

## TRIBUTE TO NORMAN DORSEN\*

I became acquainted with my good friend Norman Dorsen during my first term at the Supreme Court, when Norm was serving as a law clerk to Justice Harlan. His work on one case in particular showed to me that Norm was strongly committed to principle and indefatigably persistent. For weeks before and after the case was argued, he pursued my law clerk relentlessly through the halls of the Court, peppering him with arguments. Sooner or later, Norm calculated, my clerk would agree, exert his influence and induce me to see reason. Similar efforts directed at other chambers, it seemed to Norm, could doubtless secure a Court.

I know Norm was disappointed that the Court ultimately did not adopt his views in that case. I am grateful, however, that he has not held against me my authorship of the Court's opinion. Certainly Norm's views have prevailed in other cases, and far more often than not I have found myself in agreement with him. It is a distinct privilege to be asked to honor him on this occasion.

Just a few years after he left his clerkship and entered the academic world, Norm became a member of the ACLU's national Board of Directors, and soon its General Counsel. Between 1967 and 1971 he argued a number of cases in the Supreme Court. Three strike me as worthy of particular mention; each, I think, nicely illustrates Norm's vision of civil liberties.

*In Re Gault*,<sup>1</sup> decided in 1967, raised the question whether constitutional protections afforded to criminal defendants apply to juvenile court proceedings. The case involved a fifteen-year-old boy, charged with making lewd phone calls, who was given no specific notice of the charges against him, was unrepresented by counsel at the hearing, was denied the rights of confrontation and cross-examination, and was convicted in part by his own self-incriminating statements. The juvenile court committed the youth to state custody for the remainder of his minority—six years—although, if prosecuted as an adult, he would have been subject only to a \$50 fine or two months imprisonment.

Roger Baldwin, founder of the ACLU, objected to the organization's participation in the case. Indeed, during the Progressive

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1. 387 U.S. 1 (1967).

Era early in this century, Baldwin had helped establish the kinds of procedures in question.<sup>2</sup> The state's juvenile court procedures, Baldwin told Norm, were entirely defensible as a nonadversarial, noncriminal method of caring for troubled youths.<sup>3</sup> Norm, however, saw the case not just as an opportunity to extend basic constitutional guarantees to a segment of the population that had until then been left constitutionally unprotected, but as an important step in a new civil liberties strategy: challenging the administration of social welfare programs that were defended as benevolent, but were in fact sorely unresponsive to the fundamental constitutional guarantee of due process. In this respect, Norm's attack on the juvenile procedures considered in *Gault* is analytically related to the later "due process revolution," stemming from *Goldberg v. Kelly*<sup>4</sup> in the noncriminal context.

Norm's argument in *Levy v. Louisiana*<sup>5</sup> was similarly far-reaching. The Louisiana statute at issue in that case denied "illegitimate" children the right to recover for the wrongful death of their mother. Norm argued successfully that the law violated equal protection. While Justice Douglas's opinion for the Court left unclear which standard of review applies to classifications based on "illegitimacy," it strongly suggested that Norm's recommended "heightened scrutiny" approach would prevail. And indeed it has.<sup>6</sup> Norm's argument in *Levy* was important not just because it bolstered constitutional protection for children born out of wedlock, but also because it suggested that heightened scrutiny might apply to classifications not based on race. This possibility has been realized, of course, most notably in the case of gender.<sup>7</sup>

The third particularly noteworthy case Norm argued was *United States v. Vuitch*,<sup>8</sup> the first instance in which the issue of abortion reached the Supreme Court. *Vuitch*, heard the term before *Roe v.*

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2. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 32-33, 253-54 (1990).

3. *See id.* at 254.

4. 397 U.S. 254 (1970).

5. 391 U.S. 68 (1968).

6. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[The] level of intermediate scrutiny . . . generally has been applied to discriminatory classifications based on . . . illegitimacy."). Norm filed amicus briefs in two of the intervening cases: *Labine v. Vincent*, 401 U.S. 532 (1971), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

7. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (strict scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny).

8. 402 U.S. 62 (1971).

*Wade*,<sup>9</sup> involved the criminal prosecution of a doctor under a District of Columbia statute prohibiting abortion “unless . . . necessary for the preservation of the mother’s life or health.”<sup>10</sup> Norm argued that the statutory reference to “life or health” was, as the district court had found, unconstitutionally vague. Criminal enforcement of such a statute, he argued, threatened to compromise the autonomy of doctors’ judgment regarding the medical advisability of abortion.<sup>11</sup> Norm also defended the much broader position that women have the constitutional right to determine whether or not to continue their pregnancies.<sup>12</sup>

The Court, of course, did not reach the broader constitutional question in *Vuitch*, reasoning that the lower court had not passed on that issue.<sup>13</sup> But in responding to Norm’s arguments, the Court’s holding prefigures certain themes developed more fully in *Roe*. The Court construed the statute so as to protect the autonomy of the doctor/patient relationship.<sup>14</sup> And its expansive interpretation of the word “health” seemed to recognize that the state may inflict multifarious harms when it requires women to continue unwanted pregnancies.<sup>15</sup>

Norm’s influence on the Court’s civil liberties decisions extends far beyond the cases he argued. He authored or co-authored persuasive amicus briefs in a number of cases, beginning with the landmark “right to counsel” case, *Gideon v. Wainwright*.<sup>16</sup> While these cases are too numerous to survey individually, I would like to suggest two in which I found Norm’s participation particularly helpful.

Both cases concerned the constitutional limits on executive authority. In the Pentagon Papers litigation,<sup>17</sup> the question was whether the executive could impose prior restraints on publication of material it deemed dangerous to national security. Norm’s brief argued strenuously that such power would permit an administration to exempt itself from criticism, and that such prior restraints were totally impermissible. My concurrence approached this position (although I did have to acknowledge a “single, extremely nar-

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9. 410 U.S. 113 (1973). *Roe* was first heard in the 1971 term but was carried over for reargument.

10. See *Vuitch*, 402 U.S. at 67-68.

11. Transcript of Oral Argument at 42-52, *Vuitch* (No. 84).

12. *Id.* at 52-60.

13. See *Vuitch*, 402 U.S. at 72-73.

14. See *id.* at 70-72.

15. See *id.* at 71-72.

16. 372 U.S. 335 (1963).

17. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

row class of cases" that had approved prior restraints in circumstances not then implicated).<sup>18</sup> Norm, it seemed to me, was entirely correct that a decision the other way would have been a disaster for civil liberties.

The second case in this area was *United States v. Nixon*,<sup>19</sup> in which then-President Nixon sought to invoke "executive privilege" to avoid relinquishing to the Special Prosecutor tapes that implicated the President in the Watergate cover-up. The contribution of Norm's brief was that it framed the dispute as far more than an intra-executive conflict between the Special Prosecutor and the President: The broad notions of executive privilege on which the President relied would effectively place him above the law, and that, Norm argued, was a matter that seriously threatened civil liberties.

Perhaps the greatest influence Norm exerted on the development of civil liberties came through his organizational role as first Director, then General Counsel, and most recently President of the ACLU. In those positions, Norm helped shape ACLU policy and litigation strategies, which in turn determined which civil liberties issues would come to the forefront. As an outsider to the organization's workings, I cannot chart in great detail Norm's contributions in this respect. I can, however, discuss one crucial decision made during Norm's watch that I think deserves special recognition: the decision to press for constitutional recognition of women's rights.

Before the ACLU established its extraordinary Women's Rights Project in 1970, the Supreme Court had never found any gender-based discrimination to be constitutionally infirm. Its rulings in this area were really quite remarkable. In the infamous 1873 *Bradwell v. Illinois* decision,<sup>20</sup> for example, a member of the Court saw fit to proclaim that "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."<sup>21</sup> Even midway through this century, the Court's understanding of the constitutional implications of sex discrimination had not advanced appreciably.<sup>22</sup> It was in this context

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18. *See id.* at 726 (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (discussing wartime emergencies)).

19. 418 U.S. 683 (1974).

20. 83 U.S. (16 Wall.) 130 (1872).

21. *Id.* at 141 (Bradley, J., concurring).

22. In *Goesaert v. Cleary*, 335 U.S. 464 (1948), for example, the Court upheld a Michigan statute that prohibited women other than wives and daughters of bar owners from working in bars. The Court justified this result in part by stating that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards" and by hypothesizing reasons why Michigan's legislative choice might be considered rationally based. *See id.* at 465-67.

that the ACLU Women's Rights Project brought a series of well-chosen suits to the Supreme Court.

In *Reed v. Reed*,<sup>23</sup> the Court for the first time invalidated a gender-based law as a violation of equal protection. The Court purported to apply the traditional "rational basis" test, but in fact the level of judicial scrutiny was considerably higher. I favored explicit recognition of the new heightened standard, and in subsequent cases I pressed for the ACLU's recommended "strict scrutiny." I was never quite able to obtain a Court for this position,<sup>24</sup> but the result of the cases brought by the ACLU was an "intermediate" standard of review.<sup>25</sup> While this standard has led the Court on some occasions to unfortunate results,<sup>26</sup> it has made the constitutional guarantee of equal protection more real for the majority of our population who had previously been virtually unprotected. We all owe a debt of gratitude, I think, to Norm Dorsen for his unwavering support of the ACLU's initiatives in this area.

Norm's tenure as President of the ACLU seems to me truly remarkable. Leadership of a group of talented, passionate people cannot be an easy task even in the calmest of times. And the first few years during which Norm served as President were not exactly calm. One of the first major issues Norm had to confront was the controversy over the ACLU's representation of the American Nazi Party in its attempt to secure a permit to march in Skokie, Illinois. The ACLU itself divided sharply over this issue. The organization had traditionally supported the First Amendment rights of unpopular political groups, from radicals during the post-World War I "red scare," and Communists during the McCarthy era, to the Klan in *Brandenburg v. Ohio*.<sup>27</sup> But supporting the rights of Nazis to march in Skokie seemed a far different thing to many ACLU members: Skokie had a substantial Jewish community, many of them Holocaust survivors to whom a Nazi march would be particularly offensive. The ACLU's stance was met with outrage by many, and by Jewish groups in particular. Old allies such as the National Lawyers' Guild denounced the ACLU's position.<sup>28</sup> Thousands of members

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23. 404 U.S. 71 (1971).

24. See *Frontiero v. Richardson*, 411 U.S. 677 (1972) (plurality opinion) (strict scrutiny).

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

26. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding gender-based statutory rape law largely on the basis of hypothesized legislative purposes); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding draft registration law that exempted women altogether).

27. 395 U.S. 444 (1969).

28. WALKER, *supra* note 2, at 325-26.

resigned, and the ACLU faced enormous financial and organizational problems.<sup>29</sup>

Throughout the crisis, Norm stood firm. Under his leadership, the ACLU overhauled its internal structure to cut expenses and rebuild its membership. More important to me, it launched an extensive public outreach program to explain its position as one of principle and to regenerate the organization's and the nation's commitment to civil libertarian values.<sup>30</sup> By the beginning of the 1980s, the ACLU had effectively recovered from the Skokie crisis, and it may well have been a stronger organization than it was before.<sup>31</sup>

Norm's remaining years as President were filled with similar challenges, including controversies over affirmative action, First Amendment protection for pornography, and restrictions on campus speech. At the same time, he faced a federal judiciary, including the Supreme Court, that seemed to be far less receptive to the organization's conception of civil liberties than it had been in the past. Norm guided the ACLU admirably through those years and now, after fifteen years as President, he has turned the leadership over to other hands.

I wish my dear friend Norm Dorsen well in his "retirement" from the ACLU. I cannot imagine, however, that his contributions to civil liberties will be any the less than before. Congratulations, Norm, on a job well done.

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former Associate Justice  
Supreme Court of the United States

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29. *Id.* at 327-28.

30. *See id.* at 329-31, 337-38.

31. *See id.* at 330-31, 338.