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ARE YOU NOW OR HAVE YOU EVER BEEN A MEMBER OF THE ACLU?

David Cole*

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

I

When George Bush accused Michael Dukakis during the 1988 presidential campaign of being a "card-carrying member of the ACLU," he invoked a long tradition in American politics: red-baiting. Indeed, historically speaking, Dukakis got off easily. Some seventy years earlier, presidential candidate Eugene Debs was sentenced to ten years in prison for giving a Socialist antiwar campaign speech.¹ In 1930, Hamilton Fish created the House Special Committee to Investigate Communist Activities, initiating a spate of witchhunting and blacklisting that was continued into the late 1950s by Senator Joseph McCarthy and the House Special Committee on Un-American Activities (p. 120). In 1948, the United States indicted and convicted the entire central leadership of the Communist Party of the United States under the Smith Act,² which criminalized advocacy of violent overthrow of the government; by 1956, 108 Communist Party leaders had been convicted under the Act, and another 27 were indicted and awaiting trial (pp. 185-88). As recently as 1986, the Immigration and Naturalization Service sought the deportation of a poet for her "world communist" poetry.³ A year later it arrested eight immigrants in Los Angeles and sought to deport them for belonging to a group that advocated the "doctrines of world communism."⁴

The vehicle for George Bush's red-baiting, however, was not the Communist Party (already on a precipitous worldwide decline in 1988) but the American Civil Liberties Union — an organization dedi-

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1. Debs v. United States, 249 U.S. 211 (1919).

2. Ch. 439, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1988)).

3. See David Cole, *What's A Metaphor?: The Deportation of a Poet*, 1 YALE J.L. & LIB. 5 (1989); Randall v. Meese, 854 F.2d 472 (D.C. Cir. 1988), cert. denied, 491 U.S. 904 (1989).

4. See American-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445, 445-47 (9th Cir. 1991). The Bush administration continues to seek their deportation to this day.

cated not to violent overthrow of the U.S. government, but to enforcement of our most important foundational document, the Bill of Rights to the Constitution. What are we to make of this substitution? Perhaps candidate Bush perceived the revolutionary potential of the Bill of Rights in the hands of an organized group of committed card carriers (some of whom believe that the Bill of Rights guarantees economic rights such as housing and a living wage) (p. 377). Perhaps the former director of Central Intelligence was impressed by the massive file the FBI compiled during its years of investigating the ACLU as a Communist front. Maybe he was alluding to the ACLU's origins after World War I, when it was in fact a radical, pro-labor, oppositional organization.

Then again, the Bush campaign may have simply gauged the mood of a nation tired of sky-is-falling anti-Communist rhetoric and ready to redirect its hostility against a truly threatening organization. The ACLU, after all, has successfully infiltrated the heart and soul of our legal system and changed American society as the Communist Party never did. As Samuel Walker's *In Defense of American Liberties: A History of the ACLU*⁵ demonstrates, the ACLU has been instrumental in extending constitutional rights to groups who threaten the majority's sense of well-being — accused criminals, minorities, prisoners, women, gays and lesbians, atheists, and perhaps most prominently, dissenters. Critics refer to the ACLU as "the criminals' lobby."⁶ Almost by definition, the ACLU's clients stand outside of, and threaten, the mainstream; if they didn't, they wouldn't need the protections of the Bill of Rights. Bush's red-baiting played on these fears and rhetorically linked the ACLU and the Communist Party as "outsiders" whose rights claims imperil the privileges of the majority.

At the same time, the history of the ACLU is in large part the story of successful adoption by the majority. The organization's life is coextensive with an unprecedented expansion of constitutional rights. Since its beginnings in 1917, the ACLU has helped convince most Americans to adopt a set of values and ideals — such as equality, privacy, and free expression — that protect those outside the mainstream. One measure of the organization's success is that Bush's "card-carrying" charge, from the ACLU's point of view, if not Dukakis', was a shot in the arm; ACLU memberships increased exponentially in the charge's wake (p. 369), prompting the quip that Bush deserved a top position in the organization's membership campaign.

The Bush-Dukakis episode unwittingly captures a central theme in the ACLU's history: the tension inherent in appealing to the mainstream while representing those whom the mainstream seeks to sup-

5. Samuel Walker is Professor of Criminal Justice, University of Nebraska at Omaha.

6. See, e.g., *Offensive/Defensive*, N.Y. TIMES, May 19, 1981, at A14 (quoting Attorney General Edwin Meese).

press, silence, or exclude. The allusion to red-baiting is especially fitting, because red-baiting is a tactic developed by those in the center to marginalize and demonize opponents as "outsiders." It is the antithesis of the ACLU strategy, which encourages the majority to see that it is in their own interest to protect the rights of outsiders. Yet ironically, the ACLU's record with respect to red-baiting is troubled. During the forty-odd years in which state and federal governments conducted Communist witch hunts in the United States, the ACLU often failed to challenge the government's actions head on, and sometimes collaborated with the government behind the scenes, even "naming names."⁷ Indeed, the ACLU engaged in its own red-baiting, purging one of its founders, Elizabeth Gurley Flynn, in 1940 because of her Communist associations, and printing an anti-Communist disclaimer in every brief it filed between 1948 and the early 1960s.⁸

The ACLU's troubled relations with Communism provide fertile ground for analyzing the tension inherent in advocacy on behalf of outsiders. The decision to work within legal structures necessitates an appeal to established values and ideals. Yet the substantive claims of the dissenter and the disempowered will virtually always challenge the status quo. The ACLU seeks to walk that line, and the Communist Party, as the paradigmatic threatening outsider in American political culture for several decades, repeatedly tested the ACLU's ability to do so.

The ACLU presents itself as an "absolutist" organization dedicated to the Bill of Rights (p. 5), but the tension inherent in advocating for outsiders within established legal structures often drove the ACLU to compromise its "absolutist" principles. These pragmatic compromises were rarely if ever successful. The root of the problem was that compromise undermined the absolutist appeal of the ACLU's rights rhetoric. The organization's readiness to defend the rights of its enemies as heartily as those of its friends forms the core of its appeal to the mainstream.⁹ If constitutional rights protect everyone, then protecting the rights of outsiders in fact advances majority rights as well — from the vantage point of constitutional rights, we are all allied with the Communists. Thus, whenever the ACLU agrees to compromise its principles, whether to jettison the Communists or to align itself with the powers that be, the moral authority of its rights rhetoric is undermined.

The ACLU nonetheless survived the compromises of the Cold War

7. See *infra* note 47 and accompanying text.

8. See *infra* note 46 and accompanying text.

9. See, e.g., WILLIAM DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* 2 (1985) ("the strength of the ACLU is directly tied to its nonpartisan image"); CHARLES LAM MARKMANN, *THE NOBLEST CRY* 428 (1965) ("What has largely contributed to the esteem that the Union has gained from both government and the enlightened public is its utter lack of partisanship and its concentration on principle.").

era, and is known today not as the organization that betrayed the Communists but as the organization that will represent even the Nazis and Oliver North if their rights are endangered. It has regained the absolutist high ground from which it slipped during the Cold War. But now that it has recovered its principled stand, the ACLU faces a new threat to the principles for which it stands. In Walker's preoccupation with whether the ACLU has lived up to its ideals, he fails to ask what may be a more pertinent and difficult question: Is the ACLU's absolutist, nonpartisan rights rhetoric outmoded as a principle for navigating today's civil liberties controversies?

II

One of the most striking things about the ACLU is that its relatively short history — its predecessor, the National Civil Liberties Bureau, was founded in 1917, and the ACLU itself was founded in 1920 — encompasses virtually the entire active life of the Bill of Rights. We recently celebrated the Bill of Rights' 200th anniversary, but the celebration was misleading because the Bill of Rights effectively lay dormant until the late 1920s, when the Supreme Court first paid serious attention to claims of constitutional rights.¹⁰

Walker's book is as much a history of constitutional rights as of the ACLU, and reading it reminds one of the substantial progress this nation has made in protecting basic civil and political liberty. As a result of that progress, much of what passed as legitimate exercise of state power in the first half of this century would be flatly unacceptable today. During World War I, for example, the federal government imprisoned many who did no more than speak out against the war, and banned the Socialist Party and antiwar press (pp. 14, 26-27). It seized and burned all the records of the Industrial Workers of the World, a prolabor organization, and indicted 169 of its top leaders (p. 25). In the Palmer Raids of 1919 and 1920, directed by Attorney General A. Mitchell Palmer, the Justice Department arrested over 4000 "subversives" in thirty-three cities across the country (pp. 43-44). The searches and arrests were conducted without warrants and were often accompanied by physical beatings (pp. 43-44). A *Washington Post* editorial praised the raids, asserting that "[t]here is no time to waste on hairsplitting over infringement of liberty."¹¹

During World War II, in an action strongly supported by then-California Attorney General Earl Warren and criticized by very few, the U.S. Army interned 120,000 Japanese-American citizens in con-

10. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding segregation against equal protection challenge); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

11. P. 44 (citing ROBERT K. MURRAY, *RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919-1920*, at 217 (1964) (quoting *The Red Assassins*, WASH. POST, Jan. 4, 1920, at 4)).

centration camps as security threats, solely because of their race (p. 136). The Supreme Court found no constitutional violation.¹² Until the 1950s, segregation was legal and the Communist Party was not.¹³ Until the 1960s, states could freely regulate the sexual practices of consenting adults,¹⁴ and until the 1970s women were denied equal protection of the laws because they were seen as simply different from men.¹⁵

The ACLU protested all of these practices, and sometimes stood courageously alone in doing so. All of this conduct is now seen as clearly unconstitutional and unacceptable: people are now free to voice dissent unless and until it poses an immediate danger of illegal conduct;¹⁶ racial distinctions are inherently suspect;¹⁷ warrantless searches of homes are illegal;¹⁸ women deserve equal treatment;¹⁹ and at least heterosexuals have a right to unregulated sexual intimacy.²⁰

Even a cursory listing of ACLU-handled cases illustrates the extent to which the ACLU helped develop these and other constitutional rights. It litigated *Gitlow v. New York*,²¹ where the Court first held that the First Amendment applied to the states; *Whitney v. California*,²² which occasioned a separate opinion by Justice Brandeis that has become a cornerstone of First Amendment jurisprudence;²³ the Scopes trial, which changed the way the nation felt about teaching evolution in the public schools;²⁴ *Stromberg v. California*,²⁵ the first case to protect symbolic speech; *Powell v. Alabama*,²⁶ which reversed for inadequate counsel the death penalty for nine young black men; *Hague v. CIO*,²⁷ which established that streets and parks are public fora available to all citizens for speech purposes; *Engel v. Vitale*,²⁸ which declared organized prayer in public schools unconstitutional;

12. *Korematsu v. United States*, 323 U.S. 214 (1944).

13. See *supra* note 2 and accompanying text.

14. Pp. 300-01 (discussing events preceding *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

15. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961); *Muller v. Oregon*, 208 U.S. 412 (1907); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

16. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

17. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

18. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980).

19. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

20. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The ACLU, of course, takes the position that all individuals have a right to unregulated sexual intimacy, but to date the Supreme Court has adopted that view only as to heterosexuals. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

21. 268 U.S. 652 (1925).

22. 274 U.S. 357 (1927).

23. 274 U.S. at 372 (Brandeis, J., concurring).

24. See pp. 72-76 (describing political and legal reaction to the Scopes trial).

25. 283 U.S. 359 (1931).

26. 287 U.S. 45 (1932).

27. 307 U.S. 496 (1939).

28. 370 U.S. 421 (1962).

Keyishian v. Board of Regents,²⁹ which struck down an anti-Communist loyalty oath for public school teachers; and *Tinker v. Des Moines*,³⁰ which extended speech protections to students.

More recently, the ACLU's Women's Rights Project almost single-handedly developed the constitutional law of gender discrimination under the leadership of Ruth Bader Ginsburg.³¹ Its Prisoners' Rights Project has challenged prison conditions in forty-five states (p. 311). Its Reproductive Freedom Project, together with Planned Parenthood and others, has handled most of the important abortion cases since *Roe v. Wade*. The ACLU files amicus briefs in virtually all cases involving individual rights issues in the Supreme Court, and often its briefs have proved more influential than those of the parties.³²

Beyond litigation, the ACLU uses its nationwide membership organization to mobilize grassroots efforts — for instance, to help defeat the Supreme Court nomination of Judge Robert Bork (pp. 366-68). In addition, its affiliate structure allows it to respond at a local and direct level to civil liberties problems (p. 338). Finally, it places tremendous importance on educating the public directly about civil liberties, and its pamphlets and publications have proved very influential in both extending and reinforcing the protection of individual rights.

Of course, the ACLU is not solely or even primarily responsible for the sea change in constitutional rights since 1920. Walker's focus on the ACLU, while appropriate for an organizational history, often has the effect of slighting the substantial contributions of other civil rights organizations³³ and overlooks almost entirely the material and political forces that supported change. It is no accident that the Court reversed *Plessy v. Ferguson* in 1954,³⁴ when the civil rights movement was strong and the perceived need to defend our democratic way of life from the ideological threat of communism was at its height.³⁵ The recognition of women's claims to equality³⁶ followed the widespread

29. 385 U.S. 589 (1967).

30. 393 U.S. 503 (1969).

31. See David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 54 (1984).

32. See pp. 250-51 (discussing ACLU amicus briefs in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Mapp v. Ohio*, 367 U.S. 643 (1961)). See also Cole, *supra* note 31 (analyzing importance of ACLU Women's Rights Project amicus briefs in early sex discrimination cases).

33. Such as the NAACP, the NAACP Legal Defense and Educational Fund, the National Lawyers' Guild, the Center for Constitutional Rights, the Emergency Civil Liberties Committee, the Lawyers' Committee for Civil Rights Under Law, the Student Non-Violent Coordinating Committee, the Mexican-American Legal Defense and Educational Fund, Equal Rights Advocates, the National Organization for Women, Planned Parenthood, Lambda Legal Defense and Education Fund, and the National Abortion Rights Action League.

34. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *rev.* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

35. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

36. See *Craig v. Boren*, 429 U.S. 190 (1976).

grassroots success of feminism in the 1960s and 1970s, and direct action by the labor movement was influential in achieving speech rights for workers and other dissidents.³⁷ Ignoring these forces for change makes it difficult to assess the ACLU's particular role.

Nevertheless, the ACLU's part in virtually all of these struggles was indisputably significant, and one of the strengths of Walker's book is its exhaustive account of the remarkable growth of civil liberties over the course of the ACLU's life. Simply by presenting this success story, *In Defense of American Liberties* makes an important contribution to the rights debate. While Walker does not directly address the progressive critique of rights,³⁸ the history he presents implicitly challenges the claims made by rights critics such as Mark Tushnet, who has argued that "[b]ecause rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles."³⁹ Any comparison of the rights enjoyed by American citizens in 1920 with those enjoyed today calls into serious question the charge that these are merely "momentary advantages." And while it is certainly true that, because the exercise of rights costs money, the rich continue to enjoy greater freedoms than the poor,⁴⁰ it is unlikely that the "rights gap" has increased since 1920, during which time the rights of the poor have expanded considerably. If we could put a version of Ronald Reagan's question to the American people — are you better off today (in civil liberties terms) than you were in 1920? — the answer would be, I suspect, overwhelmingly affirmative. Though conducted primarily through the courts rather than in the streets, the rights revolution has changed the consciousness of the American people in ways that will be difficult to reverse.

III

The ACLU's appeal to individual rights has succeeded because it is in an important sense a universalist claim. When the ACLU urges that pornographers should be free of obscenity restrictions, it defends not so much a pornographer's right as a speaker's right. It is the right of all human beings to speak freely, even when the message offends the majority. Similarly, when the ACLU argues for the exclusionary rule, it appeals to the sense that all people have an interest in protecting a sphere of privacy from the unrestrained arm of the state. The ACLU's

37. See David Kairys, *Freedom of Speech, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 237 (David Kairys ed., 2d ed. 1990).

38. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). But cf. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (defending rights-based approach to progressive politics).

39. Tushnet, *supra* note 38, at 1371.

40. *Id.* at 1387-89.

individualist focus has a universalist force precisely because it appeals to what, at bottom, we all hold in common — we are all individuals.

The foundation of this individualist-universalist approach is even-handedness, and this explains the ACLU's self-characterization as an "absolutist" and "nonpartisan" organization. The concept of an individual right necessarily implies that all individuals hold equal entitlement to its protection. Thus, the ACLU must defend the rights of the Nazis, the Ku Klux Klan, pornographers, and Oliver North; if it did not, its appeal to individualist rights would lose its universalist force. If the majority sees the ACLU selectively defending individual rights, it will see no reason not to be selective, too — by denying to disfavored individuals rights that the majority enjoys. Thus, it is for good reason that the ACLU is best known for its defense of the unpopular; therein lies its moral authority, which is the ultimate source of its influence.

Walker demonstrates, however, that the ACLU's reputation in this regard outpaces its actual record. Throughout the organization's history, two forces have made strict adherence to the absolutist principle difficult: (1) the danger of becoming identified with a particularly unpopular outsider; and (2) the pragmatic desire to maintain connections to those exercising power. The first concern led the ACLU to take steps to distance itself from the Communist Party, thereby fueling rather than confronting anti-Communist fervor. The second desire often led the ACLU to mute its criticism of official violations of constitutional rights.

The Communist Party is the ACLU's Achilles' heel. To Walker's credit, he devotes a great deal of attention to the ACLU's wavering and conflicted responses to Communism. In its early years, the ACLU was distinctly pro-labor, and many ACLU members were quite sympathetic to the Soviet Union and Communism.⁴¹ Roger Baldwin, the organization's founder and leader for thirty years, spent two months in the Soviet Union in 1927 and wrote a largely favorable book entitled *Liberty Under the Soviets*.⁴² In the 1930s, Baldwin undertook active organizing for the Communist Party's Popular Front; in his thirtieth-anniversary Harvard yearbook, published in 1935, Baldwin wrote: "I seek social ownership of property, the abolition of the prop-

41. In 1935, the ACLU's National Committee had more Socialists (28) than Democrats (22), and more Communists (4) than Republicans (3). P. 119.

42. ROGER N. BALDWIN, *LIBERTY UNDER THE SOVIETS* (1928). The book examines both liberty and repression in the Soviet Union, but Baldwin admits that he chose the title to underscore his emphasis on the expanded definition of liberty ushered in by Communism — particularly, economic liberty. *Id.* at 2. He writes:

[a]lthough I am an advocate of unrestricted civil liberty . . . I know that such liberty is always dependent on the possession of economic power. Economic liberty underlies all others. In any society civil liberties are freely exercised only by classes with economic power — or if by other classes, only at times when the controlling class is too secure to fear opposition.

Id. at 3.

ertied class and sole control by those who produce wealth. Communism is the goal."⁴³

At the same time, the ACLU differed with the Communist Party on several fundamental issues. Perhaps most importantly, the Communist Party refused to concede free speech rights to conservatives, while the ACLU thought all should receive First Amendment protections (p. 63). The ACLU also objected to the Communists' tactics of maintaining secrecy and denying party membership under oath (p. 63). At bottom, the organizations held conflicting aims and used conflicting means: where the ACLU worked within the system to extend individual rights, the Communist Party sought far-reaching social and material equality through violent revolution.

The ACLU represents many organizations whose aims clash with its own, most prominently the Nazis and the Ku Klux Klan. The ACLU's brand of universalism allows it to defend the rights of such groups without endorsing their views. In fact, the ACLU often represented the Communist Party; as Walker notes, "[b]ecause of government repression, they were the ACLU's most frequent clients" (p. 63). In the 1920s, the ACLU's two most important Supreme Court cases involved the defense of Communists Benjamin Gitlow in New York and Charlotte Whitney in California.⁴⁴

But as anti-Communist hysteria heated up in the late 1930s, the ACLU began to back away from the Communist Party. When the New York legislature launched an investigation into whether Communists were teaching in New York City schools and colleges, the ACLU "objected only to certain procedures" and left the purpose of the investigation unchallenged (p. 125). When Senator McCarthy's House Special Committee on Un-American Activities (HUAC) labeled the ACLU a Communist front in 1938, the ACLU did not attack HUAC's legitimacy, but instead met privately with the committee, offered to turn over its books, and denied that there were any Communists among the ACLU leadership (p. 129). After a series of private meetings, HUAC cleared the ACLU's name (p. 129). At the same time — and, some charge, in exchange for the exoneration⁴⁵ — Roger Baldwin suppressed an ACLU memo criticizing HUAC, appointed a special committee stacked with anti-Communists (the committee subsequently published a report praising HUAC's objectives), and began an effort to purge Communists from the organization's leadership (pp. 129-30).

In 1940, the ACLU adopted a policy excluding from its governing

43. P. 119 (quoting HARVARD CLASS YEARBOOK (1935)).

44. See *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

45. See, e.g., CORLISS LAMONT, FREEDOM IS AS FREEDOM DOES: CIVIL LIBERTIES TODAY 269-70 (1956).

committees or staff anyone "who is a member of any political organization which supports totalitarian dictatorship in any country or who by his public declarations indicates his support of such a principle" (p. 131). The target of the resolution was Elizabeth Gurley Flynn, one of the ACLU's founders, a leading figure on the left for two decades, and a member of both the ACLU board and the Communist Party's National Committee. She declined the ACLU board's invitation to resign, so the board held a formal "trial" over her eligibility.

Flynn opened the proceedings by moving to dismiss the charges, contending quite accurately that the charges "violate[] every principle we fought for in the past" (pp. 132-33). John Haynes Holmes, the chair of the board and a virulent anti-Communist, ruled against Flynn on this point and every other. As one would expect in a guilt-by-association trial, the proceeding focused more on the Communist Party and the Soviet Union than on Flynn herself. At its close, after a six-hour debate, the board voted ten to nine to expel Flynn. It was not until 1968 that the ACLU rescinded its anti-Communist resolution, and not until 1976 that Flynn was reinstated to the board, posthumously (p. 133).

Nor was the Flynn incident an isolated mistake. While the ACLU defended some alleged Communists, such as labor leader Harry Bridges, it also continued to distance itself from the Communist Party. When in 1947 the federal government instituted a loyalty program barring from government employment anyone who was affiliated or even sympathetically associated with a Communist organization, the ACLU again took the tack of accepting the government's substantive purpose as legitimate and objecting only to its procedures (pp. 176-78). One year later, the federal government indicted the entire leadership of the Communist Party; while the ACLU demanded that the indictments be dropped, it also began inserting the following disclaimer into all of its legal briefs:

[The ACLU] is opposed to any governmental or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or the single-party state, or any movement in support of them whether fascist, Communist, or known by any other name.⁴⁶

At the same time, the ACLU refrained from criticizing, and sometimes collaborated with, one of the principal fighters in the Cold War, the FBI. Roger Baldwin was personally impressed with J. Edgar Hoo-

46. P. 186. The ACLU included this disclaimer in its briefs until the early 1960s. *Id.* In 1949, the ACLU adopted an anti-Communist resolution opposing "any form of . . . the single party state, or any movement in support of them." Mary S. McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in *THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM* 156 (Robert Griffith & Athan Theoharis eds., 1974) (quoting ACLU, *IN THE SHADOW OF FEAR: AMERICAN LIBERTIES*, 1948-49 at 71 (1949)).

ver, and as a result often toned down ACLU criticism of the agency (pp. 65-66, 191). In 1950, at the height of the FBI's illegal domestic surveillance, ACLU Board member Morris Ernst published a *Reader's Digest* article, "Why I No Longer Fear the FBI," which Walker claims was "practically written by the bureau" (p. 192). Irving Ferman, the head of the ACLU's Washington office in the 1950s, gave internal ACLU documents to the FBI and named individuals he suspected of being Communists (p. 193). In 1947, Baldwin himself, who had become strongly anti-Communist, informed a member of Congress that an ex-director of the Chicago ACLU office was affiliated with the Communist Party (p. 193). During this entire period, the FBI was spying on the ACLU; its files on the organization ultimately numbered more than 40,000 documents.⁴⁷

The ACLU's tactic of compromised objection to government procedures rather than substantive criticism of government ends was by no means limited to Communist issues. In the 1950s, for example, the ACLU took a similar position on homophobia, which often went hand-in-hand with anti-Communism.⁴⁸ At first it declined to represent lesbians discharged from the military, because ACLU policy considered homosexuality "relevant to an individual's military service."⁴⁹ Later, it stated that "homosexuality is a valid consideration in evaluating the security risk factor in sensitive positions," and limited its defense to due process and entrapment claims.⁵⁰ In its most revealing statement, the ACLU professed incompetence to judge the normative merits of homophobic policies: "It is not within the province of the Union to evaluate the social validity of the laws aimed at suppression or elimination of homosexuals."⁵¹ With homosexuals and Communists, then, the ACLU compromised between the claims of the included and the excluded by insisting only that the exclusions be carried out with fair procedures.

Perhaps the most troubling example of procedural compromise involved the Japanese internment program of World War II. Initially

47. P. 193. See generally DONOHUE, *supra* note 9, at 175-88 (reviewing evidence of ACLU-FBI cooperation contained in FBI files).

48. For example, in 1950, Senator Kenneth Wherry explained to the *New York Times*: "You can't hardly separate homosexuals from subversives. . . . Mind you, I don't say every homosexual is a subversive, and I don't say every subversive is a homosexual. But [people] of low morality are a menace in the government, whatever [they are], and they are all tied up together." N.Y. TIMES, Dec. 16, 1950, at 3, quoted in LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* 143 (1991). In 1953, President Eisenhower signed an executive order mandating that the federal government investigate all its employees for homosexuality. Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953) (investigations designed to develop information relating to potential "sexual perversion," among other things), discussed in FADERMAN, *supra*, at 143.

49. FADERMAN, *supra* note 48, at 335 n.11.

50. *The ACLU Takes a Stand on Homosexuality*, THE LADDER, Mar. 1957, at 8, quoted in FADERMAN, *supra* note 48, at 144.

51. *Id.*

the ACLU strongly opposed the whole endeavor, but almost immediately an internal split developed. The internment policy was backed by a curious mix of ACLU liberals supportive of President Roosevelt (including Alexander Meikeljohn), ACLU progressives supportive of the Soviet Union and the Communist Party, and ACLU conservatives generally deferential to presidential power (p. 139). After much internal debate, the ACLU adopted a watered-down policy, advocating procedural constraints such as individualized hearings conducted by civilian authorities, but leaving unquestioned the substance of the President's internment order.⁵² In 1942, seeking to maintain good relations with the military even as it was moving 120,000 Japanese Americans into concentration camps, Baldwin wrote General John DeWitt, "congratulating him on completing the evacuation 'with a minimum of hardship,' [and] noting the 'comparatively few complaints of injustice and mismanagement'" (p. 143).

What can be said of the ACLU's repeated compromises of principle over the Communists, or of the fact that during the Cold War the ACLU had a more cordial relationship with the FBI than with the Communist Party? Walker simply treats these incidents as mistakes. But certainly they tell us more than that.

From a critical perspective, these compromises might be said to reveal a weakness in the appeal to rights. The same characteristic that makes the appeal to rights strong — its universality — is also a limitation. The rights appeal works in part because it can be portrayed as neutral and nonpartisan. But it may be difficult to reconcile a "neutral" stance with critiques of normative substance. In this sense, the ACLU's substitution of procedural complaints for substantive criticism of blatant discrimination against Communists, homosexuals, and Japanese Americans is illustrative. That move has the same effect within rights discourse that a focus on rights sometimes has in the larger sphere of political debate: it refuses to take sides when sides have to be taken. Just as the ACLU distances itself from the substantive political positions of its clients by focusing on defending their rights, so when push came to shove in the 1940s and 1950s, the ACLU retreated to procedural rights when substantive rights were the core political issue.

The ACLU's compromises also indicate the frailty of individual rights when asserted against strong community sentiment. Individual rights against the majority need their greatest protection when the majority feels most threatened. Yet the history of this country's treatment of Communists suggests that when an outsider's claim is perceived as a serious threat to the community, the appeal to rights

52. Pp. 140-41. Even so, the ACLU was one of the few organizations to condemn the internment policy; neither the National Lawyers Guild nor the American Bar Association registered any protest whatsoever. P. 142.

will not prevail. An appeal to individualist values works as long as people see themselves as individuals first and as a community second. But where the majority feels strongly *as a community* that its community status is at stake, where people see their individual identity as secondary to their communal identity, an appeal to rights is less likely to succeed. This may explain the weakness of rights claims in wartime, for war endangers the very existence of the community and so maximizes nationalist identification. Not coincidentally, the ACLU's biggest compromises occurred during wartime, hot and Cold.⁵³

Yet the fact that rights are diminished when the community itself is threatened does not wholly condemn the appeal to rights, if only because we are not always at war. When we see ourselves as individuals first and a community second — which in a nation of our size and diversity will probably be much of the time — rights rhetoric will be effective. And perhaps the most important result of the rights revolution is that our *communal* identity is now inextricably intertwined with the protection of *individual* rights. Thus, when the Supreme Court began to reject anti-Communist laws in the mid-1960s, it reasoned:

“national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in the Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties — the freedom of association — which makes the defense of the Nation worthwhile.⁵⁴

The pragmatic element of the ACLU may have felt that distancing the organization from the Communists was essential to retaining its appeal to the majority — that the Communists would have to be sacrificed for the greater good. But because the ACLU's authority turns on its willingness to defend everyone's rights, these compromises ultimately undermined the organization's legitimacy. The compromises revealed the limits of the ACLU's principles of absolutism and evenhandedness, and reduced the moral authority of its rights claims. Ironically, Richard Nixon best illustrated the cost of the ACLU's political compromise. When Arthur Garfield Hays testified for the ACLU in Congress against the anti-Communist Nixon-Mundt bill in

53. One indicium of the weakness of individual rights claims during the Cold War is a 1954 survey that found that 89% of the American public thought that Communists should not be allowed to teach in universities, 77% felt that Communists should have their citizenship stripped, 68% believed that they had no right to speak, and 51% said that they should be incarcerated. See SAMUEL A. STOUTER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES 41-44 (1955).

54. *United States v. Robel*, 389 U.S. 258, 264 (1967).

1948, then-Congressman Richard Nixon interrupted him to ask whether the ACLU itself had not barred Communists. When Hays admitted this was true, "Nixon laughed and asked why the ACLU would deny the government the same power. Hays had no answer" (pp. 198-99).

The ACLU's compromises on the Communist Party can be fruitfully compared to its stance on the most controversial case in its more recent history — its 1977 defense of the Nazis who sought to march in Skokie, Illinois. On this issue, the ACLU never wavered. It held strong in its defense of the Nazis' rights even when harshly criticized by its friends, and even when it appeared that its stand might prove crippling expensive (pp. 323-29). While myth has it that this unpopular defense cost the ACLU thousands of members (and their dollars) (p. 323), Walker's account also suggests that there may have been other reasons for the organization's fiscal troubles.⁵⁵ More importantly, in the long run the Skokie incident strengthened the ACLU. The Skokie case has come to symbolize the ACLU's nonpartisan, evenhanded defense of constitutional rights, and, at least in the world of images, has effectively overshadowed the ACLU's earlier compromises on Communism.

IV

Early in his book, Walker foreshadows his overriding theme: "The essential feature of the ACLU is its professed commitment to the nonpartisan defense of the Bill of Rights" (p. 5). The value of Walker's book is reflected in his addition of "professed" to a sentence that might otherwise have been written by an ACLU publicist. Walker carefully measures the ACLU against its own standard of an evenhanded nonpartisan defense of rights, and he is as interested in where the ACLU falls short of that standard as in where it meets it. But because Walker's appraisal fails to examine the validity of the standard itself, it ignores one of the most interesting questions raised by the ACLU story: Is it possible to be evenhanded and absolutist about constitutional rights?

At the outset, the ACLU was anything but absolutist and nonpartisan. In a memorandum at its founding, Roger Baldwin proposed a "dramatic campaign of service to labor" with a National Executive Committee composed of a core of labor leaders and labor sympathiz-

55. Apparently, the ACLU began to suffer economic hard times three years before the Skokie case, in part because of internal organizational problems. Pp. 327-28. Skokie was merely the crisis that forced the ACLU to do something about these underlying problems. When David Goldberger, the ACLU attorney who represented the Nazis in Skokie, wrote a letter to ACLU members explaining the case and seeking their financial support, the letter brought in an unprecedented \$550,000 from 25,000 members, nearly three times more than any other fundraising letter had ever raised. P. 329.

ers.”⁵⁶ Baldwin told one interviewer that “he viewed the free-speech issue as primarily political and only secondarily legal, and as inseparable from the rights of workers to organize and bargain collectively.”⁵⁷ And Baldwin distinguished himself from Emma Goldman, whom he admired greatly: “I was essentially a pragmatist. I did things that I thought would work. Emma was essentially an idealist, and she did things that she thought were right.”⁵⁸

Not coincidentally, the ACLU at its founding was also more interested in direct action than litigation. The courts had historically provided little check on government abuse of rights, and had proved particularly ineffectual during World War I. Baldwin and his cofounders, inspired by the power of strikes, favored “struggle in the field” to dramatize their cause, even if it might lead to “conflict with the authorities and even . . . mob violence” (p. 47). Arthur Garfield Hays, one of the organization’s greatest attorneys, was openly cynical about the legal process, and saw lawsuits as a platform for making political statements and educating the public rather than for achieving legal victories (p. 53).

As the ACLU gained independent stature in the legal community, however, and as the courts became more hospitable to constitutional rights claims, the organization developed the nonpartisan, absolutist identity for which it is known today. An absolutist commitment to principle can be particularly effective in a legal setting, because it corresponds to the law’s own emphasis on principle, uniformity, and certainty. The ACLU’s nonpartisan identity resonates with the law’s insistence on distinguishing itself from politics. Thus, the ACLU’s identity was useful not only in appealing to the mainstream, but precisely in doing so through law.

But this strategy has its limits. When the courts become less hospitable to liberal conceptions of rights, more overtly political tools may be necessary simply to forestall erosion of gains once won. This is certainly the case in the abortion context today, where a Supreme Court dominated by Republican appointees appears poised to deny women the right to reproductive choice. The ACLU has responded to that threat by abandoning its nonpartisan identity and openly politicizing the issue of reproductive choice. In November 1991, the ACLU sought early Supreme Court review of a Pennsylvania abortion statute, phrasing the question presented as “Has the Supreme Court overruled *Roe v. Wade*?”⁵⁹ Moreover, it announced the filing of its

56. National Civil Liberties Bureau Memorandum, “Proposed Reorganization of the Work for Civil Liberty” (Dec. 31, 1919), *quoted in* Kairys, *supra* note 37, at 255.

57. Kairys, *supra* note 37, at 255.

58. *Id.* at 254.

59. See Petition for Writ of Certiorari at i, *Planned Parenthood v. Casey* (No. 91-744), *cert. granted*, 112 S. Ct. 931 (1992).

petition for certiorari at a national press conference, explaining its action as an attempt to let women know where they stand prior to the 1992 presidential election.⁶⁰ Thus, as the courts once again grow more hostile to rights, the ACLU may return to more overtly political tactics.

A more profound limitation on the strategy of an evenhanded defense of rights lies in the unstated premise that constitutional rights do not conflict. If rights conflict, one cannot "evenhandedly" defend everyone's rights. Selectivity becomes inevitable. Accordingly, the ACLU has chosen to defend the rights of pornographers to speak over the rights of the community to regulate the fabric of social life or the rights of women to protect themselves from gender discrimination (pp. 350-52). It has chosen to defend the expressive rights of cross burners and Nazi marchers over the interests of providing equal protection to blacks and Jews.⁶¹ It has defended the rights of corporations to speak rather than the rights of the poor not to have their voices drowned out in election campaigns.⁶² And it supported the right of a bank to fire a woman for taking pregnancy leave on the ground that a state law requiring employers to provide pregnancy leave violated principles of equality.⁶³ Where rights compete, dedication to the evenhanded defense of rights does not dictate which side to support.

What unites the ACLU's positions in these cases is not evenhandedness or absolutism, but commitment to an individualist perspective. As Robert Post has argued, laws designed to suppress speech harmful to women or blacks as a class are difficult to square with an individualistic conception of rights.⁶⁴ Rather than limiting speech where it harms the individual qua individual, as the "fighting words" doctrine arguably does, or where it harms the community qua community, as the clear and present danger doctrine does, the regulation of racist and sexist speech is designed to protect particular groups. Such regulations are based on the notion that in our society one derives one's identity at least in part from gender or race, and that equal enjoyment of rights therefore requires the state to recognize these differences among individuals.⁶⁵ But that understanding conflicts with an individualistic conception of rights because it affords individuals dif-

60. "Important freedoms can never be guaranteed by the courts alone," said ACLU Executive Director Ira Glasser. CIVIL LIBERTIES, No. 375 at 1 (Winter 1991-1992).

61. See, e.g., *In re R. A. V.*, 464 N.W.2d 507 (Minn.), cert. granted sub nom. *R. A. V. v. City of St. Paul*, 111 S. Ct. 2795 (1991) (crossburning); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (invalidating university regulation prohibiting racist speech).

62. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978).

63. See *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272 (1987).

64. Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

65. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2376-79 (1989).

ferent types of protection depending on their group identity. It is the ACLU's individualist ethic that underlies its adamant opposition to virtually all regulation of racist speech and pornography.⁶⁶

The same individualist perspective explains the ACLU's position in the campaign finance cases. Restrictions on campaign spending attempt to limit the speech of some (wealthy) individuals in the interest of providing more equitable speech opportunities to other (poor) individuals. From a structuralist perspective, campaign finance regulation may increase actual speech opportunities by preventing domination of the marketplace of ideas. But a rigidly individualistic understanding of rights bars such distinctions because they accord individuals different speech rights based on their wealth.⁶⁷

Probably the most extreme example of the ACLU's individualist ethic is its position in *California Federal Savings & Loan Assn. v. Guerra*.⁶⁸ In that case, a bank fired a receptionist after she took a pregnancy disability leave.⁶⁹ She sued under a California statute requiring employers to provide unpaid pregnancy leave, and the bank responded by arguing that the California law violated Title VII's prohibition on pregnancy discrimination.⁷⁰ The ACLU, the National Organization for Women, and several other women's organizations filed amicus briefs urging the court not to invalidate the California law, but to extend the law's benefits to both men and women, a form of relief sought by neither party. The ACLU contended that a pregnancy leave policy constituted "special treatment" for women and that the state must require gender-neutral leave or nothing.⁷¹ Other women's organizations, including Equal Rights Advocates, supported the California

66. The one exception appears to be racial and sexual harassment in the workplace, which the ACLU believes should be proscribed under Title VII, at least in certain circumstances. Title VII doctrine provides that sexual or racial harassment may be demonstrated by evidence of "sufficiently continuous and pervasive" use of demeaning literature or racial epithets, *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986), or by the display of pornography. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("[T]he pervasive use of derogatory and insulting terms relating to women generally . . . may serve as evidence of a hostile environment."); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, No. 91-3655 (11th Cir.). The ACLU, however, opposes a conception of sexual harassment that encompasses general displays of pornography, and would instead require a showing that the pornography was specifically directed at an individual employee and resulted in demonstrable hindrance to or prevention of the employee's functioning. See Brief for Amicus Curiae, ACLU Foundation of Florida, Inc., *Robinson* (No. 91-3655). Thus, even in the context of a wrong that is by definition group-based, the ACLU maintains a strong commitment to an individualist approach.

67. As the Supreme Court stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49.

68. 479 U.S. 272 (1987).

69. 479 U.S. at 278.

70. 479 U.S. at 275, 279.

71. Other women's organizations supporting this position included the League of Women Voters of California and the National Bar Association Women Lawyers' Division.

law, arguing that in order to provide equal employment opportunity for women, the state could take into account the fact that only women get pregnant.⁷² The Supreme Court upheld California's law.

The ACLU's framing of the issue in *Guerra* as "special treatment" presumes that any legal acknowledgement that women differ from men is inconsistent with "equal treatment." In the ACLU view, in order for the sexes to be equal, they must be treated as undifferentiated "individuals." But female and male individuals are not in all respects the same, and the issue therefore is what social rules provide equal opportunity in light of that fact.⁷³

These examples suggest that the ACLU's individualist conception of rights may be inadequate to address the competing rights claims involved where class, gender, and race differences in society make the notion of individual qua individual illusory. This is not to say that the individualist approach will never be appropriate. One might well conclude, for example, that it is too dangerous to empower the government to consider gender, race, and wealth when it regulates speech opportunities, and that the best way to guarantee that the government will not abuse its power is to require it to act equally toward all individuals' speech. But that conclusion cannot be justified as "absolutist" or "evenhanded"; it must instead derive from a normative and pragmatic weighing of the costs and benefits of government regulation recognizing that individuals are different in group-based ways. The ACLU has characterized its position as "absolutist," but that begs the question of whose rights one wants to be absolutist about.⁷⁴

The ACLU's individualist focus is both its strength and its weakness. On the one hand, its success is in large part attributable to the universalist force of individualist rights claims, which may persuade those with the power and privilege to be free to extend basic rights to those who need those rights in order to be free themselves. On the

72. These groups included the Coalition for Reproductive Equality in the Workplace, the National Association of Working Women, and others. See generally Reva B. Siegel, Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 YALE L.J. 929 (1985).

73. See CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987).

74. Another case in which the ACLU's "absolutist" position appeared to ignore conflicting rights was *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (discussed at p. 345). In *Mozert*, a group of fundamentalists objected on free exercise grounds to their children's exposure to the Holt reader series, which took a classically liberal approach to education by presenting a wide range of perspectives. This liberal exposure to competing ideas, the fundamentalists argued, violated their free exercise rights because it implicitly rejected their view that the Bible determines truth. The ACLU sided with the school board, arguing that "mere exposure" to a liberal reading curriculum does not infringe the free exercise of religion. P. 345. This position allowed the ACLU to present itself as neutral, but ignored the necessary conflict of rights between the fundamentalists, who object precisely to the ideology of "mere exposure," and liberals, who rest their faith in the presentation of various viewpoints. See Nomi Stolzenberg, *"He Drew a Circle that Shut Me Out . . .": Assimilation, Indoctrination, and the Paradox of the Liberal Education*, HARV. L. REV. (forthcoming 1992) (manuscript on file with author).

other hand, an individualist focus ignores that people in America are defined, and their fate is often determined, by their group identity — a fact that may compel the state to take group identities into account in order to provide equal opportunity in the enjoyment of rights.⁷⁵ The individualist claim works best for those who have the luxury of seeing themselves as individuals. Because our society has defined the “individual” largely from a white male perspective,⁷⁶ an absolutist insistence on individualism may ultimately redound to the benefit of white men, to the exclusion of other perspectives which are not easily assimilated. This has been made most clear in race discrimination jurisprudence, where the individualist rhetoric of formal equality frustrates attempts to achieve substantive equality for black Americans.⁷⁷

In addition, an individualist perspective may imply that background norms are by and large legitimate; it suggests that to achieve social justice we need only ensure that everyone is treated as an individual. In this respect, the individualistic appeal to rights shares an affinity with the ACLU's procedural compromises in the 1940s and 1950s; both failed to take on substantive social problems directly, instead mediating them through a world view based on assumptions that may hold true only for the privileged few.

The inescapable problem is that in order to be successful in persuading the majority, whether politically or legally, one's rhetoric must appeal to majoritarian interests. Arguments that reject the mainstream's fundamental tenets are unlikely to succeed on the merits. The reason the ACLU's individualist rhetoric of rights has succeeded to the extent that it has may well be that it implicitly affirms the world view of the mainstream.

At the same time, the ACLU's greatest success has been in helping to extend rights to those outside the mainstream. Freedom of speech, for example, was critical to the civil rights movement; it not only guar-

75. The ACLU has long recognized this necessity in the area of racial equality, where it supports affirmative action. This support, however, has been a continuous source of contention within the organization. Pp. 305-06.

76. See, e.g., MACKINNON, *supra* note 73. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* (1991) (reviewed in this issue by Professor Robin L. West. — Ed.); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

77. The formal view of equality seeks a color-blind society, and sees any distinctions based on race as suspect. See Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (Powell, J.) (1978) (“[The] guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”). A substantive view of equality acknowledges the need to take account of race in order to get beyond race. See *Bakke*, 438 U.S. at 407 (Blackmun, J., separate opinion) (“In order to get beyond racism, we must first take account of race.”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

anted the right to demonstrate in the streets and to sit in at libraries⁷⁸ but also allowed news organizations to cover civil rights confrontations without fear of debilitating libel judgments⁷⁹ and permitted the NAACP to organize without revealing their membership lists to southern state officials.⁸⁰ Similarly, the ACLU's insistence that women were individuals just like men, and therefore similarly situated to them, was critical to the Supreme Court's development of sex discrimination jurisprudence.⁸¹ Indisputably, the ACLU's strategy of accepting the mainstream presumption of individualism has benefited many "outsiders."

The resurgent interest in nonindividualist conceptions of rights in recent years⁸² may be attributable in part to the success of the ACLU approach. As we recognize and eliminate the most egregious and explicit forms of rights violations, as the government achieves more consistent treatment of people as individuals, the shortcomings of the individualist approach become more evident. This has certainly been the lesson of equal protection jurisprudence. The future of the ACLU, therefore, may require it to question seriously the individualist ethic that goes unquestioned in Walker's book and in much of the ACLU's rhetoric.

CONCLUSION

Writing *In Defense of American Liberties*, Walker plays out his own version of the tension that has characterized the ACLU's role as an advocate to the mainstream on behalf of those outside. Walker acknowledges at the outset that he is not a nonpartisan observer; he is a member of the ACLU's board of directors, and served as President of its Nebraska affiliate (p. vii). His book could just as well be titled *In Defense of the ACLU: A History of American Liberties*. This is an advocate's history. In his own defense, Walker first maintains that there is no such thing as scholarly objectivity, because all scholars come to their work with a set of values that necessarily color their vision (pp. vii-viii). At the same time, he claims that he has tried to be objective by "examining ACLU history with an impartial eye, fairly presenting the different sides of particular controversies and fully examining the embarrassing episodes in ACLU history — of which there are many" (p. viii). The force of his book lies in his willingness to be

78. *Brown v. Louisiana*, 383 U.S. 131 (1966) (ruling that a library sit-in was protected by First Amendment); *Cox v. Louisiana*, 379 U.S. 536 (1965) (ruling that a street demonstration outside a courthouse was protected by the First Amendment).

79. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991) (discussing importance of First Amendment limitations on libel law to civil rights movement).

80. *NAACP v. Alabama*, 357 U.S. 449 (1958).

81. See Cole, *supra* note 31, at 54.

82. See sources cited *supra* note 76.

more than a mere advocate, to write more than a publicist's "house biography." In large measure, Walker succeeds in providing a fair reading of the ACLU's history, much as the ACLU has in large measure succeeded in maintaining a principled defense of civil liberties. But Walker's "objectivity" has its limits; while willing to question whether the ACLU has measured up to its own standards, he does not question the legitimacy of the standards themselves.

Similarly, the ACLU's commitment to the "evenhanded" defense of individual rights, its willingness to defend the Ku Klux Klan and the Nazi Party (if not always the Communists), is the source of its moral authority and the key to its success in persuading the majority to extend rights to the minority. But as difficult as this "evenhandedness" is to maintain, it also has its limits; it ultimately fails to question its individualist foundation. Unless addressed, that failure may hamper the ACLU's effectiveness in the battles and struggles to come in an increasingly diverse and divided society. The difficulty of walking the line between the outsider and the mainstream drove the ACLU in the past to compromise its principles in favor of maintaining its connections to the powerful. But today the ACLU's principles face pressure from the opposite side of the line, as those for whom it struggles begin to question the validity of its individualist conceptions. The tension inherent in appealing to the mainstream on behalf of those outside never recedes, for Walker or the ACLU, and it is in those moments that it surfaces that we learn most not only about the ACLU but about the nature of civil liberties.