neier, executive director of the ACLU in the 1970s, the same question. He said the ACLU is no substitute for the police, and dismissed the idea that the Union ought to take a more balanced approach to this issue.⁴⁶ Not surprisingly, the ACLU favors probation to imprisonment, calling the latter "harsh."⁴⁷

What is striking about the ACLU's position is its duplicity. It argues that the police, whose job it is to provide for order, must respect the civil liberties of those whom they apprehend. Fair enough. But the ACLU sees no need for it to balance civil liberties with the need for order. That's not their problem.

If there is one city where the ACLU has been successful in getting the police to toe its line, it is Chicago. The windy city is also among the most violent cities in the nation. Gone is "stop and frisk," and in its place are a set of unrealistic directives that the police must respect. The strictures were written by the ACLU as part of a consent decree. The result? Mounds of paperwork have slowed police response to street crime, resulting in an epidemic of killings. A study by two professors from the University of Utah shows that the spike in the murder rate in Chicago is traceable to what they call the "ACLU effect."⁴⁸

Drugs play a major role in street crime, and this is another issue the ACLU deflects. It wants to legalize all drugs. Ditto for gambling, prostitution, and pornography, all of which are seen as victimless crimes. I asked Baldwin why the ACLU defends street solicitation as a civil liberty. He replied, "Well, I don't think we defend solicitation. We defend the right of a person to be a prostitute." He was mistaken. The organization he founded was on record defending solicitation of prostitution.⁴⁹

Freedom of Religion

When the ACLU was founded in 1920, it listed ten objectives, including all the rights detailed in the First Amendment, with one exception: freedom of religion.⁵⁰ This was no oversight: religious liberty has nothing to do with the cause of labor, which was the Union's urgent concern. It's also because Baldwin, and many of his colleagues, were atheists.

Today the ACLU lists the following as current religious liberty issues: "government promotion of religion; religion and the public schools; using religion to discriminate; and the free exercise of religion."⁵¹ The first three exemplify its vision: they are all concerned about limiting the reach of religious liberty, not advancing it.

The first major trial that the ACLU participated in was the Scopes "Monkey Trial" in 1925. A law had been passed in Tennessee

making it illegal for anyone in a state-supported school to teach that humans are descended from a lower order of animals. The ACLU found a teacher willing to test the law, John T. Scopes.

The trial pitted William Jennings Bryan, prosecutor and three-time presidential candidate, against famed defense attorney Clarence Darrow. The ACLU rolled out its heavyweight lawyers for the defense, including Felix Frankfurter. Scopes was found guilty and fined \$100. On appeal, the Tennessee Supreme Court upheld the law but overturned the conviction.⁵²

In the 1960s, the ACLU played an active role in getting prayer banned in the public schools. It also opposed the opportunity to say a silent prayer. I asked Baldwin to explain the Union's position. Here is the exchange.

WD: Whose rights are being infringed upon if there is a silent prayer voluntarily said by a student?

RB: If they don't say anything? You mean if they don't—

WD: Right. Are you afraid they are going to proselytize the rest of the class?

RB: Well, they tried to get around it. They've tried to get around it even further than you by calling it meditation.

WD: What's wrong with that?

RB: You don't say anything about God or religion or anything. I suppose you can get by with that but it's a subterfuge, because *the implication is that you're meditating about the hereafter or God or something.* (My emphasis.)

WD: Well, what's wrong with that? Doesn't a person have the right to do that? Or to meditate about popcorn for that matter?

RB: I suppose that—it sounds very silly to me because it looks like an obvious evasion of the constitutional provision.⁵³

Freedom from religion has always played a much bigger role for the ACLU than freedom of religion. The list of religious expressions it objects to is quite long. Here are some of them.

- the right of houses of worship to be tax exempt (in the 1980s, the ACLU Foundation and the New York Civil Liberties Union filed an amicus brief in support of the Abortion Rights Mobilization to secure standing in its lawsuit directed at stripping the Catholic Church of its tax-exempt status)
- a public school performance of "Jesus Christ Superstar"
- the distribution of Gideon Bibles on public school grounds
- the singing of "Silent Night" in the schools
- the inscription "In God We Trust" on coins and postage
- the words "under God" in the pledge of allegiance
- a poster in the office of a municipal treasurer in Shawnee County, Kansas proclaiming "In God We Trust" (the judge called the ACLU suit "patently frivolous")
- formal diplomatic relations with the Holy See
- kosher inspectors on the payroll in Miami Beach
- the right of a judge to order a person found guilty of drunk driving to attend meetings of Alcoholics Anonymous
- a nine-foot underwater statue of Jesus Christ placed three miles off the coast of Key Largo⁵⁴ [This is my personal favorite.]

Today the ACLU spends most of its time on two major religious liberty issues: it seeks to deny Catholic hospitals the right to follow Catholic teachings on life issues; and it seeks to deny religious exemptions to any religion whenever gay rights are in play.

The Union has filed dozens of lawsuits trying to force Catholic hospitals to perform abortions, and has sued the United States Conference of Catholic Bishops over this matter.⁵⁵ The ACLU is part of MergerWatch, a coalition of organizations dedicated to this end.⁵⁶ It was co-founded by Frances Kissling, formerly of Catholics for Choice, and a virulent enemy of the Catholic Church.

The ACLU has also tried to force the Catholic Church to provide abortion to illegal immigrants.⁵⁷

Not surprisingly, the ACLU is going full bore attempting to see the Equality Act passed. This bill is the most comprehensive assault on religious liberty, the right to life, and privacy rights ever packaged into one bill in the history of the United States.⁵⁸

It would gut the 1993 Religious Freedom Restoration Act, eviscerating important religious rights. Freedom of speech, belief, and thought would be put at risk. Conscience rights would be jeopardized. Adoption and foster care providers would have their rights stripped. Catholic hospitals would no longer be able to abide by Catholic teachings. The LGBT agenda is far reaching, and much of it decimates the free exercise of religion.

The ACLU bears such an animus against Christianity that some of its attorneys actually blamed the "Christian Right" for the massacre at a gay Orlando nightclub in 2016. The ACLU lawyers said that Christian conservatives cultivated an anti-gay environment. Ironically, the killer was Omar Mateen, a Muslim extremist who pledged allegiance to the Islamic State of Iraq and Levant shortly before going on his rampage.⁵⁹

Freedom of Speech

If there is one civil liberty that the ACLU is most known for defending, it is freedom of speech. As we have seen, however, it is a myth to contend that it was founded as a principled defender of free speech. In fact, it took an instrumentalist approach. "If I aid the reactionaries to get free speech now and then, if I go outside the class struggle to fight against censorship," Baldwin said in 1934, "it is only because those liberties help to create a more hospitable atmosphere for working class liberties."⁶⁰

That is why I titled my first book on the organization, *The Politics of the American Civil Liberties Union*. It was never non-partisan: the ACLU has been the legal arm of the liberal-left for most of its 100 years. This point was made with force when I stumbled on

something big while reading reels of ACLU documents on microfiche at the New York Public Library in the 1970s.

In December 1936, Harold Lord Varney wrote a critical piece about the ACLU in the *American Mercury*, an influential journal of opinion. The article, "The Civil Liberties Union—Liberalism à la Moscow," was a searing indictment of the ACLU's alleged non-partisan position. Most of what Varney said was undeniably true, but some of his comments exaggerated the Union's record. There certainly was nothing libelous about it.⁶¹

Upon publication, the ACLU threatened a libel suit. This incident has been wholly ignored for decades by those who write about the organization, and by the ACLU itself. It amounts to a cover-up.

Varney seized on Baldwin's praise for the Soviet Union.

"Repression in Western democracies are violations of professed constitutional liberties and I condemn them as such. Repressions in Soviet Russia are weapons of struggle in a transition period to Socialism."⁶² This, and similar statements like it, are what irked Varney. What followed was a series of hot exchanges between the ACLU and Varney. Then came the libel suit.

Neither side wanted this issue to go to the courts. Arthur Garfield Hays, a powerful ACLU board member, suggested a compromise. He recommended that the famed journalist, H.L. Mencken, write an article assessing Varney's essay. The expectation was that the Baltimore icon would come down squarely on the side of the ACLU.

The bickering began in earnest, extending well over a year. On January 12, 1938, Baldwin wrote to Paul Palmer, editor of the *American Mercury*, outlining his position. "It is understood that both you and we reserve the right to reject the article if it does not suit our common purpose on which we appear to be in agreement."⁶³ Once the piece received the ACLU's blessings, Baldwin said, it could be printed and the suit would be dropped.

Palmer was furious. He had already traveled to Baltimore to request Mencken to do the article, and he agreed. Now he was left in the embarrassing position of having to disinvite him. A protracted fight ensued among ACLU board members over what to do next.

On March 31, 1938, Mencken submitted his article to Palmer and Baldwin. He chastised Varney on some of his points, but overall he said he was accurate. Mencken bared the truth: the ACLU was not a non-partisan organization. In fact, he wrote that its most active officers were "strong partisans of the Left."⁶⁴

The ACLU leadership went bonkers. Mencken, some said, was nothing but a "fascist"; he was just as bad as Varney. The ACLU raised such a fuss that Mencken agreed to write another article, toning down his criticism of the Union. Baldwin and company were still not pleased. So Mencken wrote a third piece. Baldwin wasn't happy with it either, but in July 1938 the board voted 14-6 to permit publication of Mencken's third submission, along with a rejoinder by the Union. The suit was finally dropped. The article appeared in the October 1938 issue of the magazine.⁶⁵

There is no virtue in being an absolutist on free speech, or any other civil liberty. The Founders certainly weren't. In practice, neither was the ACLU. Yet in 1920, in its first annual report, it flatly said that "it puts no limit on the principle of free speech."

Laws governing libel, slander, copyright infringements, lying on a resume, incitement to riot, harassing phone calls, and the like, have long been accepted by the ACLU, and everyone else. Even Supreme Court Justice Hugo Black, who called himself an absolutist, did not regard flag burning and the wearing of obscenities on a jacket in a public building as protected speech.⁶⁶ The question is not whether a line should be drawn, but where to draw it.

Should paramilitary organizations with a history of violence, such as neo-Nazis, be given the same rights as Little Leaguers? This was the question that haunted the ACLU in 1977 when Frank

Collin, a modern-day Nazi, pledged to march in Skokie, Illinois, a mostly Jewish suburb of Chicago. The ACLU decided to defend Collin, much to the anger of many Jewish members of the Union. In 1978, after a prolonged legal fight, the ACLU won in court, but Collin elected not to march.⁶⁷

At the time, the ACLU was praised by many for being principled, and it still wins plaudits today for defending the Nazis. However, as we have seen, the ACLU was not founded as a principled defender of free speech.

More recently, it certainly has not gone out of its way to defend the free speech rights of conservatives on college campuses, or the rights of pro-life demonstrators, both of whom—let's be honest—are more of a threat to the ACLU's political agenda than a small band of neo-Nazis are. No matter, its reputation as an even-handed defender of free speech persists, Skokie being cited as the prime example.

The question remains: Should freedom of speech extend to those who, if they were to prevail, would extinguish free speech for everyone but themselves? Much depends on the meaning of this First Amendment provision.

The Founders saw free speech as a necessary means to the creation of a free and democratic society. To achieve this end, political speech had to be protected. But if by protecting that speech the result would be a regime of censorship and oppression, would that not be a self-defeating act? Wouldn't the stated mission of the ACLU implode if terrorists won? "The Constitution," as Supreme Court Justice Robert Jackson warned, "is not a suicide pact."⁶⁸

The First Amendment specifically says that people have the right to "peaceably" assemble. Armed terrorists, with a record of violence, whose modus operandi is coercion unlimited, do not seek the right to peaceably assemble. They seek the right to create warfare.

In 1991, I debated ACLU president Norman Dorsen at Harvard Law School. The jam-packed crowd was not on my side throughout this long debate. But it did cheer me on at one point. "Nazis ought to be defeated, not defended," I said.⁶⁹ Dorsen looked stunned. After the debate, the ACLU student chapter at Harvard reneged on its pledge to release a tape of the event for the public to view.

Some ACLU attorneys, such as Jeanne Baker, are so radical in their interpretation of the First Amendment that they would allow two extremist groups to confront each other in a march, even when both sides pledged to engage in violence. In the 1980s, Harvard Law professor Arthur Miller asked the former ACLU lawyer if she might change her mind if she knew that the two groups promised to bring an A-bomb to the demonstration. She didn't blink an eye—even that would not deter her. Miller wondered aloud whether she "allowed doctrine to run riot here."⁷⁰

The ACLU's position on free speech is so far gone that it actually defends the sale and distribution of child pornography. It lost in a unanimous decision in the Supreme Court in 1982.⁷¹ That defeat, however, did nothing to curb its appetite for the rights of kiddie porn. In 2007, Charles Rust-Tierney, former president of the Virginia ACLU, was arrested and charged with possession of child pornography; he pleaded guilty.⁷² Former ACLU president Nadine Strossen said she was okay with showing oral sex on TV during the day when children may be watching.⁷³

When Dorsen defended the ACLU's position on child porn during our debate, he said he did so because of the slippery slope implications. I asked him which free speech rights had been curbed in the decade since *New York v. Ferber* was decided. He couldn't cite one.⁷⁴

The author of the First Amendment, James Madison, never envisioned that freedom of speech would come to mean the defense of child pornography. Nor did he think that free speech would include dwarf-tossing, mud wrestling, sleeping in parks, and

the right of demonstrators to block traffic on bridges. These are all official policies of the ACLU.⁷⁵

The Hyper-Politicization of the ACLU

If the ACLU of the 1920s and 1930s was a left-wing partisan organization that sought to stifle the free speech of its critics outside the organization, the ACLU of the twenty-first century is a left-wing partisan organization that seeks to stifle the free speech of its critics inside the organization. Consider what happened in 2006 when it took aim at its own board of directors.

"Where an individual director disagrees with a board position on matters of civil liberties policy," an ACLU committee proposal read, "the director should refrain from publicly highlighting the fact of such disagreement." What prompted this call for self-censorship? Money. "Directors should remember that there is always a material prospect that public airing of the disagreements will affect A.C.L.U. adversely in terms of public support and fund-raising."⁷⁶

Nat Hentoff, longtime member of the ACLU's board of directors, and one of the most consistent champions of free speech in American history, was aghast. "For the national board to consider promulgating a gag order on its members—I can't think of anything more contrary to the reason the A.C.L.U. exists."⁷⁷ Many senior members of the ACLU took Hentoff's side, but not all of them.

This proposal came at a time when the ACLU was thinking about lending its support to legislation that tried to stifle the free speech of pro-life crisis pregnancy centers. This alarmed libertarians such as board member Wendy Kaminer.⁷⁸ She and others wondered what was next.

At the April 2006 board meeting, Kaminer incurred the wrath of ACLU executive director Anthony Romero; he was elected in 2001 and serves as the director today. The Union's first gay and Hispanic leader, Romero reportedly tried to get Kaminer ousted.

Board member David Kennison claimed that Romero had a "thick file on her." Romero also had a file on Kennison. At the same meeting, Romero confronted another one of his critics, Alison Steiner. He asked her to leave the room with him and then proceeded to blast her "for the look on her face" when he clashed with Kaminer.⁷⁹

This issue would not die. A lawyer for the New York state attorney general's office reportedly notified the ACLU, in an informal communication, that any proposal to silence the free-speech rights of its board members would have grave implications. When the board met in June, it decided not to endorse the proposal, but the damage was done.

Kaminer soon quit the board.⁸⁰ Her decision made good sense. She and Michael Meyers, another principled civil libertarian, were the subject of an earlier proposal to get them kicked off the board for publicly criticizing Romero; the outspoken Meyers lost in his bid for re-election to the board in 2005.⁸¹ They were both victims of Romero's interest in putting a gag order on the ACLU's leadership.

Rushing to the defense of Romero were past director Aryeh Neier and other former officials.⁸² The split was wide: there were divisions between current board members and former ones.

By the fall of 2006, more than 30 longtime ACLU advocates rebelled, calling for the ouster of the ACLU's leadership. They wanted Romero and Strossen to resign, as well as members of the executive committee. One of the loudest voices seeking the ouster was Ira Glasser, who preceded Romero as executive director.⁸³

According to the *New York Times*, among the issues that alarmed the critics of the leadership were the ACLU's "use of data mining to profile donors, a plan to monitor its employees' e-mail messages and efforts to control board members' access to staff and information."⁸⁴ In short, Romero had become a control freak, alienating influential board members.

Under Romero, data mining has extended to Washington. In 2015, it was reported that the ACLU, which opposes government surveillance, embedded tracking devices in its emails to monitor online activity of Capitol Hill staffers. It employed software to insert cookies into their computers, allowing it to personally identify who they are; their identity is triggered when they click on a link to one of the ACLU's emails.⁸⁵ Such actions undermine the good work that the ACLU has done protecting privacy rights, in general.

Today the most vocal critic of the ACLU is Alan Dershowitz, the former Harvard Law professor. He argues that he hasn't changed, the ACLU has; he charges that it has become increasingly political. I would say that it has reverted back to its hyper-partisan beginnings.

Ever since Dershowitz left Harvard and moved back to New York, he has been at the forefront of legal controversies involving President Donald Trump. He has mostly defended the president and has been relentless in calling out the ACLU—he was a former board member—for doing nothing in the face of gross constitutional injustices.

What irks Dershowitz are the numerous government raids on the homes, hotel rooms, and offices of those who have worked for the Trump administration. The authorities seized material protected by lawyer-client privilege. What has the ACLU done about it? Nothing. Why? Politics and money.⁸⁶

No one disagrees that the ACLU harbors a strong animus against Trump. The money aspect is less obvious.

Romero came to the ACLU from the Ford Foundation. His job was to manage tens of millions of dollars, directing the grants to left-wing organizations like the ACLU. That's one of the reasons he got the top job in the first place. He has not disappointed his supporters, but it comes at a price.

To Dershowitz, the decision by Romero to argue for a presumption of guilt regarding sexual allegations against Supreme Court nominee Brett Kavanaugh smacked of more than politics. "It is all about pleasing the donors."⁸⁷

Mollie Hemingway and Carrie Severino, who authored the definitive book on the Kavanaugh hearings, agree. "Having strayed in recent years under the influence of progressive donors...the organization now abandoned two of its core principles: the presumption of innocence and opposition to guilt by association."⁸⁸

Under Romero, fund-raising has become more important than ever before. Dershowitz maintains that "after Trump took office, the ACLU has never become so cash rich, yet principle poor."⁸⁹ What matters most is the profile of today's donors.

"The problem is that most of that money is not coming from civil libertarians who care about free speech, due process, the rights of the accused and defending the unpopular," Dershowitz notes. "It is coming from radical leftists in Hollywood, Silicon Valley, and other areas not known for a deep commitment to civil liberties."⁹⁰

The ACLU has always been political, but not until recently has it jumped into the political arena with both feet. In 2018 it officially overthrew nearly 100 years of policy when it announced its foray into electoral politics. It pledged to spend more than twenty-five million dollars trying to affect the November elections.⁹¹

Glasser, who first suggested that Romero take his place at the helm, was blown away by this decision. He told the *New Yorker* magazine that this was "a transformative change," one that "has the capacity to destroy the organization as it has always existed."⁹²

Make no mistake about it, Romero has no interest in mollifying the likes of Dershowitz or Glasser. He is content to cash the checks and appease his highly politicized base of supporters.

The ACLU's hatred of Trump is fueling its engines today. It will pull out all the stops to oppose him in the election of 2020.

Whether Trump wins remains to be decided. But it is already clear that the ACLU will never come close again to the kind of organization that people like Hentoff and Dershowitz hoped it would become.

The original sources for many of these endnotes can be found in my two books on the ACLU.

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⁸ Donohue, *The Politics of the ACLU*, pp. 37-38.

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