

UNDERSTANDING CIVIL LIBERTIES

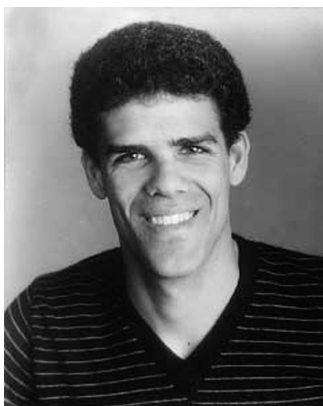
*A Guide
for the Perplexed*



www.nyclu.org

Third Edition,
2010

DEDICATION



JOHN PERRY

Civil libertarian and libertarian, lawyer and linguist, actor and athlete, friend to all foreigners, child of an integrated family, he had a broader view than most. Nothing human was alien to him. In the words of a colleague, he was “a Renaissance man.” For John, it was no contradiction to be a member of the NYCLU Nassau board of directors and a New York City police officer. It was as such that he died on September 11, 2001 as part of the rescue effort at the World Trade Center. He was 38. We salute both John and his mother, Pat Perry, a former board member and chapter president, who together made their dedication to civil liberties a family passion.

This handbook was prepared by the Nassau County Chapter of the New York Civil Liberties Union (NYCLU).

The NYCLU is one of the nation’s foremost defenders of civil liberties and civil rights. Founded in 1951 as the New York affiliate of the American Civil Liberties Union, we are a not-for-profit, nonpartisan organization with eight chapters and regional offices and nearly 50,000 members across the state.

Our mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality and due process of law for all New Yorkers.

Nassau County Chapter:
33 Front St., Suite 205
Hempstead, NY 11550
(516) 741-8520

NYCLU Headquarters:
125 Broad St., 19th Floor
New York, NY 10004
(212) 607-3300

TABLE OF CONTENTS

Introduction

DEFINITION OF A CONSTITUTIONAL RIGHT 7

1. What’s in the Bill of Rights 7

2. What’s in the Constitution 8

3. Right of privacy 8

4. Majority rule v. individual liberty 9

PUBLIC/PRIVATE DISTINCTION 10

5. Searches: why the boss can but the police cannot . 10

6. Constitutional principles and private sector 10

FREE SPEECH 12

7. Free speech for ideas we hate 12

8. Hate speech on campus 13

9. Speech on the airwaves 13

10. Speech on the Internet 14

11. Anonymity online 14

12. Pornography 14

EDUCATION 16

13. Student press rights 16

14. Student free speech rights 16

15. Speech on my website 17

16. “Abstinence only” sex education 17

17. Military recruitment 18

CHURCH & STATE 19

Religion and the Schools 19

18. School prayer 19

19. Religion as a subject in school 19

20. “Intelligent design” 20

21. Vouchers and parochial school tuition 20

Religion in the Public Sphere 21

22. Government religious symbols on public property 21

23. Is the ACLU anti-religious? 21

24. Private religious speech on public property. 22

25. Faith-based initiatives 22

26. Religion and politics 23

OPEN GOVERNMENT 24

27. Freedom of information laws 24

28. Taping school board and other public meetings . 24

EMPLOYMENT 25

29. Employment at will 25

30. Disability	26
31. Equal pay for women	26
32. Sexual harassment	26
33. Drug testing	27
34. Conduct off the job.....	28
AFFIRMATIVE ACTION	30
35. “Reverse discrimination”.....	30
THE POWERLESS	32
36. The homeless	32
37. Voting rights	32
38. Rights of undocumented immigrants	33
39. Legal representation for the poor	33
DISCRIMINATION	34
40. Racial profiling	34
41. Age discrimination	34
42. Private clubs and discrimination	35
SEXUAL ORIENTATION	36
43. Equal rights for gays and lesbians	36
44. Marriage	36
45. Gays and lesbians in the military	37
ABORTION	38
46. Abortion and the death penalty.....	38
47. Minors’ right to an abortion	38
48. Publicly funded abortions for poor women	39
49. “Partial birth” abortion procedure.....	39
DEATH PENALTY	41
50. Deterrence.....	41
51. DNA	42
52. Child molesters	42
MEDICAL PRIVACY	43
53. Testing everyone for HIV/AIDS	43
54. Access to medical records	44
55. “Right to die”.....	44
CRIMINAL LAW & THE COURTS	46
56. Legal “technicalities” and criminal justice	46
57. Miranda rights	46
58. Answering police questions	47
59. Resisting arrest	48

60. Search and seizure	48
61. Search of house vs. search of car	49
62. Surveillance cameras in the streets	49
63. Cameras in the courtroom	50
64. Bail for “dangerous” suspects	50
65. Increased penalties for hate crimes	51
66. Residency restrictions for sex offenders	52
67. Civil commitment for sex offenders	52
68. Victims’ rights	53
69. Recording a phone call	54
70. Double jeopardy	54
71. Trial by jury	54
72. Right to a lawyer	55
73. False arrest	55
74. Accountability of judges	55
75. “Judicial activism”	56
WAR ON TERRORISM	57
76. “No Civil Liberties Abuse Left Behind Act”	57
a) USA Patriot Act	57
b) National Security Letters	57
c) National Security Agency	58
d) Military Commissions Act	58
e) Extraordinary rendition	59
f) State Secrets	59
g) Real ID Act	60
77. Due process for those accused of terrorism	61
AFTERWORD	62
Individual vs. society	62
ACKNOWLEDGEMENTS	63
APPENDIX	64
A. Citations	64
B. Text of Bill of Rights	66
C. NYCLU Chapters	68

INTRODUCTION

The purpose of this booklet is to answer some of the perplexing questions people ask about their constitutional rights and how these rights apply to their daily lives. Some people assume that anything unfair is also unconstitutional, or that every wrong, particularly a serious wrong, violates a constitutional right. Some feel that the Constitution itself, by assuring the rights of unpopular, even hateful, people, sometimes grants too much freedom.

We all believe in individual liberties in principle. We believe that each of us should enjoy freedom of speech and religion, that the accused should have a fair trial, that one's personal beliefs are nobody else's business, that discrimination on the basis of race or sex is bad and that we have the right to be let alone, the right of privacy. It's only when we start applying those principles to everyday life - when my rights bump into your rights - that we run into trouble.

Remember, constitutional rights are not self-enforcing. You must speak up, complain, if necessary go to court, to assert your rights. Since the ACLU often represents unpopular individuals with controversial views, it is often mistakenly identified with those views. But the ACLU promotes no partisan beliefs, other than the belief in fairness for all.

Many of the questions that follow have been posed by people who have asked us for information about rights or to explain the ACLU position on various public issues involving rights. The questions in this handbook are framed as people actually ask them of us or framed by legal experts.

Note: If your constitutional rights are violated, the NYCLU and its local chapters and regional offices are available for information and aid (see Appendix C). If you wish to take legal action, you must consult a lawyer, since this handbook alone should not be considered legal advice in any situation.

1. What's in the Bill of Rights?

Constitutional rights, or civil liberties, are individual rights that may not be violated or taken away by the government nor voted away by the people. They are embodied in the Bill of Rights and other amendments that were added to the U.S. Constitution in order to protect personal liberty from government power and from majority rule. That is, the Constitution defines government power; the Bill of Rights limits it. Those rights include freedom of speech, religion, press and assembly, rights of due process and equal protection. *

Freedom of religion, which precedes speech in the First Amendment, means that the government may not take any religious position itself ("establishment") by favoring one religion over another or religious belief over non-religious belief nor may it interfere with the practice ("free exercise") of one's own religion.

Freedom of speech means not just the right to speak freely, but to read, write, listen, use the public streets and parks for protest and parades, and express oneself "symbolically." For instance, the U.S. Supreme Court found that wearing a black armband to school to protest the Vietnam War, or burning the flag to protest some other government policy, is a form of protected symbolic speech.

Freedom of the press means that the government may neither censor nor compel printed speech, nor interfere with the public's right to receive information. Because of limited access to the airwaves, there is significant government regulation of radio and television in ways that do not apply to newspapers, magazines or books. By and large, though, broadcast speech, including Internet speech, enjoys the same fundamental protection as printed matter.

Freedom of assembly means that individuals may associate with whomever they wish and may act together to increase their political effectiveness. Peaceful picketing on public property near employers or businesses, demonstrations at abortion clinics, and mass marches on Washington to protest poverty or support civil rights are all examples of protected rights of assembly.

Due process means fair procedure for those criminally charged, including freedom from illegal search and seizure (Fourth Amendment); freedom from double jeopardy, from self-incrimination and from the unjust denial of life, liberty or property (Fifth); the right to a speedy and public trial by jury, to be presented with specific charges, to obtain friendly witnesses and cross examine hostile witnesses, and to be represented by a lawyer (Sixth); and

freedom from cruel and unusual punishment (Eighth). Due process rights also apply in civil (non-criminal) matters when the government seeks to deny an individual a benefit (Fifth and Fourteenth).

Equal protection (Fourteenth) means freedom from discrimination on the basis of race, creed, color, sex or national origin.** Rights to equal treatment are generally known as civil rights.

*The full text of the Bill of Rights plus some later amendments can be found in Appendix B.

**Discrimination based on other arbitrary grounds such as age, marital status, disability or sexual orientation is prohibited by federal, state or local laws.

2. What's in the body of the Constitution itself?

The federal Constitution itself describes the powers of the three branches of government - legislative, executive and judicial (Congress, the presidency and the courts) - designed as a watchdog system of checks and balances to ensure democracy and guard against tyranny.

Not satisfied with describing the powers of government, the nation's Founders insisted on a Bill of Rights to guarantee our individual liberties, but also included as a moral imperative in the text of the Constitution itself the ancient English legal principle of habeas corpus, the right of prisoners to challenge the legality of their confinement. Also included in the text are a ban on bills of attainder, i.e. laws targeting one individual or group; a ban on ex post facto laws that bar the conviction of an individual for an act not illegal at the time it was committed; and a ban on any religious test for office.

3. Privacy is not mentioned in the Bill of Rights. Where do we get our rights of privacy?

While the word privacy does not appear in the Bill of Rights, the Supreme Court has nevertheless ruled that the Constitution confers various forms of privacy by protecting rights of belief and association under the First Amendment, by protecting "persons" and their possessions from unreasonable search and seizure under the Fourth Amendment, and by protecting personal decision-making under the due process and equal protection clauses and under the Ninth Amendment. The Court has further recognized beyond these specific provisions a general right of privacy. In simple terms, the Bill of Rights has an "umbrella" effect guaranteeing, in the words of Justice Louis Brandeis, "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."¹

Every personal right, trivial or important, could not possibly have been named or anticipated in the Bill of Rights, which is a statement of broad principles. Birth control as a personal

liberty, for instance, was unimaginable over 200 years ago. Similarly, electronic eavesdropping as an abuse of privacy could not have been foreseen as a violation of the ban on unreasonable searches.

In addition, privacy gains protection from the Ninth and Tenth amendments, which recognize that the states retain rights not explicitly named in the other amendments. Thus the Bill of Rights could apply to a future the Framers could not foresee involving rights of privacy they could not describe.

4. Why should one person be able to overturn a law that everyone wants? Doesn't the majority rule in this country?

In electing our representatives, in setting our domestic and foreign policy, the majority generally rules. But in establishing our constitutional system, the framers also recognized that elected officials, even with majority support, could abuse their authority and violate the rights of the individual. The framers feared a "tyranny of the majority." Thus, individual liberties were deliberately written separately as a Bill of Rights (the first ten amendments to the Constitution) to be beyond the reach of the majority and to protect the people as individuals from the power of the people as a whole. That means that minorities - even a minority of one - have some rights that may not be overruled by the majority.

Recognizing that the people could be swayed by passion and prejudice, the framers designed a system of separate branches of government to check and balance each other. The most important check is an independent court system. Thus, when state legislatures authorize school prayer or when school boards remove library books because of unpopular ideas, the Supreme Court reminds us that rights of speech and belief are not dependent on the popular will. If minorities had to win elections to secure their rights, church attendance might still be compulsory, political protesters might not be able to distribute literature and schools might still be legally segregated.

5. I work in a store. Why can my boss search my bag “at will” but a police officer cannot?

Because a police officer is a government official; a storeowner is not. It is important to remember that the Bill of Rights limits the conduct *only of government* - not the private individual. Who are government officials? the police, the school board, the fire department, the civil service commission, the motor vehicle department, the Social Security Administration, the unemployment insurance office, Congress or any appointed or elected official from the local dog catcher to the president of the United States. Whether their role is as employer or provider of services, their power is curbed by the Constitution and its Bill of Rights.

The private sector is bound by laws - local, state and federal, civil and criminal law - not the Constitution. Thus, a private employer or store owner may search you as an employee (unless you're protected by a union contract) or even as a customer. Similarly, a police officer breaking into your house without a warrant generally violates the constitutional ban on unreasonable searches; a burglar doing the same thing to steal property violates the criminal law but not the Constitution. A dispute with a neighbor or any private party raises legal, but not constitutional, issues. The critical distinction is between public and private institutions.

6. Are constitutional principles ever applied to the private sector?

Although the Constitution limits only government conduct, in some instances its values are incorporated into laws affecting private conduct. For example, equal protection, as embodied in Fourteenth Amendment, is applied through our local, state and federal laws banning discrimination by private employers, store owners and others operating places of public accommodation (swimming pools, movie theaters, etc), real estate brokers, landlords, home sellers, creditors and insurers. Thus, a store owner cannot refuse to hire you because of the color of your skin, your ethnicity, where you're from, what language you speak at home or your religion.

In addition, labor contracts give union members due process and privacy protections when they bar unjust discipline and dismissals or the use of polygraph (“lie detector”) tests.* However, equal protection is the only constitutional principle that has been widely applied by law to the private sector.

* The Federal Polygraph Protection Act protects most *job applicants* in private employment against the random use of polygraph tests, and protects *employees* unless there is a specific incident and individualized suspicion. Government employees enjoy no blanket protection from these tests; it depends on the sensitivity of the job or whether it is protected by a specific state law.



7. Why does the ACLU defend free speech for racists and totalitarians?

We protect free speech for hatemongers in order to preserve free speech for ourselves. If we do not protect speech for a Nazi, we cannot protect it for a Martin Luther King. It is that simple.

Nothing in the First Amendment suggests that speech is protected only if it is true or loyal to the nation. If the government can silence the hated few, then it can silence its own critics, the merely unpopular, the political dissenter, ordinary people, you and me. Rather than government censorship, we rely on a self-correcting marketplace of ideas to respond to bad ideas and offensive speech.

When the city officials of Skokie, Ill. in 1977 tried to prevent a small group of American Nazis from marching, they passed a law banning speech that “incited hostility” on the basis of race or religion, or that “provoked civil disorder.” In effect, the law said, “If you get me so angry that I attack you, you may not speak.”

The U.S. Supreme Court has ruled unconstitutional this “heckler’s veto” that would allow the listeners to stop any speech by simply announcing that they will react violently.² Such a law would have prevented the right to organize unions, to protest the Vietnam or the Iraq war, to march for civil rights, to picket abortion clinics. The First Amendment was intended to protect precisely such expressions of unpopular or controversial ideas.

When civil rights and anti-war demonstrators were threatened with violence and even death in the 1960s, the ACLU demanded that government protect the demonstrators based on earlier Supreme Court decisions upholding the right of an anti-Semite (*Terminiello v. Chicago*)³ and an Ohio Ku Klux Klan leader (*Brandenburg v. Ohio*)⁴ to make racist speeches in public. As Justice William O. Douglas ruled in *Terminiello*, “The purpose of free speech is to ‘invite dispute.’” Time and again, in our defense of civil rights and anti-war marchers, we have come to rely on the protections extended to hatemongers in these and other decisions in order to protect all forms of speech.

Speech that might make a hostile listener angry does not reach those limits and is therefore protected. But “fighting words” that urge a sympathetic listener to commit immediate violence, speech that “incites to riot,” does exceed those limits so that the police can be called to protect public safety by arresting the speaker.⁵

Some fear that racists and fanatics will come to power if allowed to speak. But denying them the right to

speech would make us the very totalitarians we despise. The risk that accompanies freedom is the risk that people will make bad choices, but we cannot avoid that risk without eliminating democracy.

A strong democracy stays strong by safeguarding the speaker, good or bad. Rather than curb speech, we should guarantee that the law allows the utmost freedom of speech so that tyrants seeking or gaining office can be effectively opposed. Nothing is more fatal to bad ideas than opposing them on their merits while defending their right to be heard. As Justice Brandeis said, the answer to bad speech is more speech, not coerced silence.

8. Does free speech include hate speech on the college campus?

Yes, racist remarks between students or delivered by hatemongers invited to speak at public (not private) colleges are entitled to the same protection as offensive speech in the public streets. Banning hate speech on campus has proved unworkable and even counterproductive in fighting bigotry. A speaker shouted down for making racist remarks gets to wrap himself in the First Amendment and becomes the victim, while the intended victims of the remarks are lost in a fight *for* free speech instead of *against* bigotry.

Colleges are above all centers of inquiry and the exchange of provocative ideas. Rather than banning hate speech, administrators and faculty must do the harder job of preventing the protesters from shutting down the speaker, thereby denying the chance to engage in discussion and giving the bigoted speaker a martyr's banner to hide behind. The student newspaper of the University of Wisconsin⁶ challenged the school's "hate speech" code and won when the federal court ruled it was overbroad and not confined to the "fighting words" rule set by the Supreme Court.

While private colleges are not bound by the Constitution, the ACLU believes that the same atmosphere of inquiry and academic freedom should prevail so that students would gain from the same free exchange of ideas.

9. Why isn't hate speech on the airwaves protected?

Private corporations like CBS and *The New York Times* have rights of free speech like private individuals. But the airwaves, unlike newspapers, are limited resources so private broadcasters must be licensed by the government. The licensing agency, the Federal Communications Commission (FCC), can ban the use of obscenity and regulate children's programming but cannot otherwise restrict the content of speech. So CBS, for example, can exercise its own free speech by firing Don Imus for his on-air bigotry.

10. Do free speech protections apply to the Internet?

Yes, but. Attempts by the governments to restrict free speech on the Internet are subject to the same First Amendment limitations⁶ of speech in the public streets or parks. However, private Internet service providers or website hosts, acting as their own editors or publishers, may limit Internet use on their own, and in fact federal law immunizes them from most complaints of censorship by users.

As for minors, the Child Online Privacy Protection Act (COPPA)⁷ specifically protects the privacy of children under the age of 13 from predatory Internet marketers collecting personal information from websites, chat rooms and discussion boards to sell to third parties for commercial purposes. COPPA requires that a website operator targeting children must publish a detailed privacy policy, acquire parental consent before collecting information, disclose to parents information collected, offer a right to revoke consent, to delete or restrict information and a promise to protect the confidentiality of information collected.

11. Do I have the right to remain anonymous online?

Many courts have protected the right of anonymous speech and have refused to require disclosure of the speaker's identity without some very good reason.⁸ However, to date there have been no authoritative rulings in federal or state courts in New York. Voluntary identification by Internet providers is a matter of contract governed by their respective privacy policies, which vary from company to company.

12. Why isn't pornography illegal?

While the term obscenity has been defined by law,* pornography has not, but it is the term most people use to mean sexually explicit material that some find offensive. The First Amendment right of free speech guarantees that no expression may be prohibited merely because its content is offensive. Freedom of expression would have no meaning if a minority, or even a majority, could prohibit material it finds objectionable.

Nevertheless, material that meets the legal definition of obscenity can be regulated. For adults, however, the private possession of such material in the home is protected by the Electronic Privacy Protection Act (EPPA), except for obscene pictures of, or text about, nude minor children. While other obscene material may be viewed in the home, the EPPA does not protect the publisher and distributor from criminal liability.

Although some claim that pornography causes crime, this has never been proved. Material may be sexually explicit, it may be offensive and it may be pornographic without being legally obscene. Thus, if the material does not fall within the Supreme Court's definition of obscenity, its publication and distribution cannot be banned.

Some favor censoring pornography that degrades women as a means of fighting sexism and violence against women. But if speech offensive to women is barred, what would prevent banning speech offensive to blacks, Jews, Catholics, Muslims, gays or any other group that feels offended?

*According to the United States Supreme Court, material may be found obscene if 1) the reasonable person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests, 2) it depicts sexual conduct in a flagrantly offensive way, and 3) it lacks any serious literary, artistic, political or scientific value. All three conditions must be met for a work to be classified obscene (*Miller v. California*).⁹



13. Do student editors have freedom of the press?

Not always. In 1969 the U.S. Supreme Court held that Mary Beth Tinker had a First Amendment right to wear an armband in school to protest the Vietnam War unless the protest was likely to cause “material and substantial disruption” to the educational process (*Tinker v. DesMoines*).¹⁰

Following *Tinker*, editors of public high school newspapers were generally given similar First Amendment protections, limited only by their responsibility to refrain from libel, fraud, obscenity and “material and substantial” interference with order and discipline in the school. They may take political positions, criticize school policy and officials, and comment on budget matters. The same standards apply to “underground” or independent newspapers printed outside of school but distributed in school or reported to school officials.

In 1988, however, the Supreme Court ruled that a student paper produced in a journalism class as part of the curriculum would be considered a school publication and subject to the principal’s editorial authority. (*Hazelwood v. Kuhlmeier*)¹¹. To date, New York and a number of states still adhere to the broader *Tinker* standard.

As for public colleges, student editors generally enjoy First Amendment press protections while editors in private colleges do not. But, of course, the private institution can always give its editors complete academic freedom, not as a constitutional obligation but as a matter of good public policy.

14. Do students enjoy the same free speech rights as student editors?

Yes, the *Tinker* standard for student press rights also applies to any student speech, written or oral. Students may speak, write and meet freely with other students in clubs, organizations, rallies and demonstrations. However, school officials may limit or prohibit the use of vulgar or obscene language,¹² or language that promotes the use of drugs at a school-sanctioned event, even off school grounds. When a student held up a banner reading “Bong Hits 4 Jesus” at an off-campus rally,¹³ the Supreme Court upheld his suspension calling the speech “disruptive.” The Court distinguished that from “Legalize Marijuana,” ruling that the former advocates engaging in an illegal act while the latter advocates changing the law, a political act of protected speech.

For more complete information on free speech and other rights in public schools, see our booklet, "Your Rights in School and in the Community."

15. Can the school punish me for what I say on my own website?

The Student Press Law Center in Washington reports that since May, 2001, in four of the five cases that have gone to court in which students were suspended for posting insults or ridicule about teachers or school officials, the students were reinstated and won damages on the grounds that the posted material did not violate the *Tinker* standard of "material and substantial disruption." But the Center also warns that "some courts are reluctant to tie the hands of school officials, even when the expression exists entirely outside of school." However, for lower courts, *Tinker* is still the standard, even off campus. The Center is a national advocate for student free press rights that provides information, advice and legal assistance free of charge to students and teachers.

16. Why does the ACLU oppose "abstinence only" sex education?

"Abstinence only till marriage" gives the false and misleading impression that contraception is ineffective in preventing pregnancy and sexually transmitted diseases (STDs).

Research from Yale and Columbia shows that 88 percent of teenagers who pledge abstinence till marriage break that pledge and, when they do have sex, are less likely than other teens to use condoms or be tested for STDs. Studies show that the rate of certain STDs among 15-24 year-olds is four times that of adults. A 2006 study by the Guttmacher Institute reported that more than nine out of ten Americans have sex before marriage.

No one opposes telling teens to be abstinent before marriage. The problem lies with federally funded programs that ignore the reality of teen sexuality and forbid teaching them about reproduction and how to prevent pregnancy, STDs and HIV. When condoms are mentioned only to highlight their failure rates, the pregnancy and STD numbers should be no surprise.

Furthermore, abstinence-only education raises civil liberties concerns by banning free expression and information essential to reproductive health. Studies show that comprehensive sex education including messages about both abstinence and contraception, is medically accurate and age-appropriate, and is the most effective way to help young people postpone intercourse and limit sexual partners. Since federal funding is limited to abstinence-only programs, state funding is necessary to provide comprehensive sex education. In September, 2007, the New York State Department of Health rejected federal funding and redirected the matching state dollars for pregnancy programs that teach comprehensive sex education.

17. Can the school give my name to a military recruiter?

Yes, unless you tell them not to. The 2002 No Child Left Behind Act, which authorizes such recruitment, requires schools to notify students and their parents in writing that they have a right to “opt out” by instructing the school not to give any contact information about their child to recruiters. But once you are notified, you or your parents must personally advise school officials that you want to opt out. *If you fail to respond, the school will give out your name.* The school, however, must also tell you that you have a right to change your mind and give you an opt-out form. Nor can the school demand parental consent once you have opted out. To make doubly sure that you are not harassed by recruiters, you should also tell the Defense Department to remove your name from their database.

After a suit filed by the NYCLU based on privacy concerns,¹⁴ the Defense Department agreed in 2007 to modify the data it collects on 16-25-year-olds and to provide a way for them to opt out. The Department must use the database only for recruiting, must not share it with law enforcement, intelligence or credit agencies, can keep information for only three years instead of five, and must stop collecting Social Security numbers. Finally, recruiters must tell students how they can have their information removed from the database. Be aware that refusing to release information to a military recruiter does not bar disclosure to colleges or prospective employers, though the student’s permission is required.

Though the N.Y. State Court of Appeals has ruled that high schools with a non-discrimination policy regarding sexual orientation may deny access to military recruiters on that ground alone, the U.S. Supreme Court has denied that right to colleges, most likely dooming the state ruling for high schools as well.¹⁵

Religion and the Schools

18. Why is school-sponsored prayer impermissible in public school?

At one time New York State prescribed a prayer for students to recite at the start of the school day, but in 1962 the Supreme Court held in *Engel v. Vitale* that such prayer violated the separation of church and state, even when the prayer was non-denominational.¹⁶ Students are a captive audience, the Court ruled, and, particularly when young, defer to the teacher's authority and are subject to the "indirect coercive pressure to conform," in the words of Justice Hugo Black. The Court has further ruled that when a State uses a "moment of silence" as a pretext for prayer, such legislation would be equally unconstitutional.¹⁷

Students may pray on their own, however. New York Education Law does allow a "moment of silent reflection on the anticipated activities of the day."¹⁸ For instance, teachers can call for a moment of silence as needed, to calm a class down before a test or after recess.

The U.S. Supreme Court has ruled that the right to pray on your own does not extend to student-led prayer at graduation¹⁹ or at football games or other sports events. These decisions do not rest on who led the prayer - clergy, coach or students - but on the fact that school officials set aside time for prayer, thus lending the state's endorsement.²⁰

19. Should religion be a forbidden subject in public schools?

No, on the contrary, religion has had an important role in the development of all civilizations. History, literature, music and art, not to mention war, all reflect the influence of religion and religious leaders. Since a main goal of the public schools is to help students understand the past and the present, to exclude teaching *about religion* would undermine that goal. Thus, students should have an opportunity to learn about many different religions without violating the principle of government-sponsored religious observance. In fact, in New York, the study of world religions is incorporated into the social studies curriculum from the early grades through high school.

Some secular and religious leaders argue that teaching the "Bible as literature" or singing Handel's *Messiah* violates the principle of separation. The ACLU disagrees: both examples show how religion influenced great literature and music and are just as appropriate

as teaching factually about religion or explaining the meaning of a religious holiday.

On the other hand, the ACLU strongly opposes any program of religious indoctrination or celebration - direct or indirect - in the public schools as a violation of the separation of church and state.

20. Why shouldn't "intelligent design" be taught alongside evolution in the science classroom?

Because it is religion masquerading as science, or "creationism lite."* Creationists insist that no evolution ever occurred in the first place, that the Book of Genesis explains all. Advocates of intelligent design (ID) may accept natural selection, explaining its origins not on evidence but on the lack of it: therefore, there must be a supernatural designer.

But evolution doesn't compete with religion. It deals strictly with the idea that living things have the ability to change over time. Indeed, the late Pope John Paul II himself stated that there need be no conflict between religion and science on this issue.

When the teaching of ID was challenged by parents in the Dover (PA) school district, Judge John E. Jones III of the federal district court ruled that the teaching of ID is not science and "cannot uncouple itself from its creationist, and thus, religious antecedents....To be sure, Darwin's theory of evolution is imperfect. However, the fact that a scientific theory cannot yet render the explanation on every point should not be used as a pretext to thrust an untenable alternative hypothesis grounded in religion into the science classroom or to misrepresent well-established scientific propositions." He concluded that it is "unconstitutional to teach ID as an alternative to evolution in a public school science classroom."²¹

However, the Dover ruling has not stopped other attempts to introduce ID into the schools, or at least to require more scrutiny of specific curricula regarding natural selection, as the Texas State Board of Education ruled in March, 2009. Since Texas sets the bar for textbook publishers, it is important to watch.

*Coined by Eugenia Scott, executive director, National Center for Science Education. The teaching of creationism itself was rejected by the U.S. Supreme Court in 1987 in *Edwards v. Aguillard*, 482 US 578.

21. Why does the ACLU oppose the use of vouchers for parochial school students?

Separation of church and state imposes a bar against direct government subsidies of religious institutions, be they churches or schools. Using vouchers for parochial education is an indirect subsidy of religion and a thinly veiled effort to avoid the constitutional bar against direct aid to religious institutions. Parents should, of course, have the right to send their children to

religious schools but that does not include the right to have that education subsidized by taxpayers.

Religion in the Public Sphere

22. Why does the ACLU oppose government-sponsored religious symbols on public property?

Our nation has been spared the religious strife that has plagued many other nations largely because of the separation of church and state. Separation means that the state must neither “establish” any religion nor prohibit the individual’s “free exercise” of religion.

Government-sponsored displays of stand-alone religious symbols (i.e. unattended by a private sponsor) on public property send a message that the state endorses a particular religion. Though the Supreme Court has upheld a government crèche on government property when its religious message is blunted by a secular setting, such as snowflakes and reindeer,²² this ruling has quickened religious tension rather than quelled it. The wall of separation should not depend on a candy cane or a reindeer count. The notion offends both nonbelievers and true believers.

Adding religious symbols - a menorah to balance a crèche, for example - does not cure the problem but compounds it. To include some symbols is to exclude others, and it is impossible to represent all types of belief or non-belief. If the state is neutral, no one group or individual can feel slighted. Under our Constitution, the fact that a majority may endorse one religion does not diminish the state’s obligation to remain impartial.

23. Does that mean the ACLU is anti-religious?

Absolutely not. While the First Amendment prohibits the establishment of religion, it also protects the freedom to exercise your beliefs without government interference. When the government does interfere with free exercise, the ACLU challenges the interference. Among the many recent ACLU cases, it successfully represented a Christian valedictorian in Michigan when the public school removed her favorite biblical quote from the yearbook and school officials agreed to stop censoring religious entries. The ACLU also supported the right of evangelists to preach on the sidewalks of the strip in Las Vegas. It defended Massachusetts students punished for distributing candy canes with religious messages. It safeguarded a Nebraska church facing eviction by the city of Lincoln and the right of a Long Island church to post a sign free of government oversight. Not least, the ACLU won a victory for the late Rev. Jerry Falwell that struck down a provision of the Virginia constitution banning religious groups from organizing.

The First Amendment requires the government to keep mum on religion so that individuals can speak up and pray freely on their own.

24. Is religious speech ever permissible on public property?

Yes. The ACLU does not oppose privately sponsored religious symbols in an “open forum” traditionally used for all kinds of speech. For instance, the U.S. Supreme Court ruled that the state of Ohio could not prohibit the Ku Klux Klan from placing a cross in front of the state capitol because that land was a traditional public forum open to other political and religious symbols.²³ Similarly, the high court ruled in 2005 that the Ten Commandments placed on Texas state capitol grounds in 1961 could remain as a historic monument in a setting of 38 other monuments and markers commemorating Texas history.²⁴ But at the same time, it let stand a lower court ruling that banned the stand-alone Ten Commandments that Judge Roy Moore placed in the rotunda of his Alabama courthouse with the clear intent to deliver a religious message. The courthouse is not a public forum.²⁵

If, however, the government offers a public space for the display of private art that the government itself wants to sponsor, that sponsorship does not create a “public forum” for any other art.

As for the public schools, the same principle of equal access applies when they open their facilities to student clubs or community groups after school hours. Religious groups have equal access as all others, on a first-come, first-served basis.²⁶

25. If the government may not support religion, what is the “faith-based initiative” all about?

In the past, religious organizations could accept federal funding to provide food, shelter, counseling, child care and other services as long as they created a separate entity to channel the money and refrained from serving a religious message along with the soup. That separate entity assured that religion was not part of the services provided. The 1996 Welfare Reform Act and the Bush administration’s faith-based initiative have removed that safeguard, opening a door for religious institutions to proselytize while feeding and counseling and to discriminate in hiring. Thus, families could be pressured into participating in religious exercises in order to receive critical benefits. And a group may decide against hiring someone from a different faith even though the program is federally funded by all taxpayers.

Thus, the faith-based initiative violates church-state separation all around: It promotes publicly funded employment discrimination, it deprives its beneficiaries of religious liberty (“listen to this sermon or no soup”), it requires taxpayers to pay for beliefs they don’t support, and it subjects the faith community to government oversight.

In this last violation lies the irony: The Supreme Court bars “excessive entanglement” between government and religion by requiring the government to monitor the funds it dispenses. But the faith-based initiative allows no middle ground. Since the government is itself promoting the religious overlay, it cannot possibly conduct impartial oversight. The faith-based initiative has turned church-state separation on its head.

The ACLU, Americans United for Separation of Church and State and the Freedom from Religion Foundation have had some success in challenging individual programs. But in June 2007, the Supreme Court ruled that taxpayers have no standing to challenge an executive order, as opposed to congressional action, providing aid to religious institutions, so the concept of the faith-based initiative remains intact until challenged anew.²⁷

26. Can religious institutions get involved in partisan politics? Support candidates?

No, but nothing prevents any clergy or religious institution or non-profit organization from taking positions on any public or social issue, as long as they do not support or oppose candidates. It’s political *parties* that tax-exempt groups must avoid at risk of losing their tax-exempt status, not political *issues*.

There are no constitutional restrictions if there is no tax-exempt status at stake. Thus, the Supreme Court has held that clergy, as long as they can separate their institutional and individual capacities, cannot be barred from running for public office or from endorsing political candidates.

27. What is the Freedom of Information Law? How do I find out what information the government has about me?

In a democracy, the government should operate in the sunlight so that it can be held accountable for its actions. The N.Y. State Freedom of Information Law (FOIL) and the federal Freedom of Information Act (FOIA) are powerful legal tools that you can use to compel government officials to release documents they have about you. If you or your organization is engaged in peaceful political protest or dissent, you can file a FOIL or FOIA request to find out if the government has a file on you. For instance, the NYCLU used FOIL to force New York City to release the records on the hundreds arrested for peacefully protesting the Republican National Convention in 2004.

Under FOIL or FOIA, you may also request information about agency rules of operation, as long as what you request does not affect the privacy or safety of others. The operating principle is that all records are available, with certain exceptions. For instance, you may learn the final decisions of all government agencies, but not the discussion leading up to those decisions.

Check the NYCLU website (www.nyclu.org) to find out how to file a request for your FOIA records held by the federal government. For state records, either personal or agency, contact the records access officer of the agency at issue. Write the Committee on Open Government, 41 State St., Albany NY 12231, or call (518) 474-2518 for advisory opinions or their free booklets on FOIL, the Personal Privacy Protection Law or the Open Meetings Law.

28. May I attend and tape record school board and other public meetings?

Yes. Under the state Open Meetings Law, you may attend the meetings of all public bodies including school boards and listen to the debate. As a result of two lawsuits brought by the Nassau Chapter of the NYCLU²⁸, you may both audiotape and videotape the proceedings in an unobtrusive manner.

29. Does my employer need a good reason to fire me?

In private employment

Yes and no. In New York, a private employer not subject to a union contract generally can fire an employee for a good reason, a bad reason, or no reason, under the so-called employment-at-will doctrine.²⁹ Thus, you can be fired for being sick, for incompetence, for coming in late, because the boss does not like you or wants to give your job to a relative, or for virtually any other reason.

However, there are a few important exceptions to this general rule. Various federal and state laws prohibit discrimination in private and public employment on certain grounds (e.g., race, religion, national origin, sex, sexual orientation, age, marital status or disability) or in retaliation for actions such as supporting a union, complaining about job safety, or filing a discrimination charge. Union members protected by contract generally may not be discharged except for “good cause.” In New York, private employees who disclose illegal or improper employer practices (“whistleblowers”) are protected if their charge concerns public health or safety (i.e. a report of fraud alone is not protected).

In public employment

In public employment, some employees have job security under the Civil Service Law, which generally protects non-probationary employees against dismissal without good cause.²⁹ Public employees *without civil service protection* can usually be dismissed unless the issue involves

- 1) exercising a constitutional right, such as free speech, religion or assembly;
- 2) objecting to unconstitutional actions, such as unlawful search and seizure by the employer;
- 3) a “justified expectation” of job security;*
- 4) a public accusation that could damage one’s reputation; or
- 5) “whistleblowing” about certain illegal, improper or unsafe practices.

* The employee has come to rely on the security of his job either because of long employment or the employer’s implied or stated assurances.

30. Can I be denied a job due to my disability?

Not if you can do the job. The federal Americans with Disabilities Act (ADA) prohibits discrimination in employment against individuals with disabilities.* It was enacted to combat prejudices that limit the opportunity of disabled persons to work and to be self-supporting.

Under the ADA, an employer may not refuse to hire and may not discharge or otherwise discriminate against a qualified individual with a disability who can perform the essential functions of the job. An employer must make a “reasonable accommodation” for a known disability if doing so will enable the individual to perform those essential functions. This requires an objective evaluation of the individual and the job. Reasonable accommodations might include amplifying telephones for the hearing-impaired, installing ramps and raising desks to accommodate wheelchairs, adjusting hours to accommodate kidney dialysis appointments, or assigning other job duties. An accommodation need not be made, however, if it would pose an “undue hardship” for the employer (either a significant difficulty or expense).

The ADA applies whether the impairment is mental, emotional or physical, and covers those with a current disability, a history of disability, or those regarded as disabled. Employees addicted to alcohol or illegal drugs are also protected, if job performance is not impaired, but the protections are different. While alcohol addicts do not have to be rehabilitated, drug addicts may not be current users and must be rehabilitated or in a rehabilitation program.

An employee who is temporarily disabled and cannot do the job even with an accommodation may be eligible for an unpaid leave of absence of up to 12 weeks under the Family and Medical Leave Act. This provision applies where there are 50 or more employees.

*The ADA applies only to employers with 15 or more employees. In New York, employers with four or more employees are subject to the N.Y. State Human Rights Law, which provides similar protections for disabled applicants or workers.

31. Are women doing the same job as men entitled to equal pay?

Yes. In 2009, Congress strengthened equal protection by passing the Lilly Ledbetter Fair Pay Act that removed the time limitations for filing a discrimination suit by gearing the filing date to the most recent discriminatory paycheck.

32. What is sexual harassment on the job?*

Sexual harassment on the job, which includes same-sex harassment, occurs in two types of situations. In the first, the employ-

ee must grant sexual favors or put up with unwelcome sexual advances to get, keep or advance in a job. The employer need not openly state the connection between the sexual favors and the job or benefit, but the employee must reasonably believe that s/he will lose or be denied a job or benefit for refusing sexual advances. For example, if the boss makes an unwelcome suggestion to the employee that sharing a motel room might lead to a promotion, that is sexual harassment.

In the second situation, sexual harassment occurs when the offensive conduct by the employer or co-workers is so pervasive or severe that, to a reasonable person, it creates a "hostile work environment." The employee need not suffer a tangible harm, like losing a job or benefit, or sustain emotional injury to claim that the work environment is hostile; it is enough that s/he reasonably feels humiliated and demeaned by the sexual conduct. However, one flirtatious comment or off-color joke or horseplay between two individuals is not sexual harassment, unless it becomes widespread, persistent and extreme. But offensive jokes and language, unwanted touching or a request for sex, personal comments about the employee's body or clothing, or a sexually provocative poster are all examples of a hostile work environment.³¹

When job performance or emotional well-being is seriously harmed, the ACLU believes that speech or conduct that might be protected in other contexts is not protected in the workplace because of its unique features: the reality of power relationships, the need to keep one's job, and the limited ability to respond.

*Sexual harassment of students and teachers is also prohibited in schools under Title IX of the Education Amendments of 1972, which applies to any school receiving federal funds; this includes most schools and colleges.

33. Why does the ACLU oppose drug testing on the job? In school?

In private employment

While New York law does not ban drug testing in private employment, taking a urine sample under the supervision of an observer is inherently intrusive and offensive. Moreover, the testing process can reveal much private information that an employer has no right to know, such as pregnancy, medical conditions or the use of prescription drugs. Because of this, medical examinations, including drug tests, are not allowed in New York until *after* a job offer has been made.

Privacy aside, drug tests are also unfair because they can falsely label the individual a drug user. "False positives" may result from unreliable test methods and from human error in collecting and testing the urine. Even the employee's use of prescription and certain over-the-counter drugs, foods such as

poppy seed bagels, herbal teas and tonic water, or exposure to second-hand smoke can result in false positive tests.

In fact, in 1990 the Appellate Division of the Supreme Court of New York ruled that when a job applicant claims that the test is a false positive, the employer must give the applicant every chance to prove that the test was wrong by repeating it.³²

Moreover, since drug tests cannot reveal when a drug was used, the test it has little value in determining current impairment on the job. That can be measured by performance tests of eye-hand coordination and alertness. In fact, relying on drug tests is false comfort: drugs taken shortly before a test will not show up in the urine for several hours and will therefore remain undetected. Performance tests are less costly, more accurate and more dignified than drug tests.

In public employment

Public employees and job applicants are protected by the Fourth Amendment, which prohibits unreasonable searches and seizures. Generally, a public employer may not require a drug test without at least individualized, reasonable suspicion that the person is impaired on the job. But the U.S. Supreme Court has made exceptions for jobs involving public health and safety, such as police, firefighters, prison guards, air traffic controllers, and drug enforcement officers, or for certain industries, such as nuclear plants and horse racing.³³

In school

Public school students, however, do not enjoy the same protection from random drug tests as most public employees. The Supreme Court has ruled that high school athletes³⁴ and those engaged in competitive extra-curricular activities like the debate or chess team³⁵ may be subject to routine, suspicionless drug testing on the grounds that minors do not have the same rights as adults and that school athletes and competitors serve as role models for their peers. Summing up ACLU objections to the ruling, former Justice Sandra Day O'Connor's dissent answered the majority's claim that random tests would avoid the problem of choosing suspects arbitrarily: "Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment."

34. Can my boss take action against me for conduct off the job, such as smoking or drinking?

No. New York law bars discrimination for certain legal off-duty and off-premises conduct, including activities such as smoking and drinking by adults, but does not protect the use of illegal drugs or any other illegal activity.³⁶

The law also covers recreational activities such as auto racing, sky diving, viewing adult films, and certain political activities, including running for public office, supporting a candidate, or fundraising. These protections apply only to conduct outside

work hours, off the employer's premises, and without use of the employer's equipment or other property, such as a car.

The law does not, however, prevent an employer from holding an employee to its standards of performance and conduct on the job. Moreover, the law has many exceptions, including a catch-all exclusion for conduct that materially conflicts with the employer's business interests. (For example, the American Lung Association could probably refuse to hire a smoker.)



35. If discrimination is illegal, why do we need affirmative action? Isn't that reverse discrimination?

In 1965, President Lyndon Johnson put teeth into civil rights law. Understanding that freedom was not enough, he said:

You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others' and still believe that you have been completely fair. It is not enough to open the gates of opportunity.

Thus began a deliberate effort to overcome a history of persistent discrimination that dates from slavery. Exclusion by race must be met with inclusion by race. If we refused to be color-blind as our ideals demanded, we must now be color-conscious; race-consciousness to exclude and race-consciousness to include are not morally equivalent. Radiation can cause cancer but is also used to cure it. The same weapons of war are used to defend as well as to attack.

Giving special consideration to qualified minority members and women does not mean accepting unqualified job or college applicants, but it does mean considering factors other than test scores. Otherwise colleges would not need admissions committees. But colleges often take football players, violinists, rural or low-income applicants, class leaders and children of alumni and of major donors who score lower than others.

Civil service gives preference to veterans. The "old boys' network" gives the job to the banker's or the trade unionist's son. Very few complain. Only when race or gender is factored into the decision is the question of merit or reverse discrimination raised.

Race Matters

Even so, claims of reverse discrimination are anecdotal and exaggerated. An Urban Institute study of equally qualified blacks and whites in Washington and Chicago showed that whites were offered jobs three times as often as blacks, were interviewed longer and were steered to better jobs. Black men and white women still earn 70 percent of what white men do, black women 62 percent.

It is generations too late for the notion of race neutrality to serve as anything but a protector of the status quo. As the late Supreme Court Justice Harry Blackmun said in the 1978 decision in *Regents of Univ. of*

*Calif. v. Bakke:*³⁷

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

Unfortunately, the Bakke decision made the choice voluntary. While states may use race (but not quotas) as a factor to achieve diversity, they may also opt out, which four states have done (to date). So state initiatives in at least three states - California, Michigan, and Washington - bar colleges from using race as a factor, but they may still use any other non-academic criteria, such as geography, athletics or alumni parentage. Ironically, race has been denied the equal protection of the law.

In June, 2007, however, a 5-4 Supreme Court ruling declared that public schools could not voluntarily use race in their admissions programs to achieve racial diversity.³⁸ But because remedying discrimination is a compelling interest, if a school is found to have engaged in past discrimination, a court or administrative agency will allow a narrowly tailored race-conscious remedy.



36. Do the homeless have any rights?

Yes, they can live on the streets and they can vote in elections. Though it may be more pleasing to make the homeless less visible, the law forbids taking into custody those who are not a danger to themselves or others. While the state must provide shelters, the homeless are not compelled to seek them.³⁹ In New York City, despite orders to round up street dwellers in very cold weather (below 32 degrees), those who can demonstrate the ability to feed and protect themselves cannot be taken into custody against their will. Homeless people who break a public health law by urinating in the street can be arrested for that reason but not for simply being homeless.

Affordable housing and intervention before people lose their homes would help clear the streets. No matter what services the homeless need - medical, drug or job counseling - they still need housing. To quote writer Anna Quindlen, "People don't stop being homeless when they get clean and sober, or when they take their medication...or when they find work...or when the cops move them from place to place, or we decide they're bad people anyway. They stop being homeless when they find homes."

37. How can the homeless vote? Can those involved in the criminal justice system vote?

Homeless people who wish to vote can do so by listing on the voter registration form (obtainable from a post office) the place where they spend most of their time - a mission, a park, a street corner, a shopping center - so that the Board of Elections can place them in an election district. And to receive a ballot, they must list a mailing address, if different, where they are known and can receive mail, i.e. a friend's home, a mission, soup kitchen or post office box.

In New York, people may vote who are in jail awaiting trial or serving time for less than a felony, or sentenced to probation for a felony or a charge less than a felony. Those in prison or on parole for a felony lose their right to vote until after release from prison and discharge from parole.

The distinction between probation and parole is that probation is usually the sentence itself with no prison time but can be both, while parole is release after serving time in prison.

38. Do undocumented immigrants have any rights?

Like all residents, undocumented immigrants are entitled to due process (fair procedure) in the courts and to free, public education for their children. In 1982, the Supreme Court ruled that denying schooling to undocumented children would not decrease unauthorized immigration and would create an underclass, thereby increasing social costs. This would harm innocent children who “can affect neither their parents’ conduct nor their own status.”⁴⁰

The only federal social service benefits undocumented aliens may receive are emergency Medicaid, food under the WIC program (for women, infants and children), and school lunches and breakfasts. Individual states may provide broader benefits.

In addition, in order to discourage unscrupulous employers from exploiting the undocumented, the Supreme Court and Congress have ruled that all federal labor laws (e.g. minimum wage, union organizing and employment discrimination) apply to all immigrants regardless of status.

According to the Urban Institute, “Immigrants actually generate significantly more in taxes paid than they cost in services.” This is because undocumented workers, though ineligible for most federal benefits, have Social Security and income taxes withheld from their paychecks.

Please note that there is no single definition or clear line defining “undocumented.” An individual can be applying for status or appealing a denial and have no formal legal status. The Immigration & Customs Enforcement (ICE, formerly INS) has as yet no single, reliable, up-to-date computer data base defining status, nor any easily recognizable document demonstrating legality.

39. Is every poor person involved in a legal dispute entitled to free legal representation?

No. Only those accused of crimes or involved in certain Family Court matters are entitled to Legal Aid attorneys or court-appointed attorneys, if they cannot afford counsel.*

Poor people who are involved in landlord-tenant disputes or who have problems securing government benefits or services such as public assistance, Medicaid, food stamps or disability benefits may be eligible for (but are not automatically entitled to) representation by the Legal Services Corporation, a federally assisted program. Eligibility for benefits is subject to individual circumstances, including income and size of family, and can be adjusted up to 200 percent of federal poverty guidelines. (See the telephone book for the Legal Services office in your area.)

* See Question #59 for more information.

40. If the police are looking for a black or a Muslim, what's wrong with racial or ethnic profiling?

Racial or ethnic profiling means using characteristics like skin color, hair, language or any other visible or audible sign as *the only reason* to stop and search someone. This is what prompted Florida and New Jersey police to disproportionately stop black drivers more often than whites on the assumption that blacks were more likely to possess drugs.

But for stops to be legal, there must be some other descriptive clues – yellow sweater, eyeglasses, long raincoat, very tall, very skinny or fat, furtive behavior - to justify the stop. Race or ethnicity can be one factor but it cannot be the only factor to trigger a stop; otherwise, every black or Muslim could be stopped. If the police were looking for a white man, would they stop every white man without some other identifying feature?

41. If age discrimination is illegal, how can a store owner refuse to serve minors?

Under the New York State Human Rights Law governing public accommodations (private businesses that serve the public), a store owner cannot refuse to serve anyone because of race, creed, color, national origin, sex, sexual orientation, disability or marital status. But age discrimination is not barred by this provision of the law, so store owners can refuse to sell cigarettes to people younger than 18 or alcohol to people younger than 21. Bar owners sometimes establish a policy of admitting women at a younger age than men. This is illegal not because it is age discrimination but because it is gender discrimination.

Age discrimination is illegal only in certain circumstances. Discrimination against anyone 18 years of age or older is prohibited by New York state law in employment, public housing* and private, non-sectarian or public education. Discrimination by creditors and insurers-as-creditors is also barred except when age can be statistically related to credit worthiness.

* Discrimination against families because they have children is barred in both public and private housing by the Real Property Law, Sec. 236. Senior citizen housing is allowed.

42. Why can some private clubs discriminate?

While the New York State Human Rights Law prohibits discrimination in public accommodations, genuinely private clubs are not considered public accommodations and therefore can discriminate on any basis they choose. Whether a club is considered a public accommodation depends on the way it operates. The human rights law holds that a club is not “distinctly private” if it has more than 100 members; if it advertises openly for members; if it derives substantial income from the business, professional and educational as well as social functions it offers non-members; or if its members take charitable tax deductions for dues.⁴¹ Meeting any one of those conditions will deprive a club of its private status.

The law acknowledges the state’s compelling interest in assuring women and minorities equal access to the advantages of membership in clubs, a traditional avenue for economic and political advancement, and will allow clubs to discriminate only if they are genuinely private.

Clubs considered public accommodations may continue to use selective criteria for admitting members as long as applicants are not judged on the basis of race, creed, color, national origin, sex, disability or marital status.



43. Why does the ACLU support equal rights for gays and lesbians?

The ACLU believes that all people are entitled to the same rights regardless of their actual or perceived sexual status, whether gay, lesbian, bi-sexual or transgender. Many in the LGBT community are denied jobs, housing, insurance and credit but can file complaints of discrimination based on sexual orientation under local and state human rights laws, just as blacks, Latinos, Jews, Catholics and Muslims can file complaints based on race, religion or ethnicity. Protecting the civil rights of gays and lesbians does not give them special rights, just equal rights. For instance, in 2007, after a court ruled that a landlord created a “hostile housing environment” when it spied on and harassed a gay tenant into leaving, the tenant sued under the NY State Human Rights Law and won \$10,000 in damages.⁴²

44. Why do same-sex couples press for marriage? Aren't civil unions enough?

Same-sex couples make commitments and form families just like straight couples and are entitled to the same protections and recognition that come with marriage. The only possible reason to deny marriage to couples who are same-sex is to send the stigmatizing message that their relationships are less worthy. In any case, civil unions are not even “separate but equal,” since they provide fewer than half the 1,138 federal rights and benefits of marriage.

The human rights laws of NY State, NY City and Nassau County all bar discrimination on the basis of sexual orientation in employment, public accommodations and housing, but that doesn't protect couples who need to be at the hospital bedside in an emergency, who want to be able to make emergency medical decisions for each other, who want to inherit when one dies without a will, and who want to provide their children with the stability and social significance of marriage.

Both the American Psychological Association and the American Psychiatric Association have issued statements in favor of marriage rights for lesbians and gay men, citing the harmful effects of “state-sanctioned” discrimination on mental health.

While the NY State Court of Appeals has recognized gay couples as a family in some contexts, it issued a decision in 2006 upholding New York's refusal to permit same-sex marriage.⁴³ Though acknowledging that strengthening families is a legitimate state interest, the dissenting judges asked how *excluding* gay couples furthers that interest, commenting, “There are enough marriage licenses to go around for everyone.”

Some people think that sexual orientation is a matter of choice, but it's hard to imagine choosing a lifestyle that invites discrimination, hatred, public condemnation, even violence.

45. Won't gays and lesbians in the military threaten morale and effectiveness?

Most military and political leaders recognize that gay men and lesbians have long served ably and bravely, and reject Defense Department claims that acknowledging gays and lesbians will destroy military morale. The same claim was made before blacks and women were integrated into the services. That was pure prejudice, and so is this.

Sexual orientation does not determine if someone will be a "good" or "bad" soldier. No studies have shown any connection between a soldier's sexual orientation and his or her ability to perform military service. That is why 24 other nations allow gays and lesbians to serve openly in the military with no morale problem. It is that experience, talking to his own soldiers and following polls, that has led John M. Shalikashvili, a retired army general who was chairman of the Joint Chiefs of Staff from 1993-97, to change his mind and recommend that the military drop its "don't ask, don't tell" policy.

Like heterosexuals, lesbian women and gay men enlist in the military to serve their country. Sexual misconduct is unacceptable no matter what. The presence of gays and lesbians in the military does not prevent enforcing a code of sexual conduct for men and women, whether gay or straight.

46. Isn't it inconsistent for the ACLU to oppose the death penalty but favor the right to abortion?

It is only inconsistent if one equates the rights of a fetus with those of a live born human being. Opponents of abortion hold that both life and rights begin at conception. When human life begins is a matter of personal belief, but when rights begin is a matter of law. The question then is not when life begins but when life becomes a person in the eyes of the law, entitled to its full and equal protection.

In its 1973 decision in *Roe v. Wade*, the U.S. Supreme Court ruled that a fetus is not a legal person until it can survive outside the womb.⁴⁴ The court did recognize some regulatory role for the state in late-term pregnancy. But the decision reserved the full protection of the law for the point at which potential life becomes a person, at live birth.

For those who support the right to choose abortion, then, there is no legal equation between a fetus and a human being, and therefore no inconsistency in supporting a woman's right to privacy and to control her own body while opposing the official execution of a human being.

47. Why must a minor get her parents' permission to get her ears pierced but not to get an abortion?

While the government recognizes the privacy of the family and the right of parents to make most decisions for their minor children, the government may also intervene when the parent's decision threatens the child's whole mental, physical and emotional future. It would be best if all teenagers could talk freely with their parents and, indeed, organizations like Planned Parenthood encourage that, where possible. But a "compelling state interest" is raised when a teenager seeking an abortion fears that informing her parents will cause alienation, abandonment, even threats to her physical safety. That minor child needs the state's protection just as surely as does the child of a Jehovah's Witness who refuses to allow a blood transfusion, or the child with cancer whose parents elect quack remedies instead of accepted medical therapy. These children have long been protected by court rulings.

The state can intervene only when family conflict raises the gravest issue. Since there is no "compelling state interest" in pierced ears, the state will not intervene between parent and child. Some states require

parental notification when a teenager seeks an abortion. New York, however, has wisely rejected the notion, recognizing that a young person, whose whole life will be affected by her decision, must be able to choose freely whether to terminate or complete her pregnancy, with or without her parent's knowledge or consent.

48. How can a state fund abortions for poor women when the Supreme Court has ruled that such funding is not a constitutional right?

When the Supreme Court ruled that abortions are legal but that the federal government does not have to pay for them, state legislatures were then free to appropriate their own funding. The Supreme Court establishes minimum standards of liberty, but the state government may pass laws that exceed those standards. That is, the Court provides "a floor below which rights may not drop, not a ceiling above which they may not rise."⁴⁵

If the Supreme Court rules that a law is unconstitutional, such as a law banning abortion, then no government body at any level may impose such a law. But the Supreme Court may also rule that a law is neither in violation of the Constitution nor required by it, such as the Medicaid policy funding abortions for poor women. Though Congress voted it down, several states including New York support such funding, as does the ACLU, in the belief that poverty should not prevent a poor woman from exercising her constitutional right to choose abortion.

49. How does the Supreme Court ruling banning so-called "partial birth" abortion affect a woman's right to choose?

Abortions are still legal but, for the first time since its 1973 ruling upholding a woman's right to choose, the Supreme Court has banned a procedure that does not provide an exception for the woman's health.⁴⁶ The minority opinion calls the 5-4 ruling on intact D & E (dilation & extraction), which provides the safest late-term way to protect a woman's health, a "bewildering" rejection of expert medical evidence by the American College of Obstetricians and Gynecologists. In fact, those providing medical testimony opposing the procedure admitted that they had little or no experience performing abortions.

Why is the intact D & E the safest procedure? Because there is no risk of internal injury to the woman when a fetus is extracted whole and destroyed outside her body. In fact, the D & E ensures her ability to conceive again, something that *internal* fetal destruction, still legal, can compromise. It is almost irrational that abortion foes would reject the one procedure that ensures continued fertility.

The fact that the procedure affects only a tiny fraction of women is irrelevant for that small percent who need it, who suffer from uterine scarring, bleeding disorders, heart dis-

ease, compromised immune systems or carrying fetuses with severe hydrocephalus. This ruling by justices posing as medical experts patronizes women by claiming that it saves them from depression at the thought of visualizing the procedure, as if fetal destruction is less “gruesome” if done internally.

The decision does allow an as-applied exception for women at great risk but it can have no practical effect, since a doctor recognizing the need for an intact D & E would have to stop in mid-surgery to go to court.

In fact, no abortion will be prevented by this ban; women whose reproductive health would be preserved by the intact D & E will simply have to undergo a riskier procedure. So abortion foes have succeeded in a first chip at choice but not in preventing abortions.



50. If the death penalty deters crime, isn't that reason enough to have it?

To a reasonable individual, the threat of death or even of years in prison would be deterrent enough to crime. But killing is not a reasonable act. Generally, it is committed out of passion, when logical thinking is suspended, or it is planned carefully to escape detection. In fact, the threat of death does not ordinarily deter an individual who simply does not expect to get caught. That is why, despite popular belief, the death penalty does not reduce the rate of murder and therefore does not deter crime.*

Here are some facts: Death-penalty states, even those with similar population profiles of race, ethnicity and age, do not have a lower murder rate than non-death-penalty states. According to the Death Penalty Information Center, the most recent study (2005) shows that of the 15 states with the highest murder rate, all 15 have the death penalty. On the other hand, of the 15 states with the lowest murder rate, eight have no death penalty. Nor is there any greater rate of attack on police officers, prison guards or prisoners in states with no death penalty.

The inescapable conclusion is that the supposed deterrent effect of the death penalty is not found in real life. It is the prospect of swift, sure punishment, not the severity of it, that deters crime.

In addition, the death penalty in practice is commonly administered in violation of the guarantee of equal protection. It is used far more often when the killer is black, when the victim is white or when both are black. And it is applied inconsistently: it is not used against all of the worst offenders, or against only the worst offenders, and it is used far more against poor offenders. It has caused the death of innocent people and is itself a form of cruelty.

Moreover, many studies now demonstrate the unreliability of criminal trials and the significant number of innocent individuals who are wrongly convicted. Thus, in the end, it is the demand for retribution that fuels the argument for the death penalty. Those who oppose it argue that the state cannot teach that killing is wrong by killing. The ACLU believes that a punishment that is often discriminatory and arbitrary and always irreversible and cruel has no place in a civilized society. In any case, you can't give due process to a dead man.

*The crime that most people fear - random street crime involving assault, robbery, even rape - is not subject to the death penalty. Only first degree murder

- intentional, deliberate killing – and treason, are considered “capital” crimes, punishable by death.

51. Don't the wrongful convictions revealed by DNA testing argue against the death penalty?

Absolutely, but DNA is a relatively new tool to establish innocence and in any case is present in only a small fraction (10 percent) of crime scenes. Also, some prosecutors resist using it to exonerate convicted defendants. Many inmates languish in prison for years waiting for a program like The Innocence Project of Cardozo Law School to take up their claim of innocence and reopen the case.

To date, The Innocence Project has been responsible for the exoneration of 203 wrongly convicted individuals, 51 for murder, 14 of whom were under a death sentence. Those 203 spent an average of 12 years in prison; 25 of them spent more than 20 years in prison. Analyzing the evidence that led to those 203 convictions to see where the faults lay revealed these startling statistics: 75 percent were marked by inaccurate eyewitness accounts; 67 percent by other forensic mistakes; 15 percent by tainted informants' testimony; 25 percent by confessions, coerced or otherwise; 4 percent false guilty pleas. (Yes, it happens.)

If the percent of wrongful convictions among crimes containing DNA evidence were applied proportionally to the vast majority of convictions without DNA evidence, the number of wrongful convictions we would find should give us pause about executing anyone.

52. Should an exception be made for child molesters?

No. The death penalty for child molesters, now adopted by Louisiana, South Carolina, Oklahoma, Montana and Texas, will only exacerbate the suffering of the child and hinder the ability to catch the molester. How? It will make victims less willing to report crimes, since many are committed by family members or friends. Worse, it increases the risk that assailants will kill their victims to avoid detection -- not to mention the traumatizing effect on the victim who must testify at trial when the result may be the death penalty.

53. Shouldn't everyone be tested for HIV/AIDS in view of improved treatments and longer life expectancy?

Yes, but as with any non-emergency medical procedure, HIV/AIDS testing can succeed only with written and voluntary "informed consent." Despite improved treatments and longer life expectancy over the years, discrimination and stigma still attach to AIDS and HIV*, discouraging people from learning their status and unwittingly endangering others. The latest figures from the Centers for Disease Control (CDC) show that at the start of 2004, about 25 percent of the million people living with AIDS were unaware of their status and therefore incapable of protecting themselves and others.

More stringent than federal law, New York law requires counseling before the patient signs an informed consent form for very good public health reasons: forced testing undermines treatment by breaching the trust between doctor and patient. Patients frightened that exposing their AIDS status may lead to loss of jobs, insurance, housing, or friends will not agree to the daily and prolonged cooperation that treatment requires. Patients cooperate best when they are counseled without coercion. If a positive diagnosis is made, the law requires additional counseling to counter its emotional effects and on the need to change behavior.

Any legislative attempt to substitute oral for written consent fails to recognize the difference in consequences between, say, a routine cholesterol test and an HIV test. A signed consent form is the only way that doctors in a busy health care setting can prove that a patient has consented.

Written informed consent means that the patient receives pre-test counseling about the course and length of treatment, will be provided with the required care and insured for costs, and in addition can choose to be tested anonymously.

Controlling the spread of HIV/AIDS requires the patient's cooperation, best obtained with informed written consent, which protects privacy, promotes health care and prolongs lives.

*AIDS (Acquired Immune Deficiency Syndrome) is the disease. HIV (Human Immune Virus) is the virus that causes AIDS but the presence of HIV does not necessarily indicate active illness.

54. How private are my medical records? Who has access besides me?

Only your doctor and other authorized medical personnel have access to your records, unless you grant it yourself. Under the Health Information Privacy and Accountability Act (HIPAA), your doctor and your health plan must give you a clear, written explanation of how they can use, keep and disclose your health information; must allow you to see and get a copy of your records and a history of any disclosure; and must get your consent for any disclosure either for treatment or to any bank or insurer. Health information providers and insurers must adopt written privacy procedures. Exceptions, which existed before this law, include: public health, law enforcement, emergencies, research, identifying a dead body or the cause of death, or national defense and security.

55. Can I protect my “right to die” by refusing medical treatment?

You have a constitutional right to make your own medical decisions, including the right to refuse life-sustaining treatment, but you must make your wishes known in writing while you are still competent to do so. You can do this yourself without a lawyer. In New York, you can use any or all three types of advance directives described below, but the most effective is the health care proxy. The protections in each are as follows:

1. Health Care Proxy⁴⁷

This document, also known as a health care “power of attorney,” authorizes another person as your “agent” to make all your health care decisions when you cannot do so yourself. However, your agent’s right to withhold treatment will not apply to artificial nutrition and hydration (tube feeding) unless the agent has “reasonable knowledge” of your wishes. Therefore, you should be sure your proxy form contains the statement, “My proxy knows my wishes concerning all treatments, including artificial nutrition and hydration, and has full authority to act on my behalf.”

2. Living Will

A living will gives guidance to your family and doctors about your medical care if you should become unable to do so, but does not authorize anyone else to make decisions for you. It is merely an expression of your wishes. Though New York has no law governing living wills, courts and many doctors may accept them if they are written in “a clear and convincing manner”⁴⁸ and contain specific directions about withholding treatment. To be sure your wishes are met, you should sign a health care proxy even if you have a living will.

3. “Do Not Resuscitate” (DNR) Order⁴⁹

A DNR order instructs a health care provider not to use cardiopulmonary resuscitation (CPR) in case you go into cardiac arrest, and applies only to CPR. You can authorize your doctor to complete both a hospital DNR order and a non-hospital DNR order for use by ambulance attendants.⁵⁰ Check with your doctor or hospital to make sure that your orders will be followed, since some doctors may refuse on the basis of conscience.

Federal law requires hospitals to tell you of your right to refuse treatment when you are admitted, but the best way to protect your rights is when you are well. Copies of the health care proxy form are available free from the NYS Task Force on Life and the Law by sending a stamped, self-addressed envelope to “Proxy,” PO Box 1634, New York, NY 10116-1634. Or you can email: www.health.state.ny.us/nysdoh/hospital/healthcareproxy.

Copies of a living will are available free by writing to Choice in Dying, 200 Varick St., New York, NY 10014.



56. Why should defendants go free because of “legal technicalities”?

What some people might consider “technicalities” are often basic constitutional rights. Courts have the responsibility to overturn convictions not because judges are “soft on crime” but when the prosecutor or police have engaged in unconstitutional behavior, such as denying access to an attorney, coercing a confession or conducting an illegal search and seizure.

Due process is necessary to protect our basic principle that a suspect is innocent until proven guilty beyond a reasonable doubt. If you were mistakenly arrested for a crime you did not commit, or you were the victim of a witness or government agent who lied, you would want all the safeguards due you to clear your name. Since we do not know ahead of time which suspects are innocent and which guilty, we give due process to all suspects.

The government has the burden of obeying the law even as it prosecutes people for breaking it. As conservative Supreme Court Justice Antonin Scalia has ruled, “the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”⁵¹ If that means that occasionally a guilty person may go free, the response must be to improve law enforcement practices so that the accused are convicted by their own actions and not by the illegal procedures or shortcuts of the police or prosecutor.

57. What are *Miranda* rights? When does a police officer have to read you these rights?

If you are arrested or taken into custody and questioned by the police, no information you give may be used against you unless you are first informed of your rights. These are called *Miranda* warnings (after a Supreme Court decision).⁵² The police are required to give *Miranda* warnings *only if they take you into custody and decide to question you*, other than asking your name and address. The *Miranda* rule states that:

1. You have the right to remain silent.
2. Anything you say can be used against you.
3. You have the right to have a lawyer present when you are questioned.
4. If you cannot afford a lawyer, one will be appointed before any questioning begins.

However, the police can question you without an attorney present if you go on your own to give information or by request to the police station and you are not in

custody (i.e. free to leave). But if they arrest you after questioning you and wish to question you further, they must give you your *Miranda* warnings. That means they must determine if you knowingly waive your rights to remain silent by asking if you understand each of the rights read to you and if you wish to give them up and talk. Even if you have agreed to talk, you still have a right to change your mind and stop speaking at any point in the questioning.

Miranda rights are based on two constitutional protections. Under the Fifth Amendment, in any criminal proceeding you have the right to remain silent and cannot be forced to testify against yourself. Under the Sixth Amendment, you have the right to an attorney.

If you are questioned in violation of these rules, then the police may not use any evidence obtained from you against you in court. In some states, including New York, if the police know that you are already being represented by an attorney on a pending criminal charge, you may not waive your *Miranda* rights without the presence of your attorney. However, they may question you without an attorney on other unrelated matters, but you still have the right to refuse to answer.

58. Why shouldn't you answer a police officer's questions or agree to a search if you have nothing to hide?

You are not required to agree to a search of your home. If you do not consent, the police can enter only with a search warrant or at least a reasonable basis to believe that an emergency exists since criminal evidence will be destroyed. You are also not required to answer a police officer's questions. It is up to you whether to cooperate in order to avoid being given a "hard time." But even if you think you have nothing to hide, you might unknowingly provide information that could be used against you, such as admitting you were at the scene of the crime or that you knew the victim. Or, if something you have said is rephrased by the police, you may agree to it without realizing that it could be damaging.

If an officer insists on questioning or searching you or taking you to the station house against your will, you should advise the officer immediately that you wish to speak to a lawyer. If you are arrested, the police officer has a right to subject you to a "pat-down" for the officer's protection or, if you are placed in a holding cell, for the protection of other detainees. However, you still have a right to remain silent but you will not be considered for release unless you give your name and address.

59. Is it ever legal to resist arrest?

No. In many states, including New York, the law forbids the use of physical force against a police officer to resist even an unlawful arrest. Technically, you are allowed to respond to an unlawful arrest by verbal protest or by walking away, but without the use of physical force. However, since you may not be able to determine what the law considers a valid arrest, you are advised to save your challenge for the courtroom.

60. Why shouldn't a police officer's search be legal if it is conducted in "good faith?"

When William Pitt declared that the poorest man in his cottage may not be able to keep out the wind or the rain but he may keep out the King of England, he defined the basis for our Fourth Amendment's ban on "unreasonable searches and seizures" of people or their houses, papers and effects. This is to prevent "fishing expeditions," or general searches of the innocent and guilty alike to find evidence of guilt.

If the search is illegal, the Supreme Court has ruled, then the evidence seized must be excluded at trial. This exclusionary rule has served since 1961 to deter illegal searches and seizures by the police.⁵³ Generally, the police can search your home but only after obtaining from a judge a search warrant based upon probable cause (good reason). A warrant must specify your name and address, the room(s) to be searched, the items sought, and the period of time the warrant is in effect. The exception to the search warrant applies if the police have reason to believe that evidence is about to be destroyed or a life is in danger.

A warrant requires the police to wait a reasonable amount of time before entry; "reasonable" is defined by the particular facts at hand. The usual "knock and announce" standard was superseded in 2006 by the U.S. Supreme Court ruling allowing "no knock" entries. The ruling still required a warrant before entry, albeit a "no knock" warrant.⁵⁴

In 1984, the Supreme Court granted a limited exception to the exclusionary rule for warrants that turned out to be defective though issued by a judge in good faith⁵⁵.* New York, however, does not recognize this exception, using its authority to grant more protection to its residents than the Supreme Court requires as a constitutional minimum. The "good faith" of the police officer must be backed up by good evidence.

Over the years a few highly publicized cases in which suspects are freed because of inadmissible evidence have contributed to a public impression that many criminals have been released on "technicalities," but in fact only a small fraction of criminal cases are affected by the exclusionary rule, which has tended to keep police to high standards of procedure in upholding the Fourth Amendment's bar to unreasonable search and seizure.*

* In a strong dissent, Justice William Brennan warned that the “reasonable mistake” exception to the exclusionary rule “will tend to put a premium on police ignorance of the law.”

61. Why is the standard for searching a house stricter than for searching a car?

Not all your property enjoys this same high standard of protection as your house. Because your car can be driven away with potentially incriminating evidence, it may be searched without a warrant. Probable cause to believe that the car contains something illegal is sufficient grounds to conduct a search. If the police stop you for a traffic offense, such as an expired inspection sticker, but notice something illegal in plain sight on the seat of the car, they may search you and your car, including glove compartment and trunk, without a warrant. Car searches involve such a variety of circumstances that it is not possible to list here all the court decisions determining when they are legal or illegal. However, if there is an illegal search of your car or other property, the evidence seized cannot be used against you in court. A 2007 Supreme Court ruling extended this right to challenge an illegal stop to passengers as well as drivers.⁵⁶ And a 2009 Supreme Court ruling applied to passengers the same rules for conducting a pat-down on the street, i.e. the officer must reasonably believe the individual is “armed and dangerous.”⁵⁷

62. What’s wrong with surveillance cameras in the public streets?

While video cameras might be useful in investigating crime, they are of little use in preventing it. Witness the fact that the 2005 London subway suicide bombings took place in the most heavily surveilled city in the world. Better to improve community policing that builds trust and encourages people to report suspicions to the police. Better to improve undercover police work and low tech measures like brighter street lighting than rely on high tech measures that don’t deter crime and create a false sense of security. Drug dealers and muggers just move elsewhere and suicide bombers don’t care if they are video-taped.

Effectiveness aside, ordinary individuals may lose their right of privacy on the street but not their right of anonymity. They should not have to curb their behavior for fear of being watched and photographed in public places or at political meetings. Not to mention the possible abuses that occur when overzealous police officers target communities of color, the LGBT community, religious minorities and women.

Surveillance cameras have been dismantled in Atlantic City, Tampa, White Plains, Mt. Vernon, Newark and Miami Beach for ineffectiveness. We should not have to opt for an expensive system that hasn’t reduced crime where it’s been tried and where it

sacrifices rights of independence and anonymity with no yield in safety. Surveillance cameras produce a false sense of security and divert attention and funding from real crime stoppers, like enhancing community policing.

63. What's wrong and what's right about cameras in the courtroom?

What's right is that trials are open to the public and to reporters just like public meetings of school boards and legislative bodies. If you can videotape the latter, why not the courtroom? Particularly in criminal trials, there are competing constitutional interests at stake that are not present at other public proceedings – the public's right to know vs. the defendant's right to a fair trial, which could end in imprisonment. If a defendant feels that videotaping will taint the proceedings, then the NYCLU feels that he or she should be able to veto the camera. In fact, a survey of judges in New York after a decade of cameras in the courtroom in the 80s and 90s revealed that half thought they threatened judicial independence and distracted witnesses. One third of the judges said they made administrative rulings they otherwise would not have if the proceedings were not broadcast.

Other parties, including the state, should be able to restrict coverage only for narrowly focused reasons, such as the privacy of or danger to children, families, victims of sex offenses, and juries. The presumption should be in favor of an open courtroom but, presuming innocence until proven guilty, the criminal defendant, with the most to lose, must be permitted to veto the videotaping. If the defendant has no objections, however, then the camera should be permitted to video a criminal case.

In a related matter, the NYCLU supports the videotaping police interrogations to verify statements both of the police and the person interrogated. It works both ways: to protect the witness against lying or abuse by the police and to protect the police against false accusations, when the matter may end in a courtroom.

64. Why shouldn't a "dangerous suspect" be denied bail?

The purpose of setting bail is to ensure a defendant's appearance in court. Under our law a suspect is presumed innocent until proven guilty. In 1987, the Supreme Court permitted pre-trial detention on grounds of "dangerousness."⁵⁸ The ACLU believes that the decision dilutes the historic principle of the presumption of innocence.

Jailing untried suspects is punishment for unproven guilt despite the Court's claim that such jailing is meant to protect society, not to punish the suspect. Deprivation of freedom by imprisonment is punishment no matter what it is called. And ironically it is punishment not for the crime committed, but

for a crime not yet committed based on a prediction of *future* dangerousness. Studies show that no one - not psychiatrists, not lawyers, not judges - can predict dangerousness with enough reliability to justify holding a given suspect.

In New York, the law adheres to the original purpose of setting bail to ensure a defendant's appearance in court. The court considers the defendant's reputation, employment record, assets, ties to family and community, seriousness of the crime, past criminal record, prior flight to avoid prosecution, the strength or weakness of the evidence and the possible sentence. By using relevant and reasonable standards, New York has attempted to avoid unjustified imprisonment before trial based on prejudice rather than fact. However, a judge has the discretion to set reasonable bail, which can be appealed.

65. If the ACLU protects hate speech, why does it support increased penalties for hate crimes?

Some people feel that it is unfair to impose one penalty for assault, for instance, and a more severe penalty when the victim is chosen because he is black or gay or Latino or Muslim. What difference does motivation make?

Plenty. A homicide is punished more severely if it is intended rather than accidental. Not only does motive count in criminal sentencing, but it guides all our civil rights laws banning discrimination. Motivation is what makes a legal act - selling a house, offering a job - illegal if the seller or employer rejects an applicant because of skin color or religion or gender or other discriminatory ground. If we can make a lawful civil act unlawful because of hate, we should be able to punish a criminal act more severely because of hate.

Translating hate speech into action deprives not just individuals but classes of people of the right to live and work where they wish, to travel freely and use public facilities. In 1989, Yusuf Hawkins, a young black man whose car broke down in the wrong white neighborhood in Brooklyn, was killed because he was black. That crime not only killed Hawkins but threatened the right of all people of color to travel freely. When crime is motivated by hate, the social harm is increased by the number of potential victims, and society has a right to express its heightened concern.

Hate speech by itself is protected because bad speech can be countered by the corrective of good speech. But hate speech translated into acts of violence is unanswerable without the law's protection. Laws that increase penalties for hate crimes, however, must be narrowly drawn so as to apply only where a direct and serious link between the speech and the crime is proven.

66. Why does the ACLU oppose residency restrictions for sex offenders?

If community safety is our goal, then restricting where sex offenders can live is the wrong solution. It provides a false sense of security, is counter-productive, does nothing to rehabilitate and, worse, can lead to vigilantism.

Short of shipping sex offenders into outer space when they are released from prison, we should be doing everything to guarantee they become useful members of society by making sure they can get and keep jobs, live in stable homes with family, and receive treatment, counseling and monitoring. But the act of identifying sex offenders on websites and imposing residency restrictions merely drives them underground and out from under the watchful eye of the police and probation officers.

A *New York Times* story (3/15/06) reported that in Iowa “nearly three times as many sex offenders have vanished from police surveillance” after the law restricting residency took effect. And the same study reported in Colorado and Minnesota that “where an offender lives appears to have no bearing on whether he commits another sex crime on a child.”

And why should it? Think of imposing a 500 or 1000-foot boundary around a school or playground. That does not prevent a sex offender from moving 510 or 1020 feet away and simply walking across those boundaries. Worse, it tells children they can let their guard down within those limits and makes them more vulnerable.

A word about website notification and how a policy intended to ensure safety actually threatens it: Rather than warn people to stay away, it actually invites vigilantes, as it did in California when a sex offender’s car was firebombed four days after he was named on a website, and in New Jersey, where two men broke into a house and beat a man they misidentified as a recently released sex offender. After two men were killed, Maine took down its registry website as a precaution.

Community notification and residency restrictions do not work. They trigger vigilantism and drive offenders out of sight. Better to provide treatment while offenders are still in prison and then, on release, oversight through continued treatment and monitoring and making it possible to keep jobs and homes. It’s common sense, it preserves rights and it works.

67. What’s wrong with civil commitment for sex offenders after prison?

Civil commitment is hospitalization to treat mentally ill individuals and should not be legally used to extend prison terms. If a sex offender is truly mentally ill, then he should be treated for his illness while still in prison and not years after serving his sentence. In fact, a convicted felon should be evaluated at the start of his sentence and, if found dangerously mentally ill, should be confined to a mental hospital, not a prison.

According to a 2007 NY Times study of civil commitment nationally, psychologists have conducted very little research on relapse prevention because there are no statistics to study on the effectiveness of treatment since so few offenders have been released from commitment.

According to Dr. Fred S. Berlin of the Johns Hopkins Sexual Disorder Clinic in Baltimore, "many Americans think that the only investment in sex offenders should be punitive," even though civil commitment costs four times more per inmate than prison.

Civil commitment is an end-run around a defined prison sentence in order to reassure the community that a dangerous offender will still be locked up. In other words, according to the Times, it is a system not for "managing risks and rehabilitation but for managing public fear." And worse than a defined prison term, civil commitment has no end in sight and becomes a vehicle for permanent banishment.

68. We hear a lot about the rights of defendants. Don't victims have rights, too?

Of course, victims need our help. But, more and more we recognize that, even without constitutional claims, victims of crime need the government's attention beyond the role it plays in prosecuting the defendant.

Under our criminal justice system, a criminal act is a wrong committed against society, so the job of dealing with the accused belongs to government public officials - police, prosecutors, judges and corrections officers. A crime victim serves as a witness and otherwise assists the prosecution. If the defendant is convicted at trial, both in state and federal cases, victims and/or their families have a right to make an impact statement at sentencing, about how the crime has adversely affected them, which the judge may factor into the sentence. If the defendant is convicted, the victim may use the sentence as proof of injury should s/he wish to bring a civil suit for further damages.

In addition, several states have set up compensation agencies. In New York, the Crime Victims Board can compensate victims of violent crimes for non-covered medical expenses, including counseling services, lost earnings (up to \$600 a week to a total of \$30,000), occupational rehabilitation, personal property up to \$500 and transportation expenses for court appearances.

A victim's survivors may be compensated for burial expenses up to \$6,000, and Good Samaritans (who come to the aid of victims) for property losses up to \$5,000 (2009 figures). Senior citizens need not suffer any physical injury to be compensated. Any compensation, however, would be reduced by the amount received from the defendant, from insurance, or from public funds.

69. Is it ever legal to tape record a phone conversation?

In New York state, it is legal to tape record your own conversation, either on the phone or face-to-face, without telling the other person. That is, "A" may record his conversation with "B" but may not record a conversation between "B" and "C." It is illegal to tape record a conversation when no participant has consented, unless a court has given its permission. Only a law enforcement officer or agent may intercept or record a conversation and then only by court order. Laws of other states regulating wiretapping may differ from New York law.

Ownership of the telephone does not generally confer any special privilege. A husband may not record his wife's conversation with her lover merely because she is using the husband's phone. And an employer may not eavesdrop on or record an employee's personal conversation without asserting a valid "business necessity."

70. If double jeopardy is illegal, how can some people be tried twice for the same crime?

The Fifth Amendment protects a person accused of a crime from being "subject for the same offense to be twice put in jeopardy of life or limb." If a person is found not guilty, he cannot be tried again for the same crime in the same jurisdiction. This applies to criminal cases in both federal and state courts. (Double jeopardy has no application in civil cases.)

But a defendant may be tried a second time for the same crime in the same jurisdiction if a jury cannot reach a verdict (hung jury); if a judge properly declares a mistrial; or if, on the defendant's appeal from a conviction, the higher court orders a new trial. In addition, a defendant's act may lead to charges in both state and federal courts, which are considered different sovereign jurisdictions, resulting in acquittal in one and conviction in another. The ACLU opposes this principle of "dual sovereignty" because it guts the protection against double jeopardy. To satisfy both the rights of the individual and of society, the ACLU recommends joining all charges together in one trial from the start, so that either a federal or state court would have jurisdiction over all the charges.

71. If criminal defendants are entitled to a trial by jury, why are some tried before a judge?

In New York state courts, a trial by jury is available to any defendant in a criminal case where the penalty can be more than six months in jail. Some defendants do not want a jury; they may choose to be tried by a judge alone. The choice is the defendant's. In federal court, the prosecutor must also consent if the defendant elects to be tried only by a judge.

72. Is a poor person accused of a crime entitled to legal representation?

A poor person who cannot afford a lawyer will be eligible for a court-appointed attorney, based on the Sixth Amendment's provision of "assistance to counsel" in all criminal prosecutions. The Supreme Court applied this to poor people in its 1963 decision *Gideon v. Wainwright*.⁵⁹ Check the local Legal Aid Society for current financial guidelines defining a poor person. (See Question 38 for poor people and civil matters.)

73. Can I sue the police or the prosecutor for "false arrest" if I'm acquitted of the charges?

Neither one can be liable for false arrest merely because the person arrested and prosecuted is not convicted of the crime. Though you may not be able to sue the police for false arrest, you may have a basis for a civil suit if the arresting officer had no probable cause (reasonable grounds), used excessive force or acted with malicious intent (e.g. harassment, retaliation, or discrimination). Probable cause might be satisfied, for instance, if you are arrested because you match the physical description of the suspect or because you are wearing similar clothing and driving a similar car. Probable cause would not be satisfied, however, if you are arrested because you are a black simply walking in a white neighborhood.

A prosecutor or district attorney suspected of withholding evidence or creating false evidence may not have immunity from either a criminal or civil suit by a private party if the evidence were knowingly withheld or created.

74. Why can't a judge be sued for an unjust decision or for unfair treatment?

Judges must be free to exercise their authority without having to worry about being sued by the losing party. But judges can be held accountable in two ways: their decisions can be appealed to a higher court and their courtroom behavior can be reported to a state agency. A system that allows for review by a higher court while shielding the judge from financial liability protects both the judged and the judges.

In 1988, however, the U.S. Supreme Court ruled that judges could be sued for their administrative, as opposed to judicial, decisions.⁶⁰ If judges have the authority to hire probation officers, they may be sued for discriminatory hiring decisions. That is, a judge who acts as an employer or in any capacity other than deciding cases is not immune from lawsuits in those areas, nor is a judge who engages in a pattern of unconstitutional behavior.

As for the judge's courtroom behavior, any unfair treatment can be reported to the New York State Commission on Judicial Conduct, which has the power to discipline judges. To make a

complaint in New York City, call (212) 809-0566 or write to 61 Broadway, 12th floor, New York, NY 10006. In Albany, write Corning Tower, Suite 2301, Empire State Plaza, Albany, NY 12223.

75. Critics of “judicial activism” say judges should “interpret” law, not “make” it. What’s wrong with that?

Critics of judicial activism usually don’t want judges carving out whole new areas of law that tend to push forward the frontiers of justice and change the status quo. So they object, for instance, to the activism of one court for legalizing same-sex marriage and applaud the restraint of another for rejecting same-sex marriage, calling it the will of the people.

But our Founders contemplated that the courts would resolve the tension between the will of the people and the rights of the individual. So it is incorrect to call it judicial restraint when the majority prevails but judicial activism when the individual prevails.

Was it activism, for instance, when the Supreme Court outlawed segregated schools in 1954; or banned the poll tax, which prevented African-Americans from voting; or upheld the use of contraceptives; or ruled for students that “constitutional rights don’t stop at the schoolhouse gate;” or that women cannot be fired for complaining of sexual harassment or that a poor person accused of a crime has a right to counsel? Each of these rulings “made” new law but which of them would critics of activism overturn?

In fact, in each case, single individuals challenged the prevailing law passed by the majority of lawmakers, but in each case when the individual won, the new right was extended to everyone.

Usually it’s conservatives complaining about “liberal activist judges” but was it activism or restraint when the Supreme Court stopped the Florida presidential vote count in 2000, thus assuring George Bush’s election; or in 2007 when the Court overturned 50 years of racial progress by banning voluntary integration programs in the public schools; or when the same 5-4 majority made it harder to file a discrimination complaint under the Civil Rights Act of 1964 by using a technicality to deny a woman equal pay; or when the same majority accepted the Partial Birth Abortion Ban Act that it had rejected years ago; or when the Court found the District of Columbia’s gun control law violated the Second Amendment?

It seems that judicial activism has become an “equal opportunity” concept.

76. What is the “No Civil Liberties Abuse Left Behind Act?”

It’s our umbrella name for the host of constitutional violations of individual liberties perpetrated by the federal government since 9/11. They are all based on the false premise that freedom, rather than guaranteeing our security, actually threatens it. They are embodied in the abuses of the USA PATRIOT Act, the FBI’s misuse of National Security Letters, the National Security Agency’s spying on Americans, the Military Commissions Act, the denial of habeas corpus at Guantanamo Bay, “extraordinary rendition,” and the proposed Real ID Act. There are more, but these are among the worst. Here they are, described

a) The USA PATRIOT Act

Only about ten percent of the 342 pages of the Patriot Act is dangerous but that ten percent is 100 percent dangerous. Passed by Congress and signed by President Bush in October, 2001 in the panicked aftermath of 9/11, the Patriot Act upends our system of checks and balances that keeps tyranny at bay.

How does it do this? Let us count the ways:

The guiding theme of that ten percent is to loosen and lower standards that apply when the government wants to snoop into our personal records, collect data, search and seize property, wiretap, monitor, surveil the political meetings we attend, or hold immigrants for a long period of time without charges.

“How does that affect me? I’m not a terrorist,” you might ask. Exactly. The FBI no longer has to prove to a court that its target is a terrorist or even a “foreign agent,” since it needs no “probable cause” of a crime to conduct secret searches of homes and businesses (Sec. 218); or seize “any tangible thing” such as personal possessions and information from medical, library or business records (Sec. 215); or lower the standards for “sneak and peek” searches (Sec. 213); or label you a “domestic terrorist” for an act of civil disobedience or for making a donation to an organization on a suspect list (Sec. 805).

b) One of the worst and most far-reaching abuses under the Patriot Act, Sec. 505, authorizes the FBI to spy on you by issuing **National Security Letters (NSLs)** to obtain your library, university, financial, credit, employment, insurance, medical, phone, Internet or other personal records – in effect, authorizing itself without court approval to invade your privacy. And the record holder is “gagged” from telling you. In 2004 the ACLU and the NYCLU sued the Justice Department on behalf of an Internet service provider that had received an

NSL. In 2007, a New York federal court struck down the NSL provision because it prevented meaningful judicial review of gags and violated both the First Amendment and the principle of the separation of powers. The government appealed, Congress amended the law both for better and for worse, the district court declared the amended law unconstitutional and the Court of Appeals has affirmed that ruling.

Consider what the NSL provision has caused: Between 2003 and 2005, the FBI issued 143,000 NSLs, each of which could demand thousands of records. For instance, in 2004 just nine NSLs requested 11,000 separate phone numbers. But from all the 143,000 NSLs, the FBI could document only one conviction based on “material support” for a terrorist organization. The net effect of expanding the government’s power to spy on ordinary Americans is that the constitutional standard of “probable cause” has been replaced by “no individual suspicion required.” The claim of mere “relevance” to an investigation has replaced proof of evidence.

Separate from the PATRIOT Act and not to be confused with the National Security Letter is the

c) National Security Agency (NSA), originally set up to conduct physical and electronic surveillance of foreign intelligence agents by seeking an order from the secret court set up under the Foreign Intelligence Surveillance Act (FISA). The FISA court was established after a congressional committee revealed in the 1970s that the government had been spying on Martin Luther King and other civil rights activists.

After 9/11, President Bush ordered the NSA to bypass the FISA Court and engage in warrantless spying on innocent Americans unrelated to terrorism, by data mining oceans of domestic phones calls and emails with the help of phone companies and Internet providers. This “fishing expedition” is based on the president’s claim that he has “inherent authority” as Commander in Chief to ignore the law and the Constitution. The ACLU has sued both the NSA on behalf of journalists and others who claim their communications have been harmed, and AT&T, in conjunction with the Electronic Freedom Foundation, for cooperating with the NSA. After a court refused to dismiss the ACLU suit, the president submitted one program to FISA rules, but others continue to operate without restraint. The ACLU argues that the president cannot conduct “an indefinite and unlimited domestic surveillance campaign,” and says that this “power grab” in the private realm “can be used to monitor, embarrass, control, disgrace or ruin an individual.” We are awaiting decisions.

d) The Military Commissions Act (MCA), passed in 2006 by Congress and approved by President Bush, eliminates for certain detainees habeas corpus, the constitutional firewall against unlawful imprisonment. Habeas corpus is Latin for “you have the body,” and is the petition ordering the government to produce the body and prove in court its case against the prisoner. The administration justifies its actions by labeling its

detainees not “prisoners of war,” but “enemy combatants,” outside the protections of the Geneva Conventions. Habeas corpus requires due process in the sunlight, not indefinite detention in dark dungeons with no chance to challenge one’s arrest and no meaningful access to an attorney. That interpretation was confirmed when the US Supreme Court ruled in 2008 that Lakhdar Boumediene, a Guantanamo detainee, had a right to habeas corpus and that the MCA was an unconstitutional suspension of that right.⁶¹

Some 230 detainees to date remain imprisoned at Guantanamo. Nearly 30 have been ordered released by federal courts, and dozens more have been cleared for release by the Bush and Obama administrations. President Obama has indicated that some of the remaining detainees will be prosecuted in federal courts, some in “improved” military commissions, and a third group – detainees who are purportedly too difficult to prosecute but too dangerous to release – might be held indefinitely without charge or trial.

e) “Extraordinary Rendition”

In the name of fighting the “global war on terrorism,” the CIA had in the wake of 9/11 ratcheted up the illegal practice of transferring foreign nationals suspected of terrorism to detention and interrogation in countries known for their routine use of brutal interrogation methods. Detainees had been beaten, forced into painful stress positions, threatened with death, sexually humiliated, stripped naked, hooded and blindfolded, exposed to extreme heat and cold, denied food, water and sleep; intimidated by dogs and subjected to mock drowning (“waterboarding”). A more accurate and less cosmetic name for rendition is “outsourcing torture.”

Experts estimate that 150 foreign nationals have been transported in the last few years to Jordan, Iraq, Egypt, Afghanistan, Syria and elsewhere. In the words of former CIA agent Robert Baer, “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want them to disappear – never to see them again – you send them to Egypt.”

f) State Secrets

In *El-Masri v. Tenet*, the ACLU petitioned the U.S. Supreme Court to review the case of Khaled El-Masri, an innocent German citizen who was kidnapped, beaten, drugged and sent to Afghanistan where he was held for five months in the notorious “Salt Pit” and then deposited at night without explanation on a hill in Albania. His lawsuit was dismissed on grounds of the so-called “state secrets” privilege, a ruling upheld by the Supreme Court in 2007. Without high court review, then, the “state secrets” privilege allows the President’s claim of national security to trump judicial scrutiny, thus immunizing the government for subjecting Mr. El-Masri to “extraordinary rendition.” However, the ACLU has now sought a ruling from the Inter-American Commission on Human Rights. The state secrets doctrine was

originally intended to shield from review specific evidence against the government, not to dismiss an entire case before review (*U.S v. Reynolds*, 1953).⁶²

g) The Real ID Act

What's wrong with a national ID card?

Since 1936 when the Social Security Number (SSN) was introduced, Americans have repeatedly rejected the idea of a national ID card as a universal identifier. But in 2005, President Bush signed the Real ID Act into law in an attempt to federalize state driver's licenses into a single national database, thus creating America's first-ever national identity card. The Real ID Act represents one of the greatest assaults on Americans' privacy rights.

So far 15 states—Georgia, Maine, Montana, New Hampshire, Oklahoma, South Carolina, Washington, Alaska, Oregon, Idaho, Arizona, Minnesota, Oklahoma, Louisiana and Missouri—have passed binding statutes refusing to implement the Real ID Act, and ten states have passed resolutions against it. Here's why: Without enhancing our security, the Real ID Act will

- ▶ create a national database of personal information on Americans available to all states and federal agencies,
- ▶ invade privacy by enabling routine tracking by the government and by the private sector of Americans' activities,
- ▶ increase the threat of identity theft,
- ▶ create a bureaucratic nightmare to obtain a driver's license,
- ▶ target immigrants, undocumented residents, and other marginal groups missing official documents,
- ▶ turn the Department of Motor Vehicles into an immigration enforcement agency and
- ▶ require a huge tax hike, since it is an unfunded mandate, estimated to cost the states billions of dollars.

Most troubling is that, while intended to combat terrorism, it will have the opposite effect: it invites terrorists and ordinary identity thieves to sharpen their counterfeiting and bribery skills by providing a "one-stop shop" of information. By 2002, more than 10 million people were victims of ID theft and that was without a handy national database. Not just garden-variety identity thieves, but consider that Timothy McVeigh, the Oklahoma bomber, and nine of the 9/11 terrorists had all the credentials one would need for the Real ID license requirements. ID documents don't reveal intent.

Real ID creates an "internal passport," turning us into a surveillance society where the license to drive becomes a license to leave one's home. For good reason, Americans have consistently rejected a national ID card and should now, too.

77. Why should we not torture those accused of terrorism?

For at least four very good reasons, both practical and moral:

First, the United States has signed the Geneva Conventions, which ban torture of all war prisoners, including our detainees. Ignoring the treaty increases the chances that captured Americans will be tortured.

Second, many detainees in Guantanamo and unknown numbers sent to countries that openly practice torture have turned out to be innocent and have been released after torture.

Third, almost all experts in the field of interrogation agree that confessions extracted under torture produce bad information, since the detainee may say anything to stop the torture.

Fourth, and most important, as Sen. John McCain (R.-Ariz.), himself tortured as a prisoner of war, said, "This issue is not them – this issue is about us. One of the things in prison in North Vietnam that kept us strong was that we knew we were not like our enemies. That we came from a better nation, with better values, with better standards."



Has the ACLU gone too far in protecting the rights of individuals above the rights of society?

In our zeal to defend constitutional rights, have we forgotten about the way real people are affected by crime and drug abuse and racism?

No, we haven't. But however we go about solving those problems, we cannot do so at the expense of the principles that make us free, not just in theory but in practice: Free to speak even offensive speech so that when your opponent is elected to office, you can speak against him; free to say no to your boss's lie detector test based on mere suspicion; free to demand fair procedure so that if your sister is arrested, she doesn't rot in jail.

We protect the rights of people we can't stand, people who say hateful things and commit crimes, because all of us – the guilty and innocent alike – are governed by the same law. If we suspend the law to get at the despised or even the dangerous, then we leave ourselves equally defenseless. If the police can force a confession from a suspect, they can also force a confession from you or me, for a crime we didn't commit.

The Framers of the Constitution did not view individual rights in opposition to the common good but as part of it. Indeed, individual rights were the *highest* good, the very reason government was formed in the first place. At times, the Bill of Rights may make it harder to solve our nation's problems, but democracy was not intended to be a convenient or efficient form of government. Just the opposite. Its very inconvenience prevents our rights from being easily trampled.

The poet John Milton said that necessity is the argument of tyrants. The Bill of Rights – our rights – keeps us free from tyrants and tyranny.

ACKNOWLEDGEMENTS

Acknowledgments:

This handbook was prepared by Barbara Bernstein, editor, and Donald Parker, assistant editor, with the help of Tara Keenan-Thomson, Andrea Libresco, the late Doris Shaffer, NYCLU Legal Director Arthur Eisenberg, NYCLU Advocacy Director Udi Ofer, NYCLU Communications Director Jennifer Carnig, and designers Jax de Leon and Willa Tracosas.



A. CITATIONS

Third Edition
2009

- ¹ *Olmstead v. United States*, 227 U.S. 438 (1928).
- ² *Hill v. Colorado*, 530 US 703 (2000).
- ³ *Terminiello v. Chicago*, 337 U.S. 1 (1949).
- ⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- ⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- ⁶ *UWM Post v. Bd. of Regents of University of Wisconsin*, 774 F.Supp. 1163 (E.D. Wisc. 1991).
- Reno v. ACLU*, 521 U.S. 844 (1997).
- ⁷ COPPA, 15 U.S.C. Secs. 6501-6506.
- ⁸ *Doe v. Cahill*, 844 A.2d 451 (Del. 2005), *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001).
- ⁹ *Miller v. California*, 413 U.S. 15 (1973).
- ¹⁰ *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).
- ¹¹ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- ¹² *Bethel School District No. 40 v. Fraser*, 478 U.S. 675 (1986).
- ¹³ *Morse v. Frederick*, 127 S.Ct. 2618 (2007).
- ¹⁴ *Hansen et al v. Rumsfeld*, filed 2006
- ¹⁵ *FAIR v. Rumsfeld*, 126 U.S. 1297 (2006).
- ¹⁶ *Engel v. Vitale*, 370 U.S. 421 (1962).
- ¹⁷ *Wallace v. Jaffree*, 472 U.S. 38 (1985).
- ¹⁸ NY Educ. Law, Sec. 3029-a.
- ¹⁹ *Lee v. Weissman*, 502 U.S. 577 (1992).
- ²⁰ *Doe v. Duncanville Ind. School Dist.*, 70 F.3d 402 (5th Cir. 1995).
- ²¹ *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 727 (M.D. Pa. 2005)
- ²² *Lynch v. Donnelly*, 465 U.S. 668 (1984).
- ²³ *Capitol Square v. Pinette*, 515 U.S. 753 (1995).
- ²⁴ *Van Orden v. Perry*, 545 U.S. 677 (2005).
- ²⁵ *Glassroth v. Moore*, 335 F.3d 1282 (11 Circ. 2003).
- ²⁶ *Good News Club v. Milford Central School*, 553 U.S. 98 (2001).
- ²⁷ *Hein v. Freedom from Religion Foundation*, 551 U.S._____(2007).
- ²⁸ *Mitchell et al v. Garden City UFSD*, 113 A.D.2d 924; and *Csorny et al v. Shoreham –Wading River CSD*, 2002 WL 32092581 (N.Y.A.D.2Dept. 2003).
- ²⁹ *Murphy v. American Home Products*, 58 N.Y.2d 293

(1983).

- ³⁰ For protection of public employees, see generally *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972).
- ³¹ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems*, 510 U.S. 17 (1993).
- ³² *Doe v. Roe*, 160 A.D.2d 25 (1st Dept. 1990).
- ³³ *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).
- ³⁴ *Vernonia School District v. Acton*, 515 U.S. 646 (1995).
- ³⁵ *Pottawatamie v. Earls*, 536 U.S. 822 (2002).
- ³⁶ New York Labor Law, Sec. 201-d.
- ³⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
- ³⁸ *Parents Involved in Community Schools v. Seattle School District No. 1*, #05-908 and *Meredith v. Jefferson County (Louisville Ky.) Board of Education*, #05-915 (2007).
- ³⁹ *Callahan v. Carey*, 118 A.D.2d 1054, 499 NYS 2d. 567 affd. (1st Dept. 1986).
- ⁴⁰ *Plyler v. Doe*, 457 U.S. 202 (1982)
- ⁴¹ Exec. Law, Art. 15, Sec. 292 (9).
- ⁴² State Division of Human Rights (SDHR) v. Stoute, Index #39304-04 (2007).
- ⁴³ *Hernandez v. Robles*, 2006 WL1835429, NY Ct. Appeals.
- ⁴⁴ *Roe v. Wade*, 410 U.S. 113 (1973).
- ⁴⁵ *California Fed. Savings & Loan Ass. v. Guerra*, 479 U.S. 272 (1987).
- ⁴⁶ *Gonzales v. Carhart*, 550 U.S. ____ (2007).
- ⁴⁷ Public Health Law, Secs. 2980-2994.
- ⁴⁸ NYCRR tit. 10, Sec. 400.21.
- ⁴⁹ Public Health Law 2960-2978.
- ⁵⁰ Non-hospital form available through NYS Dept. of Health. Call (518) 474-7354.
- ⁵¹ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).
- ⁵² *Miranda v. Arizona*, 384 U.S. 436 (1996).
- ⁵³ *Mapp v. Ohio*, 367 U.S. 643 (1961)
- ⁵⁴ *Hudson v. Michigan*, 547 U.S.586 (2006)
- ⁵⁵ *U.S. v. Leon*, 486 U.S. 897 (1984).
- ⁵⁶ *Brendlin v. California*, 551 U.S. ____ (2007).
- ⁵⁷ *Arizona v. Johnson*, 77 U.S.L.W., p. 4096 (2009).
- ⁵⁸ *United States v. Salerno*, 481 U.S. 739 (1987).
- ⁵⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁶⁰ *Forrester v. White*, 484 U.S. 219 (1988).
- ⁶¹ *Boumediene v. Bush*, 553 U.S. ____ (2008).
- ⁶² *U.S. v. Reynolds*, 345 U.S. 1 (1953).

B. THE BILL OF RIGHTS

Passed by Congress, September 25, 1789;

Ratified by the States, December 15, 1791.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Later Amendments Affecting Civil Liberties

Thirteenth Amendment

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Nineteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Provisions of Article I in the Original Constitution Affecting Civil Liberties

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. No Bill of Attainder or ex post facto Law shall be passed.

C. NYCLU CHAPTERS

NYCLU CHAPTER DIRECTORY

HEADQUARTERS

AND NEW YORK CITY REGIONAL OFFICE

125 Broad St., 19th Floor

New York, NY 10004

Tel: (212) 607-3300

CAPITAL REGION

90 State St., Suite 518

Albany, NY 12207

Tel: (518) 436-8594

CENTRAL NEW YORK

753 James St., Suite 8

Syracuse, NY 13203

Tel: (315) 471-2821

GENESEE VALLEY

121 N. Fitzhugh St., Suite 300

Rochester, NY 14614

Tel: (585) 454-4334

LOWER HUDSON VALLEY

297 Knollwood R., Suite 217

White Plains, NY 10607

Tel: (914) 997-7479

NASSAU COUNTY

250 Fulton Ave., Suite 514A

Hempstead, NY 11550

Tel: (516) 741-8520

SUFFOLK COUNTY

Touro Law Center

225 Eastview Dr.

Central Islip, NY 11722

Tel: (631) 650-2301

WESTERN REGIONAL OFFICE

The Ansonia Center

712 Main St.

Buffalo, NY 14202

Tel: (716) 852-4033

www.nyclu.org

