

1985

## Our Endangered Rights: The ACLU Report on Civil Liberties Today

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Michigan Law Review, *Our Endangered Rights: The ACLU Report on Civil Liberties Today*, 83 MICH. L. REV. 1098 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/45>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY. Edited by *Norman Dorsen*. New York: Pantheon Books. 1984. Pp. xvi, 323. \$11.95.

Given the recent willingness of the Supreme Court to discount civil liberties concerns when they conflict with other social policies,<sup>1</sup> 1984, George Orwell's symbolic date, seems to have been an appropriate occasion for the American Civil Liberties Union (ACLU) to assess the status of individual freedom in the United States and throughout the world. *Our Endangered Rights*, edited by Norman Dorsen,<sup>2</sup> is the ACLU's attempt to "sum up the situation" as of that symbolic year (p. ix). The book contains a collection of essays by legal scholars and ACLU attorneys covering a range of civil liberties topics, including overviews of the process of protecting civil rights as well as discussions of specific issues such as racial and criminal justice. Although authored by noted constitutional authorities, the book is designed to be generally accessible rather than a groundbreaking addition to the legal literature. The authors' goal is to alert their readers to the continuing siege on the "birthright of freedom" guaranteed all Americans (p. ix), a siege which has been intensified by the prominence of the New Right's social agenda in the policies of the Reagan administration and by increasing economic scarcity. Although *Our Endangered Rights* accomplishes this limited objective, in doing so it illustrates two major problems facing the civil liberties movement: the obsolescence of the traditional liberal social agenda, with its concomitant erosion of a moral and political consensus on the issues, and the limitations of courts as protectors of civil rights.

Princeton History Professor Stanley N. Katz's concluding essay (pp. 311-23) presents a cogent discussion of the first problem. After tracing the changing concept of civil liberty through American history, Professor Katz finds that the present crisis coincides with the development of what economist Lester Thurow calls the "Zero-sum Society," where limited resources mean that one person's gain must be another person's loss. Consequently, the present crisis poses unique problems. The availability of socially and politically acceptable remedial techniques is quickly diminishing as society increasingly views one man's remedy as another man's deprivation. Indeed, current attacks upon civil protections may be partially motivated by the feelings of some Americans that their own freedom has been constrained by the

---

1. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (allowing a municipality's construction of a nativity scene); *United States v. Leon*, 104 S. Ct. 3405 (1984) (exception to the exclusionary rule for a police officer who acts in good faith reliance upon a facially valid warrant); *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S. Ct. 3348 (1984) (upholding denial of financial aid to those failing to register for the draft).

2. Norman Dorsen is President of the ACLU and a Professor of Law at New York University.

impact of the Great Society and the decisions of the Warren Court (p. 321). On the other hand, the increasing economic scarcity has made it clear that economic equality is necessary for the enjoyment of formal rights. Thus, America is at a civil rights crossroads. Professor Katz concludes that "we cannot, without a new conceptualization of civil liberties, effectuate the broader program suggested by the post-1960 expansion of republican thought" (p. 323).

Unfortunately, the rest of the book neither develops a new conceptualization of civil rights nor recognizes the unique problems of the 1980's. For example, Professor Days' discussion of "racial justice" (pp. 75-97) does little to indicate how the promises of *Brown v. Board of Education*<sup>3</sup> and other Warren Court decisions may be brought to fruition. The article recognizes that "it has become increasingly clear that whites would have to be disadvantaged, their expectations altered, and their patterns of life disrupted in order to make the promises a reality" (p. 77), but does not suggest how this is to be accomplished in the face of the inevitable backlash.

Similarly, David Rudovsky's essay on criminal justice (pp. 203-20) for the most part abandons any constructive dialogue on the devastating effects of the Supreme Court's recent criminal procedure decisions<sup>4</sup> in favor of polemics which call into question the motivations, and even the honesty, of those behind this counterrevolution. While the erosion of rights in this area represents a profoundly disturbing trend, the author refuses to concede that effective law enforcement remains a proper and fundamental concern of society's citizens. Civil libertarians must first recognize such concerns as legitimate before they can reconceptualize the goals of the movement for the eighties.

In general, the essays fail to consider the increasing moral and political ambivalence of civil rights questions. Having declared the illegality of overt, governmentally encouraged discrimination against blacks, society must now decide whether it will pursue affirmative action in order to remedy the effects of the whole society's discriminatory structure in the absence of discriminatory conduct by any specific employer. Having declared the illegality of job and pay differentials between the sexes, society must now evaluate the extent of a woman's right over her own body and her unborn fetus. These issues may not be resolved by reference to any moral or political consensus because there are strongly held and morally valid positions on both sides. The result is that many groups that were formerly allied in a crusade to advance the cause of civil liberties are now divided over which policies

---

3. 347 U.S. 483 (1954).

4. See, e.g., *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (applying *Leon*, although in issuing the warrant the judge made errors of constitutional dimensions); *Illinois v. Gates*, 103 S. Ct. 2317 (1983) (rejecting two-pronged test for evaluating trustworthiness of an informant in favor of a "common sense" test based on the "totality of the circumstances").

are truly beneficial. *Our Endangered Rights* refuses to recognize this and instead implies that if everyone acted morally all civil rights problems would disappear.<sup>5</sup> This facile view does not comprehend that civil rights questions cannot be solved by ignoring valid objections to the extension of constitutional protections. Instead, there must be considered dialogue on each entire issue.

The decline of the traditional liberal consensus is further aggravated by a second major obstacle facing civil libertarians in the future. The courts, the traditional battleground of civil rights controversies, are becoming considerably less useful for the advancement of civil rights. Noted constitutional litigator Burt Neuborne (pp. 27-45) focuses on three problems with attempts to expand civil liberties through the courts. First, limitations on subject matter jurisdiction prevent the courts from becoming involved in a number of areas. Second, the courts, due to their nature as adjudicators of specific controversies, lack effective remedies for the more complex problems arising today. Third, the need for lawyers as a prerequisite to effective involvement in the system, combined with recent cutbacks in legal aid programs, prevents the socially and economically disadvantaged from securing their rights.

In an essay echoing many of Neuborne's concerns, John Shattuck argues that many civil rights issues are beyond the expertise and capacity of the courts and must increasingly be resolved in the legislative arena (p. 49). Mr. Shattuck discusses the success the ACLU and companion organizations have had in consistently repelling conservative attacks upon the ability of the federal courts to hear and resolve the major civil liberties issues of the day (pp. 50-67). However, the increasing success of conservative forces in other areas shows that the political battle must not be merely defensive but offensive as well. Once again, civil libertarians must look beyond traditional theories and methods for new ideas and programs to implement their goals.

This is not to say that none of the contributors to *Our Endangered Rights* make progress toward reconceptualizing civil rights for the future. Professor Sylvia Law's discussion of "Economic Justice" (pp. 134-59) supports the proposition, debated even within the ACLU itself, that civil liberties include and are dependent upon adequate material resources and a substantial degree of economic and social equality. Professor Law recognizes the controversial nature of her proposals as well as the inadequacy of the courts as a vehicle for change in this area. Nonetheless, her proposals, as innovative responses to new conditions, provide a framework for constructive future action. Similarly, Professor Paul Bender authors a lucid discussion of the evolving field of privacy law (pp. 237-58), an area noteworthy because it has been expanded by a Supreme Court not noted for its strong concern for

---

5. See Nichol, Book Review, 1984 DUKE L.J. 1002.

human rights. Unfortunately these contributions are the exception rather than the rule.

*Our Endangered Rights* succeeds on one level. It alerts its readers to the very real and very disturbing attacks on their human rights protections — attacks which have been intensified by the prominence of the New Right and by increasing economic scarcity. However, the present crisis involves unique problems not easily answerable by reference to civil rights formulae of twenty years ago. Instead, the civil libertarian's social agenda must be redefined in the light of new and persistent problems. On this level, *Our Endangered Rights* provides little guidance. This is unfortunate because as America leaves 1984, the ACLU will increasingly be called upon to protect against the looming Orwellian vision. Without a revitalized conception of civil rights to meet the challenge, the ACLU's protection may prove unavailing.