

BOOK REVIEW

FRONTIERS OF CIVIL LIBERTIES. BY NORMAN DORSEN.
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In *Frontiers of Civil Liberties*, Professor Norman Dorsen, long associated with the American Civil Liberties Union (ACLU),¹ canvasses the major civil liberties issues arising in our nation during the past two decades. The book is a superb compilation showing the diversity, subtlety, and importance of our civil liberties problems.

Regrettably, the book is even more timely today than when it first appeared in 1968. These are uneasy times for individual rights. A recent opinion poll conducted by the Columbia Broadcasting System reveals that a majority of Americans are willing to restrict the freedoms guaranteed by the Bill of Rights in return for more "security."² The results of the poll cannot be taken lightly. When the majority becomes sufficiently persuaded, cajoled, or frightened to discard a significant portion of its constitutional liberties, we should be less than sanguine about the stability of the base on which these liberties rest.

Even in the best of times, preservation of civil liberties requires the majority to restrain its impulses and to allow words and actions that may run counter to its self-interests. Because such self-restraint is an unnatural state, civil liberties need protectors. Professor Dorsen sees two lines of defense. The first is the political branches of government—the President and Congress—which have the means to persuade the people that individual rights are compatible with the broader collective self-interest. The second line of defense is the courts—enforcing the Bill of Rights which catalogs our essential liberties.

Professor Dorsen points out that in times of national crisis political pressures are such that the executive and legislative branches "do not and realistically cannot be expected to do the full job" of protecting liberties.³ One may quarrel with the judgment that these branches "cannot be expected" to do the job, but there can be no quarrel with the fact that they have not. Early in the book we find

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² "Sixty Minutes," Columbia Broadcasting System, Apr. 14, 1970.

³ N. DORSEN, *FRONTIERS OF CIVIL LIBERTIES* xviii (1968).

a chilling account of the Army-McCarthy affair in the early Fifties showing the threat to liberties which can occur when public officials, cowed by fears or seduced by expediency, fail to insist on decency and fair play. But we need not go that far back. The torrent of polarizing rhetoric from the Vice-President, an Attorney General dismissing civil liberties spokesmen as "knee jerk liberals," the chimerical attitudes of the Department of Justice in desegregating schools, an administration urging Congress to enact legislation providing for preventive detention and no-knock searches, and a Congress willing to do so⁴—all illustrate the failings of the national political branches as guardians of liberty in times of stress. Nor is there more solace at the local levels when mayors in such cities as Los Angeles, Chicago, and Philadelphia too willingly find political capital in rhetoric equating the protection of constitutional rights with coddling criminals and linking civil liberties with civil disobedience and disruption.

This brings us to the second line of defense—the courts. And that is what this book, covering the leading test cases which have furthered civil liberties in recent years, is largely about. There is no doubt that the Warren Court has been crucial to the major civil liberties advances of the past sixteen years, particularly in areas of racial discrimination, voting rights, and due process in criminal procedure. An early chapter of the book excerpts a fascinating debate among four distinguished law professors on the proper role of the Supreme Court in advancing a nation's liberties. Professor Paul Bator of Harvard, emphasizing criminal justice, believes that the Court's role is to set the basic standards of due process; beyond that a political structure of support is necessary to effectuate the standards. Professor Caleb Foote of the University of California expresses faith in the Court's potential for correcting injustice if only it had better empirical data. Professor Alexander Bickel of Yale takes the Court to task for deciding major social issues, not so much because such cases were wrongly decided, but seemingly from a Machiavellian-like judgment that the nation will not tolerate a Court working major social reforms with some frequency. Professor Charles Reich of Yale argues eloquently that the Court must play an activist role in a system such as ours in which civil liberties derive from a constitutional base.

The debate is intellectually tantalizing but reads with a certain feeling of unreality. One ugly fact like the Carswell nomination seems to explode all the good theories. The Warren Court is one matter. But think of a Court with a majority of G. Harrold Carswells and jurisprudential debate on the role of the Court fades into insignificance. That nominations of men such as Haynsworth and Carswell could be made—and come as close to acceptance in the Senate as they did—underscores the vulnerability of this line of defense for civil liberties.

⁴ See, e.g., District of Columbia Court Reform and Criminal Procedure Act, P.L. No. 91-358, § 23-591(c), 84 Stat. 473 (1970).

The Court's membership has already begun to change from the Warren era. Will the Court continue to be on the frontiers of civil liberties as it has been during the past two decades? I doubt it.

The Court, however, may not be at fault. To a large extent, the frontiers of civil liberties have begun to shift from the deficiencies in our system of law to the deficiencies in our attitudes, political leadership, and general will. These deficiencies generally do not lend themselves to correction in the courts. I do not mean by this that law cannot change attitudes. Law compels acquiescence; acquiescence results in acceptance; acceptance leads to practice; practice grounds custom; custom engenders tradition; and tradition develops attitudes. But such a process is often uneven and always time-consuming. The disadvantaged and oppressed in today's society are unwilling to wait. They seek to correct the deficiencies in our system by quicker means—through minority political power, the mass media, confrontations, protests, and other strategies. Thus, the frontiers are changing, and the battlers on the frontiers are changing too. I wish Professor Dorsen had explored these new frontiers; he knows about them and treating them would have made the book even more valuable.

After probing the general capacity of our institutions to safeguard civil liberties, *Frontiers* divides into three sections: The First Amendment, Due Process, and Discrimination. The section on the first amendment explores the tolerance of dissent in our society. Professor Dorsen includes an excerpt from a brief which successfully attacked legislation designed to censor "foreign Communist" propaganda; correspondence between the ACLU and broadcasters on blacklisting by the broadcasting industry of allegedly subversive performers; briefs and correspondence in the case of Professor Leo F. Koch, dismissed by the University of Illinois for writing a letter condoning premarital sexual intercourse among mature students to the editor of a campus newspaper; and an NAACP manual for civil rights workers on how to protest within the law.

Looking back on these instances, one wonders what the fuss was all about. Political propaganda of all kinds, including communist propaganda, is now abundant, and yet communism and other alien ideologies have grown no stronger in this country; the broadcast industry is none the worse for allowing some leftwing writers and entertainers to ply their trade; firing people like Professor Koch did not abort the sexual emancipation movement then in its nascency; and the tactics of the civil rights demonstrators of the Sixties seem quite docile compared with those being forged by protestors today. The telling lesson of these examples is that our society can tolerate dissent, the avant-garde, and even the bizarre without suffering adverse consequences. The great evils feared from such sources seldom materialize; indeed, as in the case of Professor Koch, some of the dissenting views eventually find high levels of acceptance.

Yet, with amazing immaturity, we continue the scapegoat syndrome, finding new subjects for intolerance—long-haired students, conscientious objectors, and many others. And men of small vision persistently urge that we separate these “rotten apples of dissent” from our society, unable or unwilling to understand that the danger to our society stems far less from tolerating dissent than from the regression and polarization separation would engender.

The due process section of *Frontiers* concentrates on the field of criminal procedure. The chapter topics include the rights of accused adults and juveniles to legal representation, trial by jury in contempt cases, problems of prejudicial publicity, official intrusions upon private property, and the still undecided issues surrounding capital punishment. Over the past several decades, the Court has made sweeping changes in the concept of what is “due” in the administration of criminal justice. Reviewing these decisions, they seem to establish no more than minimum standards of decency and fairness in the treatment of the accused. Yet today these gains seem particularly vulnerable as law enforcement officials argue with increasing shrillness that the due process safeguards result in higher crime rates. Of course, as sophisticated enforcement officials know, these are diversionary and political tactics. Affording procedural due process has a minimal effect, if any, on the crime rate. But even assuming that the effect is real, there remains Justice Arthur Goldberg’s observation that if a system of criminal justice can work only at the expense of basic individual rights, the defect is with the system, not with the rights. It has been said that the quality of a nation’s civilization depends on the way it enforces its criminal laws. The quality of the Burger Court may well be judged by what it does in this field, in these times.

The final section of *Frontiers*, dealing with discrimination, covers some decided issues, such as the successful attacks on literacy tests in Southern States designed to deny black citizens their franchise and on legislation denying illegitimate children access to the courts. It also explores some of the frontiers, such as discrimination in private schools and using antitrust laws to combat discriminatory housing practices. Despite the advances of the past decade, the discrimination built into our system is still pervasive. The possibilities for civilizing these frontiers are endless. Hopefully Professor Dorsen will undertake this subject by itself in a future volume.

Most of the book consists of amicus briefs or memoranda prepared by Professor Dorsen for the ACLU in leading cases on these subjects. They make, incidentally, an impressive showing of Professor Dorsen’s ability, versatility, and commitment to civil liberties. I believe, however, that less reliance on these briefs might have improved *Frontiers*. Some of the points in the amicus briefs seem academic and dated once the issues have been decided. And without excerpts from the opposing briefs, the flavor of the controversy and the sense of

what made it a great battle is sometimes missing. Professor Dorsen's well-written annotations help, but not enough. For example, the amicus arguments in *Gideon v. Wainwright*,⁵ showing the unfairness of denying counsel in a criminal trial, seem rather evident today. The reader's knowledge would have been better advanced by a discussion of the controversy over the stage of the criminal process at which the right to counsel arises, the difficulties in establishing effective public defender systems, the threats to the independence of defenders, the problems arising because of unqualified counsel, and other frontier issues. But we should not carp about the omissions when we consider the tremendous amount of material skillfully assembled in a volume of only some 400 pages. And the quality and influence of Professor Dorsen's briefs go far toward justifying their extensive use.

Professor Louis H. Pollak of the Yale Law School enhances the volume with a perceptive introduction. Of particular timeliness is his analysis of the need to develop strategies addressed not to symptoms but to the underlying pathology of unrest. The volume also contains a brief preface by the late Senator Robert F. Kennedy reminding us again—never too often—that “the liberty of our nation is threatened when even one of us is denied his freedom.”⁶

Laymen have much to learn from *Frontiers*, but the book has a special message for lawyers. We are inclined to bemoan man's inability to make a difference in our complex society. Yet, as the book vividly shows, lawyers—sometimes through civil rights organizations, sometimes through public-minded law firms, and often working alone—*have* made a difference. I finished this book with a sense of exhilaration at what lawyers have done and can do to advance civil liberties. This is the great tradition of our profession. Wherever the frontiers of liberty, hopefully we shall be among the pioneers.

⁵ 372 U.S. 335 (1963).

⁶ R. Kennedy, *Preface* to N. DORSEN, *supra* note 3, at vii.