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What I Wish I Knew Then: Nadine Strossen

By Steve Cohen

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[Author's note: In past columns, I've asked interviewees to focus on work-related lessons they learned, and advice they would like to share with young attorneys. This conversation was different. Nadine Strossen, who served as president of the ACLU from 1991 through 2008, is professor emerita of constitutional law at New York Law School, and is now a full-time advocate of free speech. I asked her to talk about issues that are—or at least should be—of particular interest to recent college and law school graduates.]

When you asked me how I wound up doing what I'm doing, I realized I never had any grand master plan at an earlier stage in my life. And that's the advice I always give to younger people who ask me about career plans. I think it is unrealistic to have some master plan at such a young age. Just having a specific goal in mind—something you can aim for—is more realistic.

As far back as I can remember, I have always been committed to principles of civil liberties and human rights. Long before I had any knowledge of legal protection, I just had an instinctive sense of fundamental fairness and freedom. It was a very poignant, sharp awareness of when parents and teachers were interfering with what I considered to be my inherent human rights.

Courtesy photo

Nadine Strossen.

My activism—beyond protesting on my own behalf against parents, teachers and librarians—started when I was when I was in middle school, and continued through high school, college, and, obviously, beyond. So, I was

delighted when I discovered that there are legal protections for those rights, as well as the existence of both individuals and organizations devoted to furthering such protections.

Thinking back, I was in high school, sort of toward the beginning of the Vietnam War, when it was still quite unpopular to critique the war. Given my opposition to the war, I strongly identified with Mary Beth Tinker, an Iowa high school student also opposed to the war, and whose landmark case, *Tinker v. Des Moines,* was decided in 1969.

You may recall that Mary Beth was a 13-year-old junior high school student in December 1965 when she and a group of students decided to wear black armbands to school to protest the war in Vietnam. The school board learned in advance of the protest and passed a preemptive ban. When Mary Beth arrived at school, she was asked to remove the armband, refused, and was then suspended. She and several other student protesters were told they could not return to school until they agreed to remove their armbands. The students returned to school after the Christmas break without armbands, but wearing black clothing—which they wore for the remainder of the school year.

The students filed a First Amendment lawsuit and were represented by the by the ACLU. The case took four years, was argued by a young lawyer just out of law school, and resulted in a 7-2 landmark decision in which the Supreme Court said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

When I went to law school, I had ambitions of doing something to promote human rights. I didn't plan to do so necessarily as a full-time career, but I did envision it becoming a significant aspect of my overall professional activity. As soon as I graduated, I entered private practice and immediately became a volunteer lawyer for the Minnesota ACLU—one of the many unpaid lawyers who carry out work to augment the efforts of the ACLU's relatively small staff of lawyers. It was there at the Minnesota affiliate of the national ACLU that I first became involved in the local organization's leadership. It was also where I became very involved in women's rights organizations, political groups, and a number of other activities.

When I moved to New York to hone my legal skills by working at a Wall Street firm, I quickly realized I would not have sufficient time to pursue all the activist causes from my Minnesota days. I needed to narrow my outside activities down to one—and there was absolutely no doubt in my mind that it would be the ACLU. Then as now, its advocacy was a central prerequisite for all the other causes I value. I recognized that you can't have women's rights organizations or theater or anything else without free speech and freedom of association. So, I became involved in the national ACLU. (I did, however, have one other extracurricular activity: I was one of the founders of Human Rights Watch.) Over time, one thing led to another: I was elected to the National Board, and later the National Executive Committee. Eventually, the presidency came open, an office that, at the time, seemed beyond my ambition.

But I was selected and was honored to spend the nest 17 years there.

Barnard—A Case Study in Free Speech v. Free Association?

Recently, Barnard College issued a new policy stating that there could be no postings of any kind on dorm room doors. Triggered by sensitivity to recent pro-Palestinian and pro-Israel messages, the policy apparently includes prohibitions against putting up pictures of one's puppy, favorite car, or location alert.

Wearing my common law professor hat, I will be very clear that Barnard is a private institution that is not bound by the First Amendment. Conversely, it is free to exercise its First Amendment freedom of association rights to try to create whatever kind of community it desires. That includes adopting rules that are less protective of controversial, offensive, and potentially upsetting speech—the kind of speech that a public university would have to permit.

Barnard is physically very small—as well as numerically quite small. It is a little enclave within the larger Columbia University community, and it deliberately keeps itself separate in order to create it own unique atmosphere. I would therefore defend policies that are duly deliberated upon and announced. That way, students who choose to matriculate there, and faculty members who choose to teach there, can making a conscious decision to buy into an environment where civility, or comfort, or privacy are more prized than they would be at a public university campus.

But even on a public university campus, which is bound by First Amendment principles, the answer to the posting question isn't clear. It seems to me there are two choices because there are different areas of a campus that are subject to different First Amendment regimes. Just as we have so-called traditional public forums, limited public forums, and non-public forums when we're looking at public property rights, we have different free speech regimes.

Barnard has this little grassy area. It's small, but it's an open area, and that would be the equivalent to a public park. If it were adhering to the First Amendment, it would not be allowed to have any restrictions. No viewpoint, discriminatory rules are ever permissible on any public property.

Now let's assume Barnard is adopting First Amendment principles. All Barnard property could have certain limits on speech, but none of them could be viewpoint based; they would have to be viewpoint neutral. With respect to the analogy, the property that's analogous to a public park, time, place, and manner restrictions would be permissible so long as they were content neutral.

So, you may not have demonstrations that interfere with people's movement across campus to get to their classes. And you may not have demonstrations or speeches that are so loud that they interfere with classes which are taking place adjacent to that area.

But even the content neutral time, place, and manner regulations have to afford ample channels for free expression. But when you move

beyond that kind of public park analogy to other areas of the campus, other rules obtain.

You can imagine classrooms, laboratories and libraries, places where the predominant purpose is educational. So, any speech restriction that furthers the predominant educational purpose is appropriate.

When you're talking about dormitories, the closest analogy is somebody's home. So, you could say we would want to respect the peace and quiet and tranquility of the neighborhood. This is where it become a bit tricky.

The Supreme Court has been very protective of the right of homeowners not to be subjected to expression that they find to be upsetting or traumatizing. But even so, the Supreme Court has emphasized a less restrictive alternative approach: somebody can knock at your door, and hand you a leaflet, you can ask him to go away, close the door and throw the leaflet away. Moreover, as opposed to a complete ban on people soliciting throughout the neighborhood, you can also put up a no solicitation sign.

Now when it comes to putting something in the hall, this becomes an almost metaphysical question. Is your door the one area where you can publicly convey your views, your interests, or some aspect of your personality in your neighborhood? Such self-expression is, quite arguably, a very important interest; it also has some communicative purpose. Yet the hall can also be seen as a common space where everybody has the same interest in not being subject to material that they consider to be disturbing.

Consequently, I do think that a university could adopt a flat ban on posting anything on doors, but it would have to be completely viewpoint neutral, and completely content neutral. I think it would be very hard to try to distinguish between political messages as opposed to personal messages. So, if that's the direction Barnard was heading, I think its decision to ban all such postings was correct.

The Tension Between Free Speech and Social Justice

I think that people—and students in particular—are surprised about the interconnection between free speech and human rights—including racial justice, or whatever other vision you might have of social justice. When I speak to audiences—and again, this is particularly true for many students—they are surprised when I attack the common notion that freedom of speech is the province of conservatives, or worse yet, a tool of oppression used by white supremacists. Unfortunately, there are relatively few political liberals of which I consider myself one, who robustly defend freedom of speech.

In a recent interview, I was asked, "Nadine, you are very closely identified with ACLU, which is a left-wing organization; but you're also very closely identified with FIRE which is a right-wing organization. How can you marry those two?"

I said, "Excuse me, but I have to disagree with your premises about both."

Defending freedom of speech takes a bit of explaining, especially to students. In defending freedom of speech, we are not defending a specific idea, nor are we necessarily opposing a specific idea. Rather, we are defending a neutral principle, which benefits whichever

idea is subject to suppression in any particular circumstance.

I would add that there is actually quite a bit of censorship that's coming from the right, including on campuses that are more right leaning. This doesn't get the media play it deserves because I do think that the more right-oriented media have made this a big cause, whereas the liberal media have largely abandoned the issue.

On Being Out-Lawyered and Arrogant

Recently, I was supposed to speak at Yale Law School about the 303 Creative case. You'll recall that this was the case where the Supreme Court ruled 6-3 that Colorado could not force a web designer to design a website that violates her beliefs. I was supposed to debate the attorney who represented the designer and who had won the case. But I declined to debate her because I agreed with her position. Instead, we had a very interesting conversation, particularly about how this case differed from the bake shop case.

In doing my research for the Yale discussion, I realized that in the 303 Creative case, Colorado had stipulated to an incredible number of facts—facts that were in contention in the baking case. Colorado had stipulated that designing a website is a completely expressive activity, that it is artistic expression. Colorado agreed that it conveys a message, and it is perceived as conveying the message of the website designer. They stipulated that she is not a mere conduit. And they said that that there are ample alternative places to have that work done.

I mean, basically, they stipulated away everything. And based on that factual record, I think that Colorado was incredibly arrogant; they were overconfident that they could win on an inflated view of the legal principles.

When I was explaining that at Yale Law School, one of the students raised his hand and said I think it's very clear that Colorado was outlawyered. And I thought, you know, that is such an important point.

People can be—and too often are—so impatient. They just want to get to the conclusion. I was thinking about this in the context of something I learned from Ruth Bader Ginsburg, who, as you may recall began her career at the ACLU. She was always very, very careful to pick cases with very sympathetic, strategically selected, clients and facts. And she often asked her colleagues, "Why didn't you develop a factual record on this? "

My final thought: when we have a law school culture, where so many students believe that they can just shout epithets—indeed, conclusory epithets at others. To do so is the antithesis of the hard work that is essential to developing a factual record and using that painstakingly to craft legal principles.

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