Comstock Revisited: Janet Reno's First Amendment

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"I believe in an open society and a strong First Amendment."

Janet Reno, 20 October 1993

A student of the First Amendment may find it difficult to know precisely what First Amendment Ms. Reno believes in and under what conditions she champions its application. The Attorney General's record, upon examination, depicts a version of the First Amendment that consistently yields to any asserted government interest. Her interpretation of "freedom of speech" and the arguments she presents to justify its constriction are consequential to shaping public policy and adjusting the national tension of the dialectic between liberty and order. It is the purpose of this study to examine the rhetorical arguments of Attorney General Janet Reno in three areas in which she has chosen to translate the First Amendment -- the Waco disaster, television violence, and pornography on the Internet.

The controversy over censorship revolves around the inclusives and exclusives of protected speech, history illustrating our inability to agree on the acceptable parameters of the First Amendment. This presents society and scholars with a formidable challenge: how do we discover and mark our reference points? How do we set parameters to include and exclude protected speech versus unprotected speech when we are presented with qualifying definitions as numerous as people with opinions? It is advantageous to remember the words of Justice Potter Stewart before we set those marks:

Censorship reflects society's lack of confidence in itself. It is the hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong, only when it is truly free. In the realm of expression they put their faith, for better or worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is the Constitution that protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In a free society to which our Constitution has committed us, it is for each to choose for himself.

Although beauty may be in the eye of the beholder, those seeking to define and censor build their argument on conditions external to their psyches. One will seldom hear an argument for censorship that includes socialization patterns or self-concepts. For example, the would-be

censor does not say "my rationale for censoring you is because I am insecure." Verbalized justifications for censoring consistently come under one umbrella in the controversy. Rather than disclose personal information about early childhood development or self-concept, the censor adjusts the lens of his/her argument on values, and the point of convergence becomes the family. Here lies a rhetorical gold mine. The term "family values," ambiguous and difficult to pinpoint, elicits unequivocal endorsement. While expansively broad and remarkably useful, the term embellishes without being substantively defined. One clear element arises, however, from this cloudy abstraction: children emerge as vulnerable, malleable, and of primary concern to those endeavoring to act as the moral conscience of society. "Protecting children" has paralleled and equaled "family values" in rhetorical strength, and it has similarly eluded delineation in rhetorical analysis. What the term "protecting children" lacks in definition and parameters, it weighs in heavy with emotion and conviction. Too admirable to be challenged, it has become the banner of the argument for censorship.

The rhetorical ambiguity encompassing the "protecting children" topoi is used for many other causes besides censorship. It adheres not to one party line, one religion, nor one topic. Its wide employment testifies to its adaptability, yet no clear definition surfaces. This lack of clarity plays a crucial role in our society, as camps form over dinner tables and Supreme Court benches. To justify censorship, one theme remains constant: children are to be protected. Why exactly do they need protection? This is answered by those seeking to censor with forewarnings of corruption and ruin. Examples and explanations of this moral disaster abound in Anthony Comstock's Traps for the Young

A dissertation by Mark Irwin West called "Defenders of Childhood Innocence: Reformer Responses to Children's Culture in America, 1878-1954" traces the slow transformation in thinking regarding the status of children. He questions the various rationales for censorship and why there was such objection to exposing children to violence, sexuality, and fantasy. In examining the arguments of the reformers, West found they held similar opinions about childhood and child-rearing, thinking it to be a time of innocence and happiness, during which exposure to aggression and sexuality would confuse them. Once confused, children were then vulnerable to evil. Children as commodities to be saved continued to be the rhetorical theme following the Progressive Era. An added dimension evolved, however, when children were perceived as possessing rights. Eloquently expressed by Margaret Sanger in her speech, "The

Children's Era,"\ new voices arose calling for the protection of children. Garry Wills' article titled "A Doll's House?" illustrates how Hillary Clinton has echoed those sentiments with respect to the contemporary issues of child health and welfare.

The controversy surrounding the Communications Decency Act of 1996 generated several articles citing the use of the "protecting children" topoi by the act's proponents. Again, none questioned the use or validity of the rationale but acknowledged it as the primary motivation for the legislation. Two articles providing a thorough examination of the arguments by those who supported and opposed it, are Laura J. McKay's "The Communications Decency Act: Protecting Children from Online Indecency," and Eugene Volokh's "Freedom of Speech, Shielding Children, and Transcending Balancing."

No literature exists that examines the use of the "protecting children" topoi by the Clinton Administration. The topoi is an obvious and a powerful component to the censors' argument; however, no study has investigated the validity of its reasoning, its implementation by the current administration, or the rhetorical significance of the topoi's use as supportive evidence in the argument for censorship.

To believe that a decision is sound, an opinion credible, a court ruling just, or an argument valid, one must accept some foundational belief that precedes judgment. To conclude is to agree to accept certain major premises. In The Uses of Argument, Stephen Toulmin writes:

> A man who makes an assertion puts forward a claim --
> a claim on our attention and to our belief . . . just how seriously it
> will be taken depends, of course, on many circumstances . . .
> Whatever the nature of the particular assertion, in each case we
> can challenge the assertion, and demand to have our attention
> drawn to the grounds (backing, data, facts, evidence,
> considerations) on which the merits of the assertion are to
> depend. We can, that is, demand an argument."

If society is asked to accept a regime of censorship, the arguments put forth for censorship should first be closely examined to judge their substantive worth. If government is to legislate a scheme for censorship, its citizens should examine the reasoning behind laws before they concur or dissent. Consequently, it is important that communication scholars apply this reasoning to the "protecting children" topoi.

To accomplish the task, Toulmin's model of argument analysis will be applied to public policy statements and Senate testimony of Janet Reno. I will identify the claims, data, and warrants in the arguments the Attorney General has presented in the three most conspicuous issues of her tenure, the Waco disaster, television violence, and pornography on the Internet, and analyze the validity of those arguments.

The first crisis of Janet Reno's tenure in office occurred just 38 days after her swearing-in. The disaster at Waco, which ended in the violent deaths of 81 people, including 20 children, in April, 1993, began a long, rhetorical exercise for the Attorney General, as hearings were held in 1993 and 1995 on the incident. Her public policy statements to justify her decisions during the crisis have tested the "protecting children" topoi and found it to be even broader, sturdier, and more resilient than free speech scholars could imagine, but not more disconcerting than the American public could bear.

At a joint hearing before Congress in August, 1995, to investigate the events in Waco, the Attorney General constructed her rhetorical argument defending her decision to attack the compound on four claims. These were 1) the belief that there really was an impasse in the negotiations with David Koresh; 2) the fatigue of the hostage rescue team and the need to put them in "down time" soon; 3) the fear of an imminent, violent breakout by Koresh if the FBI waited and let him do it on his terms; and 4) concern over the condition of the children and the possibility they were continuing to be abused.

Various testimony was given that invalidated the first three justifications, and as a result, more weight was added to the fourth. As the other rationales faded, "protecting children" grew stronger; subsequently, it was submitted more frequently by the Attorney General as the major claim in the argument. At a press conference immediately after the siege ended in April 1993, Reno stated, "We were going to wait and continue to increase the pressure and be as patient as we could . . . [child abuse] was a cause for the first effort to go into the compound."

Unsupported claims and warrants abounded. In her testimony of August 1995, she elaborated: "What I was concerned about are allegations that have been supported that children were being sexually abused and that children were being beaten. And children kept under those circumstances for six months to a year without being able to get out, that's not a good condition for children."\ Then-FBI-Director William Sessions, however, said his agency had no evidence that such abuse took place during the siege.

Clearly, the rhetoric of the "protecting children" topoi relieved at least some of the pressure following the horrible events in Waco. Lacking an argument built on sound data or reasonable warrants, Janet Reno's "the buck stops here" rhetoric helped her become extremely popular outside of Washington. Despite intermittent spurts of outrage appearing in the press, the rhetorical power of the rationale Reno offered prevailed. An article in The Nation noted, "So fifty years after the Nazis' attack on the Warsaw ghetto, the FBI gassed a religious community on national television, with the near total support of the press." The consensus was with her, however, as the Broward Business Review observed, Reno may have ironically "cemented this reputation, turning her biggest failure, the botched raid, into a PR success by unblinkingly taking responsibility for the carnage."

Waco was real to us as the Gulf War was real to us. Because human lives were lost in a horribly violent and painful way, especially the lives of children the guardians said they sought to protect, one begins to realize the breadth and depth of the power of the "protecting children" topoi. If those to be rescued are sacrificed to the rhetoric that purports to save them, and still, the rescuers stand as protectors, then it is powerful rhetoric to which we succumb.

An editorial in the Denver Post articulated the absurdity. "Attorney General Janet Reno's decision to barbecue the children in the Branch Davidian compound at Waco in 1993, in order to ësave' them, is consistent with how America in general protects children. We use it as a justification for enlarging the Big Brother aspects of government, and we really don't care what happens to the children we said we were protecting . . . a government exists to protect rights, not children. As matters stand, government destroys rights in the name of protecting children, and doesn't protect children from real threats anyway."\

Television violence has long been a target for Janet Reno, dating back to her days as Dade County prosecutor. Her current argument for censoring television is based on three specific policy claims, voiced during her testimony at a Senate hearing on TV violence in October 1993. The first is her belief that "parental supervision must always be the first line of defense" against children viewing inappropriate material, because, she said, "I believe that government intervention is not the best option." While perhaps this first claim may be universally accepted, there is but one piece of accompanying data to support it, i.e. television programming contains violence. There is backing present (additional evidence to support warrants) such as statistics from the Journal of the American Medical Association asserting that "the average American

child has watched 10,000 acts of violence, including 8,000 murders. By age 18, those numbers have jumped to 200,000 acts of violence and 40,000 murders . . . 10 acts of violence an hour. That means that 10 times an hour, we expose children to behavior that society and the law condemn and prohibit. On Saturday morning, when television programming targets children, that total jumps to 20 to 25 violent acts an hour."

The second policy claim advanced by Reno is that television networks should voluntarily provide programming of a higher social value in conjunction with establishing a rating system. This stems from the Attorney General's premise that in instances when parental supervision is not concomitant, the television industry must respond. She prefaces the major claim first with warrants that the media is powerful: "The broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "It is time for television and the film industry to search their souls and realize that it possesses enormous power in a free society." Reno feels the medium has a moral influence on viewers, including a negative effect on children: "TV can be a remarkable force for good and for bad . . . Any parent can tell you how their children mimic what they see everywhere, including what they see on television. Studies show children literally acting out and imitating what they watch . . . Many young Americans struggle to construct a value system amid increasingly immoral circumstances." Next are fact claims stating that the current programming is lacking: "Television is utterly failing us . . . Too much of today's programming neither uplifts nor even reflects our national values and standards . . . television too often panders to our lowest common denominator." Subsequent warrants reveal Reno's belief that the industry itself should take responsibility: "I also think it is time the television industry helped us get our facts straight when it comes to television violence . . . What if all television offered more shows with plots which actually repudiated violence? . . . Advertisers must reevaluate the nature of the messages they wish to subsidize since each commercial minute they buy pays for the transmission of certain values to our children."

The final claim in the argument to censor violence in television empowers government. Reno justifies her argument by separating this medium from others: "Broadcasting is uniquely accessible to children . . . other forms of offensive expression may be withheld from the young without restricting the expression and its source." She claims this particular accessibility allows government regulation of media violence, and is constitutionally permissible as delineated by the Supreme Court: "The various Senate bills under consideration appear to be constitutionally

sound under the Pacifica language." Should the networks not voluntarily monitor and label their own program content, Reno asserts that the government has the constitutional authorization to do so. She states, "I think the time has come for a very specific proposal to be made by all aspects of the industry with immediate deadlines and means of monitoring compliance, or otherwise I believe that government will have no alternative but to address these problems through legislation such as you [Congress] have proposed . . . if further significant voluntary steps are not soon taken, I know it will be difficult and I think that government action will be imperative." This contradicts her previous testimony that "government intervention is not the best option." With her claims that it is now imperative, Reno has unknowingly revealed the level of conviction she has in her two previous policy claims, and has negated them as viable solutions.

With only a shell of an argument in hand, the Attorney General steps across a rhetorical threshold into the realm of absurdity: "Patently offensive, indecent material presented over the airwaves confronts the citizen not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Analysis of the Attorney General's arguments illustrates that although claims and warrants are present in her debate, no data, evidence, or explanation exists from which to infer a valid deduction. "Protecting children" becomes the sole support for her argument.

The last topic to be examined for the purpose of this study is pornography on the Internet, a topic inundated with fiery debate, made hotter with the inception of the Communications Decency Act of 1996. This is the third area in which the Attorney General has sought to adjust the parameters of free speech. In Janet Reno, et al., v. American Civil Liberties Union, et al. (1997), appellant Reno argued that FCC v. Pacifica (1978) provided a precedent for government intervention, claiming that "when the dissemination of indecency to adults poses a substantial risk that children will be exposed to the material, government may channel the indecent communications so as to minimize the risk of children being exposed."

The Attorney General uses many of the same warrants in this argument that she employed in her discussion of television violence regarding the vulnerability of children, stating that children cannot make informed choices about viewing indecent material and that "such speech may have deep and harmful effects on children that cannot readily be undone." She deemed it necessary "that we be prepared to take appropriate steps, consistent with the

Constitution, consistent with due process, to protect against crime perpetrated through our new opportunities at communication."

In Reno v. ACLU (1997), the brief filed with the Supreme Court by the Department of Justice presents an argument for censorship of the Internet that rotates on the axis of "protecting children." The first claim states that:

> Parents and their children have a First Amendment right to receive information and acquire knowledge . . . and the Internet has unmatched potential to facilitate that interest. Much of the Internet's potential as an educational and informational resource will be wasted, however, if people are unwilling to avail themselves of its benefits because they do not want their children harmed by exposure to patently offensive sexually explicit material. The government therefore not only has an especially strong interest in protecting children from patently offensive material on the Internet, it has an equally compelling interest in furthering the First Amendment interest of all Americans . . . The Communications Decency Act of 1996 constitutionally advances those interests . . . The widespread availability of sexually explicit material on the Internet and other interactive computer services has a significance beyond the direct risk posed by such material to the psychological well-being of children. Unless steps are taken to restrict the availability of such material to children, parents and schools may be deterred from permitting children to use interactive computer services. Indeed, many parents may be deterred from bringing the Internet into their homes at all.

In this manner, Reno is proposing that she is actually protecting the First Amendment rights of adults by restricting them.

The Department of Justice brief also attempts to isolate the Internet from other forms of media, in order to apply stricter limitations, stating its unique and particular features warrant dissimilar First Amendment application. This rhetorical maneuver was hit head on by a member of the Supreme Court in the DOJ's oral argument. One justice (identity unspecified in the transcript) negates the point quite effectively:

Under those provisions [of the CDA] -- suppose a group of high school students decide to communicate across the Internet, and they want to tell each other about their sexual experiences, whether those are real or imagined. They're all -- every high school student who would do this is then guilty of a Federal crime, and subject to 2 years in prison? . . . Conversations between two

minors, between a minor and an adult, between two adults on public streets and public places would all be prohibited, it seems to me, under your analysis in this case . . . How does this differ, because the Internet after all is, in addition to being a little bit like a common, is very much like a telephone? . . . What you'd have is an analogous statute that applied to the telephone so that when the high school students get on the phone and talk about their experiences, suddenly that all becomes a crime, and it suddenly looks a little bit worse from a first Amendment point of view.

The Department of Justice attempts to place a foot in the doorway of defining indecency, since, heretofore, indecency did not fall under the jurisprudence of patently offensive material as stated in FCC v. Pacifica (1978). Rather, the claim presented here endeavors to have indecency slide the slippery slope to obscenity, citing the CDA's definition of indecency as similar to the Supreme Court's definition of obscenity in Miller v. California (1973). The DOJ then uses Ginsberg v. New York (1968) to support government regulation of indecent material, and FCC v. Pacifica (1978) to support government channeling of indecent communications to minimize risk of exposure to children. These same rhetorical moves appear later in the brief as accepted warrants: "In the short run, the CDA may impose some burdens and costs on adult-to-adult communication of indecent material. Congress constitutionally decided, however, that it is better to place some burdens and costs on those who disseminate patently offensive material through use of a new and rapidly changing technology than it is to leave children unprotected." The "protecting children" topoi emerges repeatedly as a justification to censor: "The CDA's indecency restrictions constitutionally advance the government's interests in protecting children."

While the brief presented by the Department of Justice in this appeal certainly resembles more of an argument than those advanced in favor of censorship in the issues of Waco and television violence, it still belies the weakness of its central point. Reno, like many others, treats one very large, questionable warrant as though it were data. There is no evidence that exposure to indecency does produce deep and harmful effects on children that cannot readily be undone. All other claims and warrants rest on the notion that, indeed, children will be damaged by viewing certain images. The "protecting children" topoi has gone unchallenged because it is too noble, too righteous to be questioned.

"Protecting children" is a premise based on individual attitudes, compounded and reinforced with religious zeal, and has no essential connection to the actual protection or nurturing of children. Moreover, it is a premise that has been used as an almost irrebuttable claim

to justify censoring materials that infringes on the communicative freedoms of adults. No premise can be irrebuttable; however, when the door to rational discussion is closed, we are asked to accept belief without questioning. We must, instead, demand an argument.

The Attorney General is our nation's chief legal officer. It is her responsibility to protect the First Amendment, not to infringe on it behind the guise of caring for our children. If an individual truly does have the right to be left alone while in one's home, then let no intruder come in, certainly not Government with a calling card to "protect children."

Ms. Reno has embraced a groundless warrant that many others have used successfully in the past. Children are our greatest hope, but they are not the reason government was created. Our government was designed to protect rights, not children. If we collectively choose to protect children as a matter of public policy, we should do so based upon empirical evidence of objective harm, and we must do so with legislation that is narrowly focused and consistent with the First Amendment.

Reno v. ACLU, 96 U.S. 511, 1997.