Reviews

New Frontiers

Michael E. Tigar†

Frontiers of Civil Liberties. By Norman Dorsen. *New York: Pantheon Books,* 1968. Pp. ccvi, 420. $8.95.

By any account, Norman Dorsen has compiled a creditable record as law teacher and lawyer. Under his direction, the Arthur Garfield Hays Civil Liberties Program at New York University Law School has pointed the way to substantial curricular reforms in legal education, broken down the barrier between thought and action in the study of law, and greatly enriched the literature of both legal scholarship and civil liberties litigation. This book is a sort of diary of Professor Dorsen's work as law teacher and civil liberties lawyer from 1961 to 1968. The materials in it include papers, memoranda, and abridged texts of briefs (mostly in the Supreme Court) written by Professor Dorsen, as well as transcripts of conferences on civil liberties subjects moderated by him with contributions by men with as diverse views as Professor Alexander Bickel of Yale, Professor Paul Bator of Harvard, Professor Caleb Foote of Berkeley, and NAACP Counsel Robert Carter.

The subject matter of these materials is broad—free speech, academic freedom, religious liberty, criminal justice, the Supreme Court and constitutional adjudication, and racial and economic discrimination—and their quality is uniformly high. The book reflects well the issues of civil liberty which were before the Warren Court in the years it covers.

Were I to criticize at all, it would be only to suggest that the selection of materials ought not to have been limited to the work of one lawyer or group of lawyers. In considering the sit-in cases, for example, the Solicitor General's amicus brief in *Bell, Bouie,* and *Barr*

† B.A. 1962, LL.B. 1966, University of California (Berkeley); Editor-in-Chief, SELECTIVE SERVICE L. REP.

in the 1963 Term[1] is doubtless the most penetrating historical study of Jim Crow filed with the Court and deserves to be given a wider audience. But it is really unfair to criticize this book by scoring its concept. *Frontiers of Civil Liberties* so effectively represents the best in civil liberties litigation of the past decade that it provides an excellent basis from which to evaluate the work of the constitutional litigator in this period and to ask what role, if any, he has to play in the years just ahead. We lawyers owe ourselves this critical evaluation, for the social events to which civil liberties law and lawyers address themselves have moved from the relative obscurity of a lunch counter in Greensboro[2] or a loyalty oath in Florida[3] to dominate public attention and political discourse. Whatever this process may have done for others, it has led me to take a more modest view than was fashionable several years ago of the constitutional lawyer's fitness to stand at the center of the stage in the drama of important social change.

Lawyers, a sociologist once said, are the last of the generalists; he meant that they were the last and only professionals to enjoy a comprehensive view of the society in which we live. He was wrong. Lawyers could be generalists, if they wanted to; their craft and the position it occupies in the lives of their fellow beings make it possible, and perhaps even appropriate, that they should be. But lawyers are by training and inclination "confined from molar to molecular motion."[4] Taking a perspective broader than the case at hand—and, indeed, only one side of the case at hand—is an art that most of them never learn. To take one example, lawyers have for centuries been making up history to fit this or that occasion, while judges, to establish premises for decision and justifications for new rules dressed up in the guise of old, have put an imprimatur upon the crassest non-

1. Supplemental Brief for the United States as Amicus Curiae, Griffin v. Maryland, 378 U.S. 130 (1964), Barr v. City of Columbia, 378 U.S. 146 (1964), Bouie v. City of Columbia, 378 U.S. 347 (1964), Bell v. Maryland, 378 U.S. 226 (1964), Robinson v. Florida, 378 U.S. 153 (1964). The brief canvasses the history of Jim Crow and concludes that the actions of the storekeepers and restaurateurs which led to the arrests of the petitioners-demonstrators were part of a "community-wide fabric of segregation . . . filled with threads of law and governmental policy woven by the State through a warp of custom laid down by historic prejudice." *Id.* at 143. The brief is an eloquent statement of the "promise of Negro freedom" developed by Arthur Kinoy in *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). *See also* Douglas, J., concurring in *Bell*, 378 U.S. at 242.

2. *See* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 226-28 (Bantam ed. 1968) [hereinafter cited as KERNER COMM'N REPORT].

3. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

4. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Holmes made the remark in reference to common law judges, who he said were cabined by the structure of the common law itself. That lawyers should be so confined is a product not of the exigencies of their art, but of a self-induced smallness of vision.

sense and called it history, or tradition. Lord Coke and the common lawyers distorted our perspectives of English history all the way back to Magna Carta and left us with myths from which, because many of them are now enshrined in our jurisprudence and therefore safely in the keeping of the courts, we will not be free short of revolutionary change. The reformers of the nineteenth century committed the same offense with respect to English political history, and the process continues to this day.

There is refreshingly little of this distortion of history in Professor Dorsen's book, although the references to Magna Carta in the introductory chapter[5] and in the discussion of trial by jury[6] betray an acceptance of the prevailing mythology concerning the historical importance of the Charter.[7] Lawyers are free in brief-writing to put upon history any perspective that the court is likely to swallow, and to rely on what some politically-motivated old lord once said in King's Bench, the Exchequer, or the House of Lords as the authority for an assertion of fact about an historical period remote from our own and the old lord's. But when a scholar delineates the premises which establish why a written constitution is preferable to an unwritten one, or how we came to have trial by jury,[8] he owes us more. I speak emphatically not because Professor Dorsen's work gives me much cause to do so, but because the extent of the malaise I am discussing is demonstrated by a scholar of his attainments falling victim to it in the course of a generally excellent work.

Lawyer's sociology is also a cause of some concern if the constitutional lawyer is accepted as central to the making and applying of the rules which are fundamental to our law-life.[9] Caleb Foote observes in the course of a discussion reprinted in this book:[10]

> The great stoic philosopher Epictetus in one of his writings imagined himself facing a wrestler. The strong man boasted to him "See my dumbbells," to which the philosopher impatiently retorted, "Your dumbbells are your own affair. I desire to see their effect." We should like to be able to supply this kind of standard to our subject, to be able to see beyond the decisions of

5. N. DORSEN, FRONTIERS OF CIVIL LIBERTIES 8 [hereinafter cited as FRONTIERS].
6. *Id.* 234.
7. *See* Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060 (1947).
8. FRONTIERS 3-21.
9. There are some exceptions. Edgar and Jean Cahn, advocates, researchers, teachers, and scholars, come readily to mind when one thinks of lawyers' sociology and fact-gathering of high quality.
10. FRONTIERS 31.

> the Supreme Court and to gain a comprehensive picture of the effect of the Court's custodianship of our civil liberties.
>
> . . . .
>
> When we measure the effectiveness of a public health campaign such as that against polio or venereal disease, we can say that the incidence of the disease ten years ago when the campaign began was such and such; that now it is so and so; that the difference represents a measurable decline; and thus by the use of controls we may be able to attribute that decline to certain specific factors. Such an empirical validation is as important for civil liberties as for science. We all know from sad experience that any form of government can hold out the promise of a bill of rights, and that what is critical is to look behind the promise to see if its principles are available in practice to most clients of the police and of the criminal law.

Professor Foote's comments suggest two observations about attributes which the materials of *Frontiers of Civil Liberties* share with much of the constitutional litigator's work in the years just past. First, there is a distressing amount of conclusion-drawing from premises which lack empirical support. Second, the briefs and discussions which led to the Supreme Court decisions of six, five, or even two years ago do not give me the sense of a frontier's challenge: rather, I realize how quickly the social events of the ensuing years have dated the newly made rules, so that they can no longer guarantee the liberties they promised to make safe. I am led to wonder whether the lawyer's belief in "the law" as a universal solution to social controversy—a belief glowingly and ringingly asserted in urging the making of new constitutional rules and the revitalization of old ones fallen into desuetude—was in error. I consider these problem in turn.

First, as to argument from apparent empirical premises, consider the amicus brief from the right to counsel case, *Gideon v. Wainwright*, included in *Frontiers* as chapter 13.[11] The brief argues that providing counsel will not increase costs to the state and might even lower them. To support this assertion, it states that providing counsel in every criminal case will reduce postconviction applications premised upon "real or fancied trial injustices resulting from the lack of trial counsel," thereby saving litigation costs, and that prompt provision of counsel will help to eliminate delays in the administration of justice, presumably by releasing defendants on bail more quickly, thereby

11. 372 U.S. 335 (1963). The brief in *Gideon* was written by Professor Dorsen and J. Lee Rankin and is included in FRONTIERS in abridged form at 193.

saving detention costs.[12] Does the statement that costs will not increase rest upon a calculation, even a rough calculation, of the number of criminal cases tried each year and of the number of lawyers available to try them? Has thought been given to the average cost per hour of providing each criminal defendant with a lawyer, based on an estimate of the number of hours it takes to prepare and try the average criminal case?[13] I doubt it, and the brief does not reflect it. I am not criticizing the brief. It's a good brief, and I have written just as broadly and just as baselessly in more than one case. But apparently no lawyer in raising the cost issue in *Gideon*, and no lawyer in dismissing it, bothered to find out just what he was talking about. Both sides dealt in broad-gauge argumentative assertions. (The same vice is often found in the discussions of church and state: someday, someone will tell me in terms other than ringingly Jeffersonian—or Madisonian—just what is the point of the establishment clause in contemporary America; then, by figuring out what evils lurk, sensible rules can be fashioned to deal with them.) Much of the book's discussion of racial discrimination in public schools, including de facto segregation, is similarly uninformed by analysis of the tensions which underlie disputes about schools in urban areas.[14] The conference on de facto segregation reprinted in the book was held just after Harlem exploded in the summer of 1964, yet it dealt with the problem before it as one of applying *Brown v. Board of Education*[15] to the problems of New York City's schools, including even (for some participants) the psychological and sociological underpinning of *Brown*. As stated in the introduction to the book, the conference made "the tactical and policy choices which informed the briefs." What "information"? In retrospect how viable were the choices?

These defects are minor, however. I am principally concerned with the view of the civil liberties frontiers and, impliedly, of the lawyer's role on those frontiers that one might gain from the book. I turn, therefore, to the second point raised above: do the briefs which secured yesterday's significant decisions instruct us about today's problems? On reflection, I think not, even when the briefs in question are, like those preserved here, among the best of their kind. This contention does not rest upon a distinction between "advocacy" and

12. FRONTIERS 207-09.
13. *See generally* AMERICAN BAR FOUNDATION, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (Silverstein ed. 1965) (3 vols.).
14. FRONTIERS 333.
15. 347 U.S. 483 (1954).

"scholarship," for there need not be such a distinction, provided one informs his reader when he is arguing and when he is explaining.[16] Rather, I think the truly challenging questions, the "frontier" questions about law and liberty, arise from events that occur at some remove from the forum in which constitutional cases are argued and are answered only by careful study of these events.

Consider the *Gideon* brief: it demolishes *Betts v. Brady*,[17] the "special circumstances" counsel case which *Gideon* overruled. The brief and the paragraph of introductory material ably and perceptively inform the reader how a civil liberties lawyer goes about distinguishing, and if he cannot distinguish, discrediting, a precedent which stands squarely in the path of a new constitutional rule.[18] At the conclusion of the abridged brief, there is a short paragraph summarizing the Court's holding in *Gideon* and noting that the right to counsel has since been extended to arraignments, police stations, and lineups.[19] But the history of these developments, so quickly passed over, is central to the meaning of *Gideon*; we cannot understand *Gideon* unless we know the cases extending its rule into the police station. Moreover, we cannot comprehend the frontiers of the right to counsel issue unless we understand what lawyers discovered about criminal justice when they went to the station houses and criminal courts to represent indigents and unless we consider the practical effect of *Gideon* and its progeny upon the fairness with which criminal justice is administered. Now that a lawyer must be provided for everyone, should we not inquire whether the malaise of our criminal courts is more serious than the absence of counsel and of related procedural rights? Perhaps the malaise extends to our use of the criminal courts to sweep up society's refuse—to incarcerate those spewn out by a system increasingly unable to deal with its social problems except by making their more violent (or, as in the case of public drunkenness, aesthetically displeasing) manifestations the subject of punishment.

Or consider school segregation, housing discrimination, and sit-ins. The documents this book contains concerning these issues are a 1963 manual for NAACP Legal Defense and Educational Fund field

16. I am, in principle, in accord with the suggestion of Justice Douglas that law review authors representing special interest groups identify themselves as such when writing in legal journals. *See* Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965).

17. 316 U.S. 455 (1942).

18. FRONTIERS 193-210.

19. Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 388 U.S. 218 (1967).

workers entitled "Demonstrations: How to Protest Within the Law",[20] the transcript of a conference on de facto segregation whose participants were civil liberties lawyers and law professors,[21] an American Civil Liberties Union amicus brief in a voting discrimination case,[22] a 1967 paper on discrimination in private schools,[23] and a 1961 paper on antitrust law aspects of housing discrimination.[24] Material of this character cannot trace the frontiers of the questions it considers. In part this is because later legal developments qualify, modify and require re-evaluation of arguments in an area such as racial discrimination where demands and the manner in which they are presented are quickly changing. Thus, in the material on sit-ins, there is no mention of *Brown v. Louisiana*[25] and *Adderly v. Florida*[26]; concerning de facto segregation, no mention is made of the implications of the *Hobson* case,[27] the recent statutory[28] and judicial[29] changes in voting law are not analyzed; and the Supreme Court's revival of a fair housing law dating back to Reconstruction is not discussed.[30]

One ought, however, to raise questions even broader than those posed by subsequent litigation and legislation. The Court's decisions are rendered in specific historical contexts. To take an example, the holding in *Hamm v. City of Rock Hill*[31] that the prosecution had "abated" is express recognition that historical events, here the passing of a statute, had overtaken the issues in the case before the Court could confront them. In many other ways, as well, the pressure of events outside the Court has defined and redefined the frontier problems for courts and lawyers.

The first lunch counter demonstration at Greensboro, on February 1, 1960,[32] no longer looks to us as it did at the time. Today we view it through the smoke and flame of Harlem, Watts, Newark, Detroit, Washington, D.C., and scores more cities. Careful distinctions about speech and trespass, about residential patterns, and about public

20. FRONTIERS 161.
21. *Id.* 333.
22. *Id.* 317.
23. *Id.* 359.
24. *Id.* 377.
25. 383 U.S. 131 (1966).
26. 385 U.S. 39 (1966), discussed in Kipperman, *Civil Rights at Armageddon—The Supreme Court Steps Back: Adderley v. Florida*, 3 LAW IN TRANSITION Q. 219 (1966).
27. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).
28. Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. II, 1965).
29. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *And see* Judge Wisdom's devastating opinion in United States v. Louisiana, 225 F. Supp. 353 (E.D.La. 1963), *aff'd*, 380 U.S. 145 (1965).
30. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
31. 379 U.S. 306 (1964).
32. *See* KERNER COMM'N REPORT 226-28.

accommodations, seem somehow less than adequate to these events. The litigator who, after reviewing his work, can tell us only that we must bring new lawsuits in the mold of yesterday's[33] should be asked whether he really believes his solution can adequately deal not merely with demands for justice grown more insistent of late, but with a society which, as the Kerner Commission found, is permeated with "white racism."[34] In short, the liberties declared by the Supreme Court cannot be understood from an examination of the briefs and conferences that led to them. To some extent this is because the conclusions these materials advance do not rest upon empirical data. But apart from this we can understand the frontiers of civil liberties only by following a rule from the moment of its birth in the Supreme Court to its impact upon those for whom is was intended, thus determining how far it goes toward solving the problems to which it was addressed. We might then ask whether the problem was properly defined in the first place, or whether a different rule ought not to have been sought. We might even ask whether the problem can be solved by orthodox litigation strategies conducted within the framework of contemporary constitutional doctrine. This point is, I suggest, all the more urgent because today blacks in the cities and youths on the campuses are asking whether the legal system can accommodate just demands, whether it can even redeem the promises it makes.

Take, as an example, the 1968 disturbances at Columbia University and the Cox Commission Report.[35] The authors of the Report concede that Columbia was permeated with cynicism, impersonality, and arbitrariness; they admit that the institution's defects were so great that one could understand, though not condone, the acts of the students who rebelled. While the *Report* does not concede all of the students' allegations against the university, (and one would not expect it to), it does carefully document Columbia's self-proclaimed Manifest Destiny to expand into Harlem, the community be damned. It is difficult to imagine how lawsuits could be fashioned to bring the trustees and administration to account for their accumulated misdeeds. Yet the values for which the students fought at Columbia are concerned with the most fundamental issue before us today: the power of the people to control the decisions which determine the

33. FRONTIERS xxi: "[I]t may be years and even decades before persistent efforts crumble the illegal resistance and secure rights that previously were won only on paper."
34. KERNER COMM'N REPORT *passim*.
35. FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968, CRISIS AT COLUMBIA (1968).

content and rhythm of their lives and to call to account the wielders of power in and out of government. If a lawyer had participated in the events at Columbia, he would perhaps have helped the students to frame their demands in the rhetoric of existing legal principles to the extent that this could have been done. To the extent it could not, he might have used his talents to define the kind of assertions about social organization which were implicit in the students' demands for change; in this role he would have been developing a counter-jurisprudence, or a jurisprudence of insurgency, elaborating justifications for conduct which is outside the law as it exists and is interpreted today. In addition, the lawyer-participant in the Columbia events would have attempted to organize an effective legal defense for the movement for change. He would not necessarily have defended the participants in court, however, for one consequence of large-scale and significant conflicts of the Columbia variety may well be that the participants will acquire a deeper understanding of the principles at stake than they will trust a lawyer to have, so that they (or some of them) will want to defend themselves at trial.

Another possible legal response in the Columbia situation is "affirmative action"—making a number of the protesters plaintiffs and placing their demands before the courts for decision. One difficulty with this tactic is that the constitutional and legal principles which can be invoked in such a suit cannot meet the students' central demands. Also, the manner of the students' protest and the breadth of their demands are often so repellant to the average judge that their lawsuit is likely to be dismissed out of hand.[36] Finally, should the suit survive a motion to dismiss, there is an unfortunate tendency for a lawsuit of this kind to acquire a life of its own, possibly becoming unresponsive to and independent of the goals of the movement it seeks to serve. It tends to become the center of the movement and even its purpose. In some contexts, it is wise for a lawsuit to play a central role; lawsuits for desegregating schools and public facilities were the principal organizational and political method for ending racial discrimination in the South throughout the decade after *Brown v. Board of Education*. In the context of a situation like that at Columbia, however, when a lawsuit fills this central role and then is tossed out of court by an angry district judge, the defeat is debilitating and seems more important than it probably is.

36. One can say this with some confidence in the case of Columbia, since the lawsuit was dismissed out of hand. Crossner v. Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

I have dwelt upon Columbia because the issues which the students raised and the institution against which they rebelled were more limited in scope and thus more easily comprehended than those that are involved when the residents of our city ghettos unite to seek significant social change. But here, too, the lawyer must analyze the demands being made and attempt to redefine them in terms of the fundamental consitutional and democratic values which he can assert on behalf of clients. He can further assist those pressing demands by assessing the impact of particular tactics upon the government and its agencies and by charting the extent to which governmental institutions can accede to these demands. His roles as advisor concerning the law as it is and advocate for the law as it should be do not exhaust his capacity for useful service. The lawyer who claims a place on the frontiers must listen to the voices of the people on the streets and cast their demands as claims for justice in a jurisprudence of insurgency.

I am suggesting, really, a new style of life and work for lawyers, rooted elsewhere than in the law's traditional mythology. We must take the Bill of Rights out of never-never land. Once upon a time there was the American Revolution, and then came the Constitution and some rights by amendment to it. Then there was a Civil War, resulting in many statutes and some explicit promises of freedom, duly enshrined in constitutional amendments. The historical experience out of which the Bill of Rights and the Civil War amendments were fashioned was concrete and real to the authors of those amendments; not so to us. Instead, we rely upon dim and distant historical perspectives, and increasingly consider the rights themselves as abstract concepts and play intellectual games with them. Define, redefine, decide, distinguish, overrule, and dispute are the operative terms in this process. Is it any wonder that at two place in his *History of Western Philosophy* Bertrand Russell puts theology and law together as kindred intellectual disciplines?[37]

While the process of abstraction has gone on, the society for which the abstractions were designed has fundamentally changed. Unfortunately, lawyers and judges know and take account of the changes in far too many cases only by virtue of their own limited sets of experiences. This state of affairs can not continue. Lawyers must understand the life-styles of those who make these insistent claims for justice. First, the lawyer must make legal and tactical decisions in

37. B. Russell, A. History of Western Philosophy 199 (1945).

the light of events around him. More important, he must assist in the fashioning of a new jurisprudence which gives meaning, content, force, direction and coherence to the demands of the young, the poor, and the black discriminated against. As lawyers of this new generation leave the law schools to represent those who are pressing for social change and who have been virtually unrepresented until now, the experiences they share with their clients will give them insight into the principles of social order which alone will accommodate their clients' interests. Some of these principles can be advanced by lawsuits cast in the traditional mold. Some require strategies designed to influence decision makers other than courts—legislators, administrators, city officials. Others can be made into defenses in criminal cases when demands for change confront unyielding authority. Still others can be fashioned into jury speeches. There will yet remain some principles which cannot be accommodated within the system, and which await more fundamental change in our social condition and a return to the equilibrium of opinions and institutions of which Shelley spoke so eloquently.[38]

We will learn to what extent the law can serve people's interests and where it will betray them. I do not know where this process will end, nor what discomfort we shall endure before it has run itself out. I venture only that the frontiers are not in the courtroom any longer, if indeed they ever were.

38. "The great writers of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it. The cloud of mind is discharging its collective lightning and the equilibrium between institutions and opinions is now restoring, or about to be restored." Shelley, Preface to *Prometheus Unbound*, as quoted in G.D. THOMSON, AESCHYLUS AND ATHENS 344 (1st ed. 1941).