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IN DEFENSE OF AMERICAN LIBERTIES, A HISTORY OF THE ACLU. By Samuel Walker.¹ Oxford University Press. 1990. Pp. xiii, 479. Cloth, \$27.95.

*Jeremy Rabkin*²

Samuel Walker, a professor of criminal justice at the University of Nebraska, is no critic of the ACLU. But he isn't much of an historian, either. His "history" does draw on extensive research in the organization's archives and interviews with a great many of its past and present leaders. He provides a wealth of information, much of it unflattering to the ACLU. But in Professor Walker's hands, the derogatory information is not very derogatory, and indeed the rest of American history appears as a mere foil for the exploits of the ACLU. The result is more like a family album than a searching analysis of the ACLU's achievements. Still, like many albums it conveys a good deal about the family. An outsider may tire of the endless smiling poses, but if he grits his teeth and keeps flipping through the pages, he can learn much about the family's cherished conceits—and much about those less attractive traits, to which it has grown so oblivious that it does not even bother to conceal them.

AMERICAN HISTORY, FROM A TO CLU

It must be said, however, that Professor Walker's dotting approach to his subject can be rather trying for those who do not share his enthusiasm. Like many reverent biographers, Walker is prone to exaggerate the importance of his chosen subject. Thus he is not content to tell us that the ACLU was one of the earliest and loudest advocates of President Nixon's impeachment as the Watergate scandals came to light. He feels obliged to trumpet this record by characterizing the "Watergate crisis" as "the most serious constitutional crisis in American history." The Civil War seems unworthy of notice in this view—perhaps because the ACLU wasn't yet on the scene to take charge of the proceedings. Similarly the abolition of slavery and the ratification of the post-Civil War amendments, guaranteeing a wider federal role in the enforcement of basic rights, seems to count for little in Walker's version of American history. In his view, "the greatest advances in civil liberties in American history" were "encompassed" in the decade be-

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tween the ACLU's Supreme Court victories in *Brown v. Board* in 1954 and in the first amendment libel case of *New York Times v. Sullivan* in 1964.

Walker does take note of earlier constitutional battles to defend the rights of dissidents during the First World War. In this critical hour, he intones, "freedom of speech ultimately survived *but only* because the wartime crisis galvanized a small group of Americans into fighting for it."³ This "small group"—needless to say—was the nucleus of the ACLU. Walker cannot even leave it at crediting the ACLU with ensuring that free speech "survived." A bit further along, he confides that the ACLU actually created the American tradition of free speech, *ex nihilo*: before the ACLU arrived on the scene, he tells us, there was "no tradition of free speech . . . in either legal doctrine or public tolerance for unpopular views. The glittering phrases of the first amendment were an empty promise to the labor movement, immigrants, unorthodox religious sects and political radicals."

Professor Walker takes the correctness of ACLU positions so much for granted that he ends up robbing the organization of the credit it may deserve for taking painful or difficult stands. In Walker's version of history, there were never hard choices to make. Thus he does not simply point to excesses or abuses in the national security efforts of the 1950s. He dismisses the entire cold war as an absurd misunderstanding: "The cold war [sic] was an irrational outburst, one of the many episodes of popular hysteria that punctuate American history."

Temporary compromises of civil liberty, no less than sustained injustices, all look equally "irrational" to Walker, because he never allows himself to consider that there are genuine conflicts that must be faced, even within a liberal society. He assures us, near the end of the book, that fights for the "principles of the Bill of Rights" often require "defense of an unpopular and at times seemingly 'dangerous' idea." He seems never to have encountered, never even to have imagined an idea that was actually dangerous—without mocking quotation marks. As if by legal stipulation, in Walker's version of American history, no one can ever have been justified in feeling alarm at hostile incitements or malevolent doctrines, so any efforts to curb speech, by the same stipulation, must have been, not merely constitutionally improper but altogether "irrational" and "hysterical." This is American history reduced to a meaningless clash between scarecrows—and squawking crows. His book provides much

3. Page 12 (emphasis added).

evidence that this smug view has been quite congenial to the ACLU, itself.

RED DAWN

There is, to begin with, the embarrassing matter of the ACLU's extended flirtations with the totalitarian left. In its first twenty years, Walker concedes, the organization's leading figures were "deeply sympathetic to the Soviet Union," viewing it as a "bold experiment in economic democracy." Walker cheerfully doles out the evidence of this attitude; he does not, however, seem to regard it as particularly embarrassing. In Walker's view, sympathy for Stalinist Russia was not at all incompatible with the "defense of American liberty." His history makes clear that such lightheadedness has often been characteristic of the ACLU.

Thus Walker assures us that Roger Baldwin, executive director and guiding spirit of the ACLU in its first four decades, was a "political moderate who saw nothing basically wrong with society's institutions." He even claims that "Baldwin had few illusions about either the Communist party or the Soviet Union." But he also tells us that after a two month trip to Soviet Russia in 1927, Baldwin published an "informative"—and altogether straight-faced—book on *Liberty Under the Soviets*. Almost a decade later, Baldwin was still publishing articles praising the "essential liberties" of Stalin's Russia.

At times, Baldwin could be quite boastful about his radical outlook. In the mid-1930s he wrote to his Harvard alumni year-book: "I seek social ownership of property, the abolition of the propertied class and sole control by those who produce wealth. Communism is the goal." But like many other fellow travellers of the 1930s, Baldwin was quite ready to conceal the truth when he judged that his ideals—or the interests of the ACLU—so required. Thus, for example, in a 1939 radio talk Baldwin insisted that there were no actual communists among the ACLU's leadership, when, as Walker notes, he knew this claim to be untrue.

As late as 1939, following the Hitler-Stalin Pact, the ACLU did adopt an official policy statement affirming that it was "opposed to all totalitarian governments—Fascist, Nazi or Communist—as the antithesis of civil liberties." Only "a few weeks later," however, it "rescinded" this resolution and refused to adopt a resolution, sponsored by socialist Norman Thomas, condemning "the crimes against civil liberty committed in Russia." Some years earlier, when the ACLU leadership was stung at having been identified as a "Communist organization" before the House Un-American Activi-

ties Committee, Baldwin asked a “leader of the left-wing group” on the ACLU Board to prepare a memorandum criticizing the loose procedures of congressional investigating committees. The author of the memorandum turned out to be, as Walker records, “actually a secret Communist party member.”

Professor Walker does not pause to ask how this pattern could be consistent with the views of a “political moderate” with “few illusions about the Communist Party.” But he is not happy about the actions of those with fewer illusions. In 1940, the majority on the ACLU’s executive board finally pushed through a resolution condemning communist affiliations as inconsistent with civil liberty and then engineered the ouster of board member Elizabeth Gurley Flynn, who was simultaneously serving on the National Committee of the American Communist Party. To Walker, this action was “the one great deviation from principle in . . . [the ACLU’s] history.”

By his own account, Walker’s view has become the prevailing one within the ACLU. In 1968, the 1940 anti-communist resolution was rescinded and Elizabeth Gurley Flynn posthumously reinstated. At about the same time, the organization also gave up—“without debate”—the disclaimer it had been appending to its briefs since the late 1940s, affirming that it was “opposed to any form of police state or single-party state, whether fascist, Communist or known by any other name.” There was some debate when the organization entered a civil rights “coalition” in 1962 with the National Lawyers Guild, whose ongoing connections with the Communist Party provoked protests from the NAACP Legal Defense Fund. But the ACLU decided to go forward with this alliance and thus, as Walker concludes, was “laid to rest the lingering ghost of anti-Communism within the ACLU.”

By the 1960s, the ACLU’s rejection of anti-communism was unlikely to have been motivated by a “sympathetic” view of Soviet Russia. But Walker takes the anti-anti-Communist position so much for granted that he does not even bother to defend it. He does not explain what “principle” was violated when the ACLU sought to dissociate itself from advocates of tyranny in the 1940s. He does not ask whether the organization would today feel bound by the same “principle” to accept in its leadership ranks a figure who advocated racial supremacy and conspired with apartheid forces in South Africa, or even one who merely defended right-wing dictatorships, in, say, Latin America. All of Walker’s study of the ACLU’s records and all his interviews with its leaders from various eras do

not seem to have prompted him to any further reflection on the nature of the "principle" at stake in this matter.

ABSOLUTISM—SOME OF THE TIME—FOR SOME CAUSES

Whatever else may explain the ACLU's susceptibilities to the "romance of American communism," Walker's history demonstrates—again, with astonishing indifference to the implications of this fact—that extreme devotion to liberty is not, by itself, a plausible explanation. For in the course of its history, the ACLU has frequently vacillated in its approach to liberty, even to freedom of speech. In conflicts between its leftist sympathies and its absolutist rhetoric about "liberty," the ACLU has indulged its leftist sympathies—not invariably, but often.

This was already clear in the 1930s. Again, Walker himself provides the evidence. In the mid-1930s, the ACLU refused to condemn coercive sit-in tactics by labor unions (which sought not merely to withhold labor but to force the shut down of factories): "The Civil Liberties Union," it explained, "is not organized to protect the rights of property." That, at least, was a fairly plausible line to draw. But thereafter the ACLU supported efforts by the National Labor Relations Board to censor employer pamphlets arguing against unionization: "Freedom of speech is a qualified, not an absolute right," the ACLU's "leftist dominated Committee on Labor's Rights" explained. When President Roosevelt launched his direct assault on the independence of the Supreme Court in 1937, the ACLU refused to condemn this move. One of its senior Board members explained that "there has been a tendency to exaggerate the importance of courts as safeguards of our liberties."

Sympathy for labor and labor legislation was only one loyalty that warped ACLU policy. Anti-fascism was another. Thus, the organization protested the activities of the House Un-American Activities Committee in general but in the mid-1930s, the ACLU's staff counsel privately urged HUAC to investigate Nazi sympathizers in America. In 1940, the ACLU reversed its longtime position in opposition to peacetime conscription. After America entered the war, it went so far as to endorse a proposal for controlling the civilian workforce through a comprehensive system of labor conscription. Its enthusiasm for the war effort also led the ACLU board to adopt an equivocal stance regarding the free-speech rights of fascist sympathizers. The ACLU even vacillated in its response to the round-up of Japanese-Americans and their incarceration in detention camps. (It did eventually rise to the defense of Fred Kore-

matsu and other Japanese-Americans, but on carefully limited grounds.) As late as November 1942, nine months after the round-ups began, Roger Baldwin sent a letter to the army general in charge, congratulating him on completing his mission “with a minimum of hardship” and with “comparatively few complaints of injustice and mismanagement.” It was an “utterly incredible statement”—as Walker, himself, protests—but not uncharacteristic of the organization’s stance in that era.

There have been similar vacillations regarding religious liberty. In the late 1940s, the organization went out of its way to avoid hiring a Jewish director lest his “interest in civil liberties . . . be mistakenly ascribed to his being a member of an oppressed minority group.” When it began attacking school prayer in the early 1960s, the organization went to ridiculous lengths to secure a non-Jewish plaintiff and a non-Jewish legal team. It had earlier considered trying to bully Catholics by “expressing our belief that the Church is throwing its weight around in a fashion which may ultimately make more difficult the preservation of religious and other liberties.” “One of the ACLU’s most important victories” of recent years, according to Walker, was its successful lobbying on behalf of “the Civil Rights Restoration act, which overturned the Supreme Court’s 1984 *Grove City* decision.” It does not strike Walker as at all incongruous that the organization counts it an “important victory” when it succeeds in passing legislation designed to punish a small religious college—which is what *Grove City* is—for declining to pledge support for bureaucratic definitions of sex discrimination—which is what the *Grove City* case was about.

DEFIANT. . . INSIDERS

Some of these lapses may be written off as unavoidable accommodations to irresistible tides of public opinion. But as Walker’s history makes clear, the ACLU has not wanted to view itself as a political or popular organization. Rather, abundant evidence in this book suggests that the ACLU always was—and always understood itself to be—an organization of superbly well-connected insiders, perched far above the sweaty struggles of mere politics.

From the beginning, Walker reveals, the ACLU “depended on inherited wealth”—that is, the contributions of a handful of immensely wealthy donors—to finance its operations. In its earliest years, when it championed the cause of conscientious objectors against conscription in the First World War, the organization conducted secret negotiations with top legal officials of the War Department—to whom it had quite extensive access: Roger Baldwin

simply “assumed,” as Walker notes, that he could “have it both ways” by both allowing himself to “challenge the government in public and also work closely with administration officials behind the scenes.” In the 1920s, when the ACLU was concerned about the operating methods of the new FBI, Baldwin obtained access to the highest levels of the Bureau and proceeded to develop a “close working relationship” with Director J. Edgar Hoover. When the House Un-American Activities Committee seemed to be threatening the ACLU in the late 1940s, the organization negotiated behind the scenes with then Congressman Richard Nixon and HUAC Chairman Parnell Thomas. The ACLU’s Washington office director subsequently used his influence to “help quash a 1955 HUAC report attacking the ACLU.”

The public activities of the ACLU often flaunted its superb political connections. In 1939, it managed to get the President’s wife to attend one of its banquets as featured speaker and then got the Attorney General of the United States to attend its conference a few weeks later. In 1945, the ACLU held an anniversary dinner where it received a telegram from President Truman saluting its achievements and an “equally lavish” tribute from Governor Thomas Dewey, his leading Republican rival. In the same year, Roger Baldwin journeyed to the Far East, was immediately received by the new military governor of Japan, General Douglas MacArthur, and struck up such a cordial relationship with MacArthur that the general subsequently offered his own public tribute to “Roger Baldwin’s . . . beneficial influence on the course of progress.”

Yet with all its enviable political connections, the ACLU did not like to think of itself as “political.” Roger Baldwin’s view was that “other organizations represented special interest groups: union members, blacks, Jews and so on. Alas, the ACLU was a disinterested group” and so it could never be large. Walker reveals that as late as the 1960s, ACLU leaders were reluctant to expand the size and influence of regional offices and local bases, which had often in the past presented exasperating challenges to the national executive board. New national leadership in the late 1960s finally did seek to expand the ACLU’s regional affiliates and proved that there was a substantial constituency for its version of civil liberties: substantial, but at two hundred thousand or so (275,000 at its peak, during the Watergate battles, from which it declined to 180,000 by the end of the 1970s) still not exactly a vast popular movement.

Litigation evidently remains its principal focus—or as Mr. Walker puts it, with his usual modest tone, the ACLU’s role has

become that of "defining the precise scope of these guarantees [in the Bill of Rights] in the modern administrative state." Whether it has done well or not in this role, is not something that this book explores with the appropriate care.

Walker devotes all of three pages to explaining how the ACLU came to champion a constitutional right to abortion (informing us that the ACLU had worked out a scheme of its own, based on fetal "viability," five years before Justice Blackmun). He devotes only half a page to the organization's stand on the rights of homosexuals; he subsequently deplors *Bowers v. Hardwick*, but does not bother to articulate the grounds or the full implications of the ACLU's opposing view. With equal dispatch, he takes a mere eight pages to zip through a survey of other new "causes" taken up by the ACLU in the 1960s and 70s—from the "rights of students" to the "rights of the mentally ill," through the "rights" of prisoners, "the poor," the "homeless," etc. He tells us, with no apparent sense of the implication of what he is saying, that the underlying "strategy" in many of these areas was: "Identify a problem and frame it in civil liberties terms." In every case, it appears that the "problem" was "identified" by individual ACLU activists rather than by any broader social or political forces. And characteristically, Walker has very little to say about whether the underlying "problem"—be it the quality of inner city schools, the treatment of the mentally ill or the pressures of poverty—has actually been at all ameliorated by this approach; he has even less to say about whether the putative beneficiaries are grateful for the ACLU's interventions.

But Walker does not fail to mention that the ACLU continued to do well in the courts through the 1970s: after winning 90 percent of its cases in the 1968-69 Supreme Court term, the ACLU was still able to win 62 percent of the Supreme Court decisions in which it intervened a decade later. And the cases in which the ACLU chose to intervene were the big ones—80 percent of the "landmark" constitutional cases of recent decades were, by Walker's count, brought by the ACLU. With a sympathetic Supreme Court—its most powerful political connection of all—the ACLU, through most of the 1960s and 70s, was not an organization that needed to mobilize broad popular support.

UNCERTAIN PROSPECTS

In its closing pages, Walker's history takes note of cloudier weather for the ACLU in recent years. The organization experienced membership losses and fundraising difficulties in the late 1970s. It felt itself increasingly on the defensive as the Reagan ad-

ministration gave visibility and prestige to the ACLU's opponents and began appointing less sympathetic judges to the federal bench. The organization's leadership then experienced particularly sharp anxiety during the 1988 presidential campaign, when candidate George Bush cited his Democratic opponent's support for the ACLU as a sign that he was too liberal to lead the American people. A poll commissioned by the organization was reassuring in some ways, for it showed that 47 percent of those polled retained a favorable view of the ACLU. But it also showed that most of those polled had never heard of Bush's attacks. How much damage the ACLU might have sustained in a more extended attack on its positions remains open to speculation—and opponents of its positions, much more organized and sophisticated than they were twenty or thirty years ago, are no doubt speculating hard.

With new appointments likely to tip the Supreme Court even further away from ACLU positions in coming years, the organization will presumably have to rely much more on political efforts to advance (or defend) its agenda. Professor Walker's history suggests that the ACLU is not very well prepared for such efforts. Confident of its own good intentions, well-placed with elite connections, the organization did not, historically, have to worry much about generating broad public support for its policies or broad public confidence in its particular recommendations. It has assumed all along that "liberty" and "tolerance" are formulas that can be imposed by a wise governing elite, rather than virtues to be cultivated by persuasive political leaders.

Let us be fair: the ACLU, at its best, has performed valuable services to civil liberty. It may be that the organization will be strengthened and improved by greater involvement in the rough and tumble of non-judicial politics. Of course, politics may tempt the ACLU to greater demagoguery—as in its shrill but successful battle against the Bork nomination. Political calculations may also place even greater strains on its consistency. But an ACLU that has to sell more of its policies by political means will have to think harder about how its nostrums appear to those outside its current following. And the organization will then have to think harder about what its formulations of civil liberty actually have to offer American society, apart from ideological gratification. One hopes, at least, that the organization will be improved by rethinking; there appears to be much room for improvement.