

## Use of University Equipment and Facilities to Access Pornography over the Internet

### 1st Amendment Free Speech in General:

In his book *No Liberty for License: The Forgotten Logic of the First Amendment*, David Lowenthal says the following about the purpose of the 1st Amendment and the need for moderate liberty:

"Created by popular demand, so to speak, the First Amendment guaranteed the freedoms that serve as a bulwark of republican government at the national level - a means of keeping a new and in some ways awesome government responsible to the people. First Amendment freedoms are therefore primarily political in purpose and call for an interpretation consonant with, and not antipathetic to, the end of preserving republican government. Today we tend to begin from the contrary assumption that the focus of the First Amendment is the individual and his rights rather than the needs of the republic or the common good. This understanding of the Amendment has led to a vast over-expansion of individual liberty dangerous to the moral and political health of the republic - and ultimately to liberty itself." (pp. xiii-xiv) (emphasis added)

"Public morality and moderate liberty are mutually consistent and reinforcing, but extreme liberty undermines the conditions for its own preservation and can lead to nothing but the ruin of free society. Moderation stands very close to justice as the guardian of individual rights." (p. 147)

In our modern day, 1st Amendment issues regarding obscenity usually arise when the government is trying to prohibit and criminally punish the publication and/or consumption of obscene materials. The context is one where there is a willing publisher and a willing consumer of the materials. If the government wins, then effectively, all future access to those materials is cut off from the public at large since both the publisher and consumer could be put in jail for their infractions.

As we saw in *Reno v. ACLU* (521 U.S. 844 (1997)) regarding the Communications Decency Act (CDA), the court is very hesitant to allow broad point-of-source regulation of what it deems to be protected speech. The two sections of the CDA that were held to be unconstitutional on 1st Amendment grounds were both criminal statutes. But, it should also be noted that the portion of the criminal statute prohibiting the transmission of obscene materials was held to be constitutional. So even in the case of point-of-source regulation, the government does have some power to regulate through criminal statutes notwithstanding 1st Amendment free speech claims.

### **Reno v. ACLU does not apply to our situation:**

The context of the current controversy on our campus is radically different from the *Reno* case. First, nobody will go to jail simply because he violated an SUU policy regarding computer usage. The Supreme Court in *Reno* noted that the criminal nature of the statutes in question made 1st Amendment issues particularly sensitive.

Second, SUU is not trying to cut off all access to materials on the Internet. It is just trying to

impose reasonable limitations to access on its own campus for the sake of showing respect to the predominant culture and moral environment of the community it serves. If people desired, they could freely access whatever materials they wanted over their own private computers at home. Internet access off campus is both ubiquitous and cheap. SUU makes no attempt to have any influence over off-campus access.

Third, the prospect of punishing for transmission or display is fundamentally different than voluntarily choosing not to receive a particular transmission or display. While SUU could not stop any Internet transmissions, it is free to refuse to receive any or all of those transmissions.

### **Sponsorship v. Censorship:**

Generally, impediments to freedom of speech and press are considered to be less serious from a Constitutional perspective when the case involves relatively minor limitations placed upon access and when other avenues of expression are available. For example, a city was constitutionally allowed to prohibit the posting of political campaign literature on city property even in the face of free speech challenges since there were other avenues of expression open to the candidates. Closing off one avenue of expression did not foreclose all others. (*Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984))

Just like in the foregoing case, SUU cannot be forced to serve as a point of re-publication and re-dissemination of somebody else's materials. It is one thing for the government to try to prohibit publication and transmission from its origin, but it is quite another and different matter when considering the prospect of the government, or any of its agencies, being forced to receive and further disseminate indecent materials through public facilities.

In response to the National Endowment of the Art's (NEA's) sponsorship of various projects that were deemed to be indecent, Congress passed a law requiring the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in determining what projects it would sponsor. Some artists challenged this law claiming it was an unconstitutional violation of their rights to free speech. In the summer of 1998 (a year after the *Reno v. ACLU* case), the U.S. Supreme Court in *NEA v. Finley* (524 U.S. 569) ruled that law to be constitutional even against such 1st Amendment free speech challenges. Thus, the NEA was constitutionally free to reject materials that it deemed to be indecent.

The court said that the government had much more constitutional latitude when acting as a "patron" rather than a "sovereign." In other words, the case had to do more with sponsorship than censorship. In such a case, the court said, "the consequences of imprecision are not constitutionally severe." In other words, in such a setting, a law using a word like "decency" will not be held unconstitutional for vagueness. The court commented that "Congress has wide latitude to set spending priorities."

SUU's situation is very similar in that it is merely acting as a potential patron or recipient of certain materials published by somebody else. It therefore has a wide latitude in deciding how to spend its resources and use its facilities. It too can consider common decency in deciding its policies.

In addition to its status as merely a potential patron of somebody else's materials, SUU would be given even further legal latitude by virtue of its educational mission. Referring to the NEA's educational role, the court said: "It is well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration."

### **"Indecency" vs. "Obscenity":**

One should note the judicial distinction between "indecency" and "obscenity." In the criminal context, obscenity carries no 1<sup>st</sup> Amendment protection and can be prohibited even at the transmission point. By contrast, indecent expression has been deemed in our contemporary times to be protected under that amendment and cannot be blocked from the transmission point. (See *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, (1985))

While lewd exhibitions of nudity may or may not fit within the current judicial definition of "obscenity" (defined later) they would certainly fit within the common meaning of "indecency." Certainly it would in the predominant view of our surrounding community.

By using the word "decency" the court is signaling its willingness to grant government patrons/sponsors much wider discretion in deciding what things they will allow their public facilities to be used to re-publish and re-disseminate. So, while under current law, indecent materials could not be blocked by the government at the transmission point, they can be blocked at the receiving end when the government is acting as a potential recipient.

### **Abuses of Liberty:**

Perhaps the easiest issue to deal with in the current controversy on campus is the graphic nudity displayed on computer screens in public places on campus. This issue presents the most immediate offense to the sensibilities of fellow users of our campus facilities. People nearby are visually assaulted with images that most wish not to see. One might say: "If such images offend them, they are free not to look." But that is about as useful as saying: "If you don't like the smog, stop breathing."

When the irresponsible few misuse their privileges in this way, they pollute the whole cultural and moral atmosphere around them. Whether those around them look again at the pictures or not, the whole atmosphere in the room has changed for the worse. The insensitive abusers seem to take a perverse sort of pride in serving as cultural demolition experts. Sensing this, angers and resentments tend to well up in the minds of the surrounding patrons. Indeed, it may even result in physical confrontations. The Supreme Court has previously held that "fighting words" are not protected by the 1st Amendment. And when people see their whole moral and cultural environment under visible attack, much more is at stake than mere "fighting words."

This whole situation illustrates what James Madison observed in Federalist #63.20: "...liberty may be endangered by the abuses of liberty as well as by the abuses of power;... there are numerous instances of the former as well as of the latter; and...the former [abuses of liberty], rather than the latter, are apparently most to be apprehended by the United States."

Echoing Madison's observation, in his textbook on constitutional law, Raymond Gettel observes: "Liberty may be abused and thus destroy its own purpose and value."

As argued in my earlier letter to the editor, unlimited liberty and civil society are mutually exclusive by nature - we can have one or the other but not both.

### **The Need for Moral Fences:**

Those who are pushing the envelope here seem to want no moral boundaries whatsoever in society. But they should stop to consider G. K. Chesterton's wise counsel: "Don't ever take a fence down until you know the reason why it was put up."

This reminds me of another illustration concerning wisdom. The question is asked: "Which is wiser? To build some guardrails along the cliff's edge of a mountain road or to have a fleet of ambulances parked at the bottom of the cliff?" Our contemporary approach seems to be a parking lot full of very expensive ambulances. The old way was better.

Edmund Burke observed: "Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites....Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters." (Edmund Burke, Works, 4:51-2)

In his farewell address, George Washington said:

"Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instrument of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion.... reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. Tis substantially true that virtue and morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend of it can look with indifference upon attempts to shake the foundation of the fabric?" (Emphasis added)

General Douglas McArthur said: "History fails to record a single precedent in which nations subject to moral decay have not passed into political and economic decline. There has been either a spiritual reawakening to overcome the moral lapse, or a progressive deterioration leading to ultimate national disaster." (*A Soldier Speaks*, pp. 285-86)

## **Why Will People Die for Their Country? Will They Always be Willing to do so?**

The moral environment is the heart and soul of society. Notions of right and wrong, truth and error, morality and immorality, noble and ignoble are critical defining judgments that must be made if we are to expect anyone to feel sufficient loyalty to defend the community from outward threats. For any republic or democracy to survive, the people must be at least as motivated towards duty as they are towards rights and liberty - perhaps even more so.

When individual selfishness is pushed as some sort of all-consuming "right," it is unreasonable to expect any widespread feelings of loyalty to society and culture. It is unreasonable to expect any willingness towards personal sacrifice, particularly those of the ultimate type, for the greater good. For in such a society, nothing is bigger than one's own self. The "me-generation" is destined for eventual collapse.

We may very well be seeing the fruits of this dynamic right now. Many in our military are demoralized. Career people are throwing in the towel. There has been widespread media coverage of our inability to fill open positions -- we are many thousands short. Although some may argue that this is simply a result of low pay and difficult living conditions, I believe something much more troubling is involved as well.

After the recent Presidential escapades and the dismissive response of the majority of Americans to it, one has to ask: "What does America stand for any more?" What is it about her that is worthy to lay down our lives for? Is it liberty unrestrained by any sense of right and wrong, good and evil? -Liberty unchecked by duty, honor and responsibility? Such a state of affairs is not "liberty" in the traditional American sense. Rather, it is mere "license" - a very hollow and worthless shadow of its former self. In the long run, people will never rally around something so empty as the mere concept of "license". In such an environment, at the first sign of trouble, people will tend to head for the hills to save their own hides rather than rush to the battle's front when physical threats arise.

Rome learned this the hard way. When Rome was sacked by the vandals, few came to its defense because by that point in time there was nothing left of "civil society" deemed worthy of being saved. Its decadence had spawned a dry-rot throughout society that sapped its internal strength and resolve. There was no longer any binding commonality of objectives, morals, or vision of destiny. The free bread and circuses weren't enough to rally the people in a life-threatening defense of their country since the heart and soul of their country had long since vanished.

After commenting on the fall of Rome, Russel Kirk observed: "Only the earlier stages of social decadence seem liberating to some people; the last act...consists of death [to the culture and the society] ...." (*Redeeming the Time*, p.14)

Our framers studied well the failures of Athens and Rome and sought to build a political structure that would avoid their mistakes. I believe this is why Washington observed what he did in his farewell address quoted earlier where he tied political prosperity to religion, morality and duty. In short, they understood the need for moral fences.

How could America have come to the point where it would accept the things President Clinton did and allow him to retain his office? I think there are multiple reasons, one of which is the erosion of traditional notions of state and local sovereignty which will be the next topic of discussion. Through that erosion, people felt powerless to take control of the moral environments of their communities. As a result, those moral environments deteriorated significantly. Thank goodness for the recent *NEA v. Finley* case in the U. S. Supreme Court. It is a breath of fresh air and hopefully signals a reversal of dangerous trend towards federal tyranny.

### **State and Local Sovereignty:**

Another critical element in the political structure the framers built in order to preserve the republic was the preservation of state and local sovereignty over most issues of local concern. In particular, issues of morality and the public policies that flowed from them, were left to the states.

One of the principle fears, if not **the** principle fear, of the people during the founding era was the fear of creating too strong of a central government. The common sales pitch of the Federalist Papers and the common belief of those persuaded by them, was that the powers delegated to the federal government were limited and defined and that the powers reserved to the states and to the people were large and residual. Consider a few quotes to illustrate my point.

James Madison's influence over the drafting and adoption of the Constitution was so great that people generally called him "the Father of the Constitution." In Federalist #45 he wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite....The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security." (Emphasis added)

In Federalist #39 Madison said that the federal government's "jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects." Several other quotes in the Federalist Papers buttress the two given here.

So powerful was this thought that the 10th Amendment in the original Bill of Rights itself contains the same specific sentiment: "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."

Had the people believed all of this to be a lie, they would never have adopted the Constitution. They prized their state and local sovereignties too much to give them up willingly. The story of history is the story of people separating themselves from established societies at great costs and risks for the purpose of obtaining the right to local self-determination. One need look no further than the founding of our own country to understand this very powerful human dynamic and human need.

I have more to say on this topic later in my response to Professor Stathis' letter to the editor.

### **The Oppression of Minority Rule:**

In considering the issue immediately before us concerning the use of campus equipment and facilities to access pornography, before calling those who argue for rational balance "extremists," "tyrants," etc., I suggest those with such inclinations look in the mirror- because those who argue for no limits and seek for judicial mandate for that proposition, represent the truly extreme and tyrannical position. And it is the worst form of tyranny since it amounts to a tyranny by the minority.

How could I possibly call such a position tyranny? Because it is extremely oppressive and raises a knife to the heart of sustainable culture and society. It seeks to destroy a fundamental ingredient to all civilized survival. For it seeks to prohibit a majority of the community from defining itself morally and pursuing its right to local self-determination. As I said above, this burning desire within people has driven the history of nations.

Although tyranny of any sort is undesirable, why is a tyranny of the minority worse than a tyranny of the majority? Answer: because it is more dangerous to the long term survival of society itself to have an angry and frustrated majority than merely an angry and frustrated minority. After all, angry majorities are the tinder-box from which revolutions are sparked.

Consider what is at stake here. In our attempt as a community to balance the interests of the individual and the needs of the greater society, we have a few individuals who think they should be dealt a hand full of federal trump cards to veto any attempt at balance because they don't happen to like the way the balance is being struck.

If the minority don't like the locally determined judgment on the appropriate balance, they are free to leave and go to, or create, a community somewhere else where the majority of the people comprising that community see things the same way they do. This is the price people in the past have been willing to pay and this would be the constructive and honorable thing to do. If you do not want to give up certain liberties that this community determines are necessary to give up in order to preserve the rest, as Washington said any society must do, then go elsewhere. You will be happier somewhere else. But don't sit there and demand that your will reign supreme in the matter even over that of the majority within the community.

But I am being too generous to the opposition here. The current proposal regarding computer usage gives up no liberty in the traditional sense. What is really at stake here is the refusal to create a new and bogus "right" - the supposed "right" to expect free access to pornography at the taxpayer expense. I know the Constitution enumerates many rights, but I am having a hard time finding that particular one. Just because somebody says there is such a right does not mean that it is so -- no matter how often they say so.

President Clinton's defenders repeated a gazillion times the following phrase or some variation of it: "what he did was clearly not an impeachable offense." Unfortunately, the clever ruse

worked and people by and large accepted this as being true just because they heard the phrase so often. In short, they were brainwashed. And how easy this is done today in the age of television where sound bites and spin rule, and attention spans have been dumbed down and shortened to mere seconds.

Back to the issue of "rights" being conjured from the ether, this situation illustrates a commonly recognized truth: history tends to repeat itself. The French philosopher Frederic Bastiat criticized the socialists of his day for misusing the word "rights" to describe what really amounted to mere "political demands." (*The Law*, p.64) Similarly today, mere "political demands" are all that is at stake in this controversy. It does not fit within any dignified sense of American "rights" or "liberties." After all, no conscience is being impinged - people are free to think as they please. No attempt is being made to regulate thought. More than ample access off campus is available regarding pornography. What we are saying is, "buy it yourself - don't expect the university to give it to you for free -- that is not a part of our institutional mission. We are here to stimulate your reason and intellect, not your hormones."

### **Why Would Pictures be Needed in Serious and Bona Fide Research Concerning Pornography?**

In recent testimony (3/4/99) before the U.S. Senate's Committee on Commerce, Science, and Transportation, Dr. Mary Anne Layden, a psychotherapist who specializes in sexual violence perpetrators and sexual addiction, made some very interesting points about pornography. In her fourteen years of treating perpetrators of sexual abuse, in only one instance was pornography not involved.

She maintains there is a very powerful "Pornography Distortion" which acts as a "releasing mechanism that allows people to act out." The more one is exposed to pornography, the less potentially offensive and dangerous the materials appear to be in the eyes of the beholder. Attitudes change to allow people to believe several things that are very socially destructive. For example, over time viewers tend to believe that pathological behavior is really normal behavior, it is common among others, it hurts no one, it is socially acceptable, the female body is for male entertainment, sex is not about intimacy, and sex is the basis of self-esteem.

She observed that the power of the visual imagery involved is one reason why this pornography distortion occurs so readily. "When information is passed using words, the listener typically weighs and assesses the believability of the message. Often the listener is counter-arguing inside [his or her] head against the verbally presented message....But images don't work that way....Pictures are mentally processed as events, as facts and are stored unbuffered and unchallenged."

I know someone whose daughter recently told him some very disturbing things that happened during her childhood of which her father had not previously been aware. She said that when she was four years old, a certain baby sitter brought with her some X-rated videos which she played on the T.V. after the parents were gone. The babysitter made the four-year-old watch them with her and would not allow the child to leave the room. The child's age was verified by matching up the geographic location where the event occurred, the length of time that had

expired since the family lived there, and the girl's present age.

His daughter told him that even today as a young adult, the images of those movies will tend to pop into her mind seemingly out of nowhere and they are just as vivid and graphic in her mind today as they were when she first saw them as a four-year-old. This tends to support Dr. Layden's conclusions about how the mind indefinitely stores graphic images as unfiltered facts. Only after the image unexpectedly appears in the mind is some other part of the brain able to rationally deal with the unexpected intrusion by either trying to think of something else, or worse, by dwelling on the mental imagery which will tend to reinforce the memory for future recall. They say a picture is worth a thousand words. When it comes to pornography, that statement of equivalency amounts to a gross understatement.

Is it not rational to consider such powerfully destructive materials as a danger to civil society justifying regulation by the whole rather than unfettered individual liberty? Is this not a perfect example of Washington's axiom regarding the need to sacrifice some liberties in order to preserve the rest for the sake of sustaining and preserving society itself? Despite various cartoons and letters published in our school paper to the contrary, making such rational choices on a local basis is hardly the type of fearful fascist medium from which little Hitlers arise.

Building upon Dr. Layden's analysis, one should ask several questions: Is graphic Internet pornography really needed in order to perform bona fide scholarly research on the topic itself? How many people can we realistically expect will access it in order to stimulate their intellect and reason rather than just their hormones? If the majority will access it for the sake of sexual stimulation and/or to purposefully offend the sensibilities of those around them, then how can one rationally argue that the societal benefits of such access outweigh the costs involved? Why are not the various services like Lexus/Nexus, Westlaw, etc., adequate to perform research in the abstract format dealing with words and ideas rather than pictures?

Through those research services, students have access to countless scholarly journals, reviews, symposia, magazines, newspapers, etc. They can use these materials to address the topic in the abstract mode of words and ideas where reason and intellect are really developed and brought to bear rather than in the graphic mode where animal instincts are aroused rather than the higher faculties that are required to civilize man. Would not these resources be enough to satisfy any bona fide research needs at our university?

Despite all the seductive sound bites that seem to assume the contrary, we live in a world of trade-offs rather than absolutes. Whatever few examples one might conjure up to justify access to graphic pornography, one can think of many other reasons and examples to justify our refusal to sponsor such access. Hence, the latter position seems to be the most reasonable.

### **What Should We Do?**

In view of all the foregoing, I believe we should sponsor no access to graphic pornography that offends the prevailing community sense of decency. In order to help accomplish this, as a first and necessary step, I favor the use of screening software to block out offending web sites. A

Federal statute (47 U.S.C. 230(c)(2)) grants libraries and educational institutions blanket immunity from liability for installing blocking and screening software on their computer systems. This law specifically preempts any contrary state laws.

Realizing current technology will not succeed in successfully screening out all such materials, we will need to have a back-up policy prohibiting all users of our facilities from willfully accessing such graphic web sites. Since it is very possible that innocent and accidental access will occur occasionally, we should have a presumption of innocence and the burden of proof placed upon

the university to prove such willfulness by a preponderance of the evidence before anyone could be denied access to our facilities, expelled and/or fired. Once a policy is in place, it should be vigorously enforced so that users know they face meaningful penalties if they willfully ignore the policy. If we will be too timid and fearful of enforcing the policy, then we might as well not have one at all.

The next issue is more troublesome. Personally, for the reasons stated above, I do not believe we should have any bona fide research exception to disengage the screening software and allow willful access to graphic pornography through university facilities. Adequate access is available off-campus.

However, for the sake of increasing our chances for success in court, should things come to that, I could support adopting a policy that mirrors that used by the state of Virginia and which was recently (2/10/99) held to be constitutional by the federal 4th Circuit Court of Appeals in *Urofsky v. Gilmore*. In that case, some university professors from the University of Virginia sued claiming their rights to free speech and academic freedom were violated by the state law in question. They failed on both counts as the law withstood constitutional scrutiny. Effectively, the court ruled that the legitimate bounds of academic freedom end where moral impropriety begins.

Under their law, state employees were prohibited from accessing indecent materials over the Internet using state owned or leased equipment. Their law had an exception for bona fide research activities which had to be pre-approved before access was granted. Professor Barnes and I have used that law as our template to develop our proposed policy change on campus regarding Internet access.

People should also be made aware of the fact, that no matter what finally becomes of our campus computer use policy, if anybody willfully accesses "obscene" materials in violation of state obscenity laws, he or she can be criminally prosecuted without any 1st Amendment violation.

For this purpose, the U. S. Supreme Court has defined "obscenity" as follows: material that (1) taken as a whole, an average person, applying contemporary community standards would find appeals to the prurient interest, (2) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state statute, and (3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value. (*Miller v. California*, 413 U.S. 15 (1973) most recently reaffirmed in the *Reno v. ACLU* case discussed earlier)

Such criminal prosecution could occur even if we as a university gave permission to that access.

In fact, as an institution, we too could suffer criminal sanctions if we knowingly allowed it. So in our bona fide research exception, we need to at least still prohibit willful access to these kinds of materials.

We must pay particular attention to the impact our policies will have on the access given to minors to Internet pornography through our campus facilities. State law prohibits the exhibition of indecent materials to minors and the Supreme Court has shown great deference to the regulation of indecency when minors are involved. It is far more inclined to constitutionally uphold regulations dealing with the well-being of minors in this regard. This again argues for the need for blocking software. Minors regularly use our computer facilities. In fact, some of our own freshmen are still legally considered to be minors.

### **Some Things are Worth Fighting For - This is One of Them:**

Our cultural heritage is worth fighting for. It is worth litigating over if we have to. Let us not cower away from the contest because of a small, vocal minority. Too much is at stake. As Edmund Burke once said: "All that is necessary for the triumph of evil is that good men do nothing." Let us not be worthy of that rebuke.

Have we reached the point intellectually where we can no longer distinguish truth from error, good from evil, and right from wrong? Have the social deconstructionists won who believe that there is no objective truth? - that truth and error, right and wrong, good and evil are mere social constructs created and destroyed by our own collective whims? If Burke's quote sounds corny to you or embarrasses you, then I suggest you consider whether or not you have joined the deconstructionist crowd without even realizing it.

Word has it that the ACLU has been contacted and has said that it will sue us if we don't, in effect, end up with a toothless alternative that makes no meaningful attempt to consider the moral interests of the community. Look how far this little band of malcontents has gone to try to force their will upon us. They have even gotten the New York Times involved to try to pressure us into submission.

Most people learned from their youth that the only way to get a bully off your back was to stand up to him. If we don't stand up to these bullies, then by our cowardice, once again, we will suffer under the oppressive burden of minority rule and our culture will continue to slide towards the abyss.

In most cases, as with this one, it should be a badge of honor to take on the ACLU -- they are usually a pretty good barometer of where the societally destructive side of the controversy resides. A common theme to their activities is to exalt the individual over the needs of society even when common sense would dictate otherwise.

### **The Need to Avoid Rhetoric and Sophistry:**

At the close of the Roman empire, rhetoric and sophistry reigned supreme. Rhetoric was defined as the art of making what is right look wrong and what is wrong look right; of making small

things look big and big things look small. Victory was everything and truth was the casualty. It ushered in the dark ages where creativity and advancement came to a screeching halt for centuries. As we seek to determine the appropriate path to follow, let us be careful not to be persuaded by rhetoric, but rather, truth. Truth is most likely to be found when your heart and your mind agree on a topic after thoughtful and deep deliberation unmoved by all the passions swirling around you.

Regarding the issue at hand, one person recently said: "My emotion takes me one way on this issue and my intellect the other." In other words, he feels like he is straddling the divide. First, I take issue with his use of the word "emotion" for it sounds like there could be no rational support behind that inclination. I think the more appropriate word to have used would have been "conscience" rather than "emotion."

Second, what I have tried to do here is show that one need not straddle any gulf like he indicates. Rather, the law, reason and intellect come down on the same side of the divide as one's conscience. On this issue, our minds and hearts can agree if one is willing to wade through the confusion sewn by the other side.

Even if some in the community disagree where the moral lines should be drawn, that is determined by majority rule within the community affected. That is what civilizations have always had to do to survive. And when they gave up trying to make those judgments because of the pressures and confusions caused by rhetoric and sophistry, that is when they entered the decline phases of their histories.

If your conscience tells you that issues of right and wrong are involved here, then be sure to apply that conscience rather than allowing yourself to get lost in all the confusion. Do what is right and let the chips fall where they may. In the recent televised version of *Alice in Wonderland*, near the end of the show, Alice had finally gotten the nerve and courage to refute the ridiculous rantings and ravings of the King and Queen of Hearts. As she was making her defense the rabbit asked: "But Alice, aren't you concerned about what others will think of you if you keep doing what you are doing?" Alice responded: "Not if I am right!" So let it be with us.

Remember the words of Lincoln: "Let us be diverted by none of those sophistical contrivances wherewith we are so industriously plied and belabored--contrivances such as groping for some middle ground between right and wrong." (Abraham Lincoln, Feb. 27, 1860; *Collected Works* 3:550)

Since the culture wars of the sixties, our culture has tried to accommodate the counter-culture by groping for some middle ground between right and wrong and where has it gotten us? The counter-culture now rules supreme around the country. Again, our nation's response to what President Clinton did is a very sobering indication of how far we have slid. We don't have too much further to slide.

Either we have the guts to stand up and try to reclaim our culture, or we will continue to lose it in increments by default. If the prospect of being called some nasty, and inappropriate names is enough to dissuade you from the fight, then you should consider the rebuke of Samuel Adams:

"If ye love wealth better than liberty, the tranquility of servitude better than the animating contest of freedom, go home from us in peace. We ask not your counsels or arms. Crouch down and lick the hands which feed you. May your chains set lightly upon you, and may posterity forget that ye were our countrymen." (Samuel Adams, 1776; Great Quotations, p.808)

Again, keep in mind that the liberty and freedom of which he spoke was not intended to be unlimited and extreme - it included, in the spirit of Washington, the liberty and freedom of local communities to determine which liberties had to be sacrificed in order to preserve the rest. They were tired of King George making those calls from afar and demanded local rule.

Liberty, like the waters of a gently flowing river confined within its banks, creates and sustains life. But when those waters flood over those restrictive banks, they bring death and destruction. An essential part of our liberties and freedoms includes our local right to determine where the banks of the river will be set as it flows through our community. Communities upstream and down are free to set in place similar banks or have none in their communities, but they would be very presumptuous indeed, to come into our community and demand that our banks be bulldozed.

If you are not willing to educate yourself and fight this battle, then crouch down and lick the federal hands which feed you. May the chains of minority rule set lightly upon you, and may posterity forget that you were our countrymen.

### **Toleration and Diversity:**

In the name of "tolerance" and "diversity," the community does not have to allow counter-cultural elements to sap the strength from its moral foundations. As the Roman statesman Cicero said: "I tell you that freedom does not mean the freedom to exploit the law in order to destroy it. It is not freedom which permits the Trojan Horse to be wheeled within the gates, and those within it to be heard in the name of tolerating a different point of view!" (Taylor Caldwell, *A Pillar of Iron*, p. 511)

So in some cases, toleration can actually do more harm to liberty than good.

The contemporary call for tolerance and diversity seems to revolve around the belief that all ideas are of equal truth, strength and validity (except perhaps, religious and moral ideas which appear to be of a lower level of value and importance). It is almost as if the submission of an idea or philosophy is the end of the process rather than just the beginning. This seems to be the guiding philosophy behind the phrase "celebrate diversity." Western civilization has never proceeded on that assumption.

Instead the idea is put into the market place and either accepted or rejected. It competes with other ideas and a judgment is ultimately rendered on it. When a particular idea is judged to be wrong or inferior, it is rejected. It is not put up on some sort of pedestal and kept there simply for the sake of "tolerance" or "diversity." Instead, society discriminates (dare I use that word) against it, discards it, and promotes ideas that are deemed to be superior as judged by the majority. If the majority is not allowed to determine the issue, then we will sink into anarchy and

then we can kiss all of our rights and liberties goodbye.

In the eyes of this community, the idea of pornography has entered the competition of ideas and has failed miserably at producing any significant societal good. I would like to hear my opposition try to defend it from the standpoint of producing any societal good. The common opinion of this community is that not only does pornography fail to produce any good for society, it causes great harm instead. It is no more than Cicero's Trojan Horse that needs to be kept outside the gates. It is an idea that has hung around far too long and need not be further promoted by this institution of higher learning.

As I said before, the diversity the constitution promotes is the right of local communities to render judgments by majority rule in accepting and rejecting the various ideas competing for acceptance. It is not to impose a "one-size-fits-all" approach from the federal government downwards denying the rights of local communities to define themselves in moral terms. History and common sense have to be turned on their ears to call the latter approach "diversity."

What follows next is a letter to the editor from Professor Stathis which was published in the school paper. Following his letter appears my attempt at refutation.

### **Letter to the Editor by G. Michael Stathis (3/15/99)**

#### **Policy Violates 'inalienable rights'**

I have followed the debate over SUU's computer and internet policy with great interest and concern the last few weeks. Overall, I am greatly disturbed that there is a controversy on the subject at a public university. Too many students, faculty, administrators and staff members seem far too willing to accept a policy that is clearly in violation of the First Amendment to the Federal Constitution by its practice of institutional censorship of the internet and use of university computers.

In a community that treasures constitutional liberty and freedom, it is strange to see many of its citizens rush to give up the most vital of liberties in freedom of expression. Surprisingly, the common justification for these limitations is an appeal to community standards and majority rule. While these elements are certainly part of the bedrock of American law and government, they are not the only parts. In fact, in many cases, the history of the United States has proved that community standards and the will of the local majority were morally wrong and in violation of the Constitution. Case in point, if these were the primary standards by which law was made and enforced we would still have slavery in the southern states, and the enforcement of civil rights would have been a failure.

The framers of the Constitution thought better of all this and as representatives of the people of the United States wrote a Constitution to protect what they accepted as unalienable rights. One of the most important of these rights is "freedom of speech" or expression. For former Supreme

Court Justice William J. Brennan, freedom of expression is so vital that if eroded, all other liberties would be reduced. For Brennan, this liberty "gives us this society. The other provisions of the Constitution merely embellish it."

No doubt, freedom of expression is at times a troubling liberty, but where would the republic be without it? The Supreme Court has made it clear on many occasions that it would rather [err] on the side of freedom regarding freedom of speech than to establish a legal precedent for censorship, whatever the reason.

It is said that former President John Quincy Adams once remarked, "What are we to do with this embarrassing document, this Constitution of the United States?" We are sometimes so eager to cut a great path through the law to get at perceived devils in society, but, with apologies to playwright Robert Bolt, what will we do if we lay low this country's laws to get at evil, only to have the devil turn on us, "d'you really think you could stand upright in the winds that would blow then?"

This issue bears upon the single greatest fear of the founding fathers: tyranny. It is well to recognize that tyranny can take many forms, including tyranny of the majority, as James Madison wrote in *Federalist #47*, the accumulation of powers "whether of one, few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Here we are speaking of a superior right, protected by the law of the land, and retained through great effort and pain. Why would any citizen wish to limit such liberty granted them, as Thomas Jefferson wrote, by "the Laws of Nature and of Nature's God"?

## **My Response to Mr. Stathis' Letter to the Editor:**

### **1. Inalienable Rights:**

The title of his letter proclaims: "Policy violates 'inalienable rights'" First off, I have already addressed the issue of mere political demands masquerading as "rights." We surely cheapen the rights we do in fact possess when we include counterfeits among them.

Second, as to the "inalienable" rights of our revolutionaries, they suddenly became very alienable when our framers got down to the business of creating practical government. The 5th Amendment reads in part: "No person shall be....deprived of life, liberty, or property, without due process of law." "Deprived" means those things can be alienated.

For example, if our individual rights to life and liberty were truly inalienable, as they were said to be in our Declaration of Independence, it would be impossible to punish anybody for crime for in the process, the liberty of the convicts would be revoked and/or their lives forfeited. If our right to freedom of speech were truly unlimited, then nobody could face any potential legal liability for defamatory speech, obscene speech, or "fighting words." However, our courts have always recognized legal limits to speech for the sake of balancing the interests of individuals and the needs of the society they comprise.

## **2. The use of extremes to rally the troops:**

Just as the revolutionaries of 1776 were spurred on to battle under the banner of glorious principles stated so nobly as absolutes in order to strengthen their impact on the ranks, so too today, some on campus are being indignantly roused to battle, rallying behind principles that are said to be absolutes but which have never rationally been deemed to be so after cool and calm deliberation. In view of this fact, irrational emotion seems to reside more on the side of those arguing for no limits than on the side of those who argue for balance.

## **3. The mere repetition of certain propositions do not necessarily make them true:**

As I said earlier, just because something is said to be "clearly unconstitutional" a thousand times over, does not necessarily mean that it is so. I have already addressed the issue of constitutionality earlier in this paper.

## **4. Too quick to strip the states and local governments of their sovereignty:**

Mr. Stathis seems to make the argument that since state and local governments might make mistakes in rendering their judgments concerning the appropriate balance between individual liberties and individual responsibilities, they should be denied all rights to render such judgments. He cites slavery as an example.

While many issues were resolved in the Constitution we adopted, the biggest issue left unresolved was slavery. For the sake of achieving the most important goal of the Constitutional Convention, which was political union into one nation, the delegates had to make some very big compromises. As Henry Jaffa says, we must look at slavery as a "constitutional compromise" rather than a "constitutional principle."

In the spirit of compromise, the South too, gave up some ground on the issue. This is indicated by the fact that the Constitution specifically prohibited any amendment to it for twenty years concerning the various clauses within it protecting the institution of slavery in the south.

The clear implication of this provision was to put everybody on notice that this moral issue would eventually become a federal issue and that it was only on a temporary twenty-year loan to the states through the aforesaid compromise. Although it actually took more than twenty years to accomplish the transfer, the issue of slavery was obviously destined right from the start to eventually be a federal, rather than a state, issue. So that was a special issue unrelated to moral issues in general which were left to the states under the Constitution.

But consider too the following question: "If state and local governments are prone to making mistakes along these lines, why should we assume that federal judgments would somehow be infallible along the same lines?" If the federal government preempts all such decisions and turns out to be wrong, far too much, and perhaps even lethal, damage may result before we can effectively stem the massive institutional inertia and momentum behind the unwise direction we are headed. In fact, we may not be able to turn the train around at all. Witness what happens

whenever any existing federal law is sought to be repealed. People scream: "Don't mess with our rights!" And of course, when framed in the context of "rights," repeal becomes almost impossible to accomplish -- our direction then becomes permanized. Then, as with failed civilizations of the past, the train goes over the edge of the cliff and the next world power takes over the stage of prominence until it too makes the same kinds of fatal mistakes.

If some states and local jurisdictions can make mistakes, and that possibility causes us to want to take all of their meaningful authority away, then what should happen when the federal government makes similar mistakes? By the same logic, shouldn't it lose its powers too? But if both are stripped of their powers, who is left to make any decisions other than individuals for and in behalf of themselves only? This would result in unacceptable anarchy.

Sure, mistakes can be made at either level, but that fact alone should not be used to divest all governmental subdivisions of their constitutional powers. We need to realize that such mistakes are far less costly and easier to correct when made at the state and local levels than at the federal level since the respective inertias and momentums are not so massive and uncontrollable.

Besides, by allowing state and local sovereignty the way it was originally intended, we allow many different experiments to be run at the same time. Over time we can compare the various sets of rules, regulations, and balances struck by the various states and communities and decide which public policies are really the best at promoting general prosperity and happiness. If only the federal government were given this power, we would be denied access to valuable data that could be used to assess the wisdom of our choices.

In addition, if all such decisions are to be made at the federal level, what pressure relief valves are available to a discontented citizenry? They would have to give up their citizenship as Americans in order to flee the resulting federal tyranny. Or even worse, they might revolt. But on the other hand, when state and local sovereignty is allowed to function as originally intended, a much less drastic and more effective pressure relief value becomes available. Namely, without having to forfeit their American citizenship and/or revolt against the nation, people can flee a local tyranny and move to some other location within the United States that more closely matches their political and moral philosophies. Again, this illustrates the wisdom of our framers in seeking to preserve vibrant state and local sovereignty over most moral and public policy matters.

## **5. No Supreme Court Precedent for his Conclusion Regarding Absolutes:**

Mr. Stathis makes the following statement: "The Supreme Court has made it clear on many occasions that it would rather [err] on the side of freedom regarding freedom of speech than to establish a legal precedent for censorship, whatever the reason." (Emphasis added)

That statement of an absolute is simply false. He will not be able to cite any Supreme Court case for that proposition for there is none. As mentioned earlier, as recently as 1998 in the *Reno v. ACLU* case (discussed earlier), the court reaffirmed its allowance of even point-of-source censorship of obscenity against 1st Amendment challenges.

## 6. Robert Bolt's *A Man for All Seasons*:

Mr. Stathis' reference to *A Man for All Seasons* is misplaced. In the scene in question, Sir Thomas Moor's family is demanding that he arrest a bad man simply because they judge him to be potentially dangerous to Moor's political position and station. Moor observes, in response, that there is no man-made law that punishes a man for simply being bad in general. If a man is to be punished simply for being bad, then that is God's business said Moor. Then the following interchange occurs between Moor and his son in law, Roper:

Roper: "Now you'd give the devil the benefit of law?"

Moor: "Yes, what would you do?-Cut a great road through the law to get after the devil?"

Roper: "Yes, I'd cut down every law in England to do that!"

Moor: "Oh? And when that last law was down and the devil turned round on you, where would you hide Roper, the laws all being flat? This country is planted thick with laws from coast to coast. Man's laws not God's, and if you cut them down...do you really think you could stand upright in the winds that would blow then? Yes, I give the devil the benefit of law -- for my own sake."

Of what laws did Sir Thomas Moor speak? All the laws of England. Those laws are referred to as a package undoubtedly containing some sort of balance between individual liberties and individual responsibilities. Those laws would not only protect, in some limited sense, certain rights of the people, but would also prohibit certain conduct deemed to be inimical to ordered liberty and civilized society.

Most assuredly such prohibitions contained criminal punishments for violations of laws defining specific conduct as criminal - not just badness in general. Also included would be some sort of "due process" mechanism in determining guilt or innocence.

Mr. Stathis seems to argue that it is improper for the law to seek to promote any societal good since in so doing, we would be trying to "get after the devil." How would the public policies that he personally favors stand up against the winds of that proposition? What devils does he seek to confine with the laws he favors?

In the issue immediately before us, we are not "cutting a great road through the law" to do anything. Rather we are trying to fine tune the structure of our man-made laws to achieve objectives deemed desirable by the community. There is no attempt to punish anybody simply for being bad but rather, we seek to regulate specific conduct that the majority of this community deems to be dangerous to the type of society we seek. Presumptions of innocence and due process are left intact. So anyone, be they devils or angels, will have the same benefit of law.

In fact, when Mr. Stathis and those on his side of the debate argue for total and unrestrained liberty, they are the ones who are trying to "cut a great road through the law," for as mentioned

before, man-made law is a packaged deal - it both protects liberty and imposes limits on that liberty for the sake of society. Mr. Stathis proposes to cut a great road through the latter, and very necessary, part of that legal package.

Even though Professor Stathis quotes him as an ally, were Sir Thomas Moor alive today, I suspect he would prove to be Mr. Stathis' adversary in the matter before us.

## **7. Tyranny Redefined:**

Lastly comes Professor Stathis' coverage of the issue of tyranny. Referring to Federalist #47, he says: "the accumulation of powers 'whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.'" But under this definition of tyranny, all government and all authority would be tyranny. The only situation where there would be no tyranny under this definition would be when there is no government whatsoever and the individual reigned supreme. But even there tyranny would reign -- the tyranny of the bully. Anyway, this definition serves well his argument for no limits to liberty.

But this is not the meaning of Madison. Certain clarifying language was left out that changes the whole context and meaning of the quotation. The correct lead-in to the Madison quote reads: "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one....may justly be pronounced the very definition of tyranny." The underlined words were left out and by their absence, change the entire meaning of the phrase.

Professor Stathis thus turns what really amounts to be an argument in favor of "separation of powers" into a blanket argument for unlimited and unrestrained individual liberty where the government has no power. That is quite a nifty and misleading transformation. That is putting words in Madison's mouth that would obviously be repulsive to Madison himself in view of what he stood for and all that he did to create, explain, sell and pass the U.S. Constitution - a document containing obvious limitations on individual liberty.

Included in the concept of tyranny feared by Madison would not only be a failure to separate powers within any particular governmental subdivision, but also a failure to separate powers between the various federal, state and local subdivisions themselves. He would favor the traditional notion of "federalism" of the sharing of powers between the federal government and the states. In other words, he would fear and staunchly oppose the type of federal tyranny we see today over state and local sovereignty where the original idea of federalism has been lost to antiquity. This fear of a federal tyranny is a common theme throughout the Federalist Papers and I have already given some quotes earlier to prove the point.

So I disagree whole-heartedly with the various propositions made by Mr. Stathis in his letter. But in fairness to him, it is very difficult to adequately explain much in the limited space available for letters to the editor. I couldn't do it either. I had to use this mode instead. Often times when one is pressed to summarize complex ideas down to a very succinct statement, something gets lost in the reduction process and the reader is confused as to the intended meaning and position of the writer. So I presume the foregoing problems I addressed with his letter were

predominantly due to the space constraints he faced - at least I hope so.