

TRIBUTE TO NORMAN DORSEN

Some nine years ago, I wrote a tribute to Norman Dorsen for the *Harvard Civil Rights-Civil Liberties Law Review*.¹ In it, I spoke of Norman's background, his familiarity with history, including some of America's sorry examples of civil rights despoliations or deprivals, but also his experience of seeing the rise and fall of the Third Reich, and particularly its suspension of those portions of the Weimar Constitution that made up the German Bill of Rights. That background included his prestigious and civil rights-educating clerkship with Justice John Marshall Harlan, the grandson of the lone dissenter in *Plessy v. Ferguson*,² the infamous 1896 case that was not overruled until *Brown v. Board of Education*.³ After his clerkship, Norman participated in the Army-McCarthy Hearings as an assistant to the General Counsel of the Army, and they, as we know, were the first television exposure of the "cruelty and recklessness," in Counselor Joe Welch's words,⁴ of the Wisconsin Senator who created such a danger in the 1950s to the civil liberties of all Americans.

Norman has inspired us all—his hundreds or thousands of students both at NYU and at other law schools; the readers of his books, his essays, and his law review articles; us judges who have heard his arguments; and the thousands of members of the ACLU. As I said nine years ago, "Norman towers above the crowd as a defender of the civil liberties of all."⁵

And lest we forget, civil liberties still are endangered. I am not speaking just of the United States of course, but even in the United States we continue to have dangers that have been pointed out by Norman time and again for our edification. In what follows, I track his 1983 introduction to the *1984 ACLU Report on Civil Liberties*, titled *Our Endangered Rights*.⁶

While we have outlawed obvious forms of preference and exclusion, Norman says that we have not eliminated them, and subtler techniques of discrimination, using a wink and code words rather than a more blatant message, do continue to go on. Not only in

1. Oakes, *Norman Dorsen: A Tribute*, 27 HARV. C.R.-C.L. L. REV. 315 (1992).

2. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

3. 347 U.S. 483, 494-95 (1954).

4. Oakes, *supra* note 1, at 316.

5. *Id.*

6. OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY (Norman Dorsen ed., 1984).

times of economic stringency but even in so-called prosperity, entitlements to the dependent poor and the powerless are the first casualties. The discrepancies in wealth today are unbelievable. Many suggest that the tax cuts recently proposed, including abolition of the estate tax, will further widen that discrepancy.

International tensions continue, and they affect the United States: ongoing is a trial in the Southern District of New York for the bombings of the American Embassies in Tanzania and Kenya. And while the tribulations in Ireland don't much impact the United States at this point, they nevertheless have many ramifications abroad.

Norman refers to these three historic sources of constitutional instability—discrimination, economic stringency and discrepancies, and international tensions—as being, in 1984 as today, compounded by the resurgence of a fourth: the excesses of religious fundamentalism. He said:

The issue is of course not Christianity, which is rooted in humanitarianism and altruism of the Sermon on the Mount. It is rather the zealotry and insensitivity evinced by some of its modern leaders. Thus, the Moral Majority and its allies not only want their children to pray in school; they want everyone's to do so. They not only want to prevent fundamentalist women from choosing to seek abortion; they want to keep every woman from this choice. They not only want their children to learn "scientific creationism" as an alternative to science; they want every child to learn it. They not only want to decide which books their children cannot read; they want to decide for the children of all. They not only want to spend their own money on church schools; they want everyone to be taxed for this purpose. It is sadly ironic . . . that such anti-civil libertarian attitudes are presented in the name of religion.⁷

And what about the threats of governmental intrusion on privacy? Is that any less of a problem today (as Norman has, time and again, pointed out over the years) than it was yesterday or twenty years ago or forty years ago? Free expression, equality, due process, and privacy are the principles by which Norman has lived and stood for, advocated and taught.

Withal, Norman, using his own words, has "deep affection for the United States, for its many gifts to its people, for its leadership in creating the first constitution that is both written and judicially enforceable, and for its record in advancing liberty in so many

7. *Id.* at xi.

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ways.”⁸ It has been his goal in life to further the efforts of our country to meet its full promise. He does not eschew criticism of the worst in our heritage, and he pays due homage to the best of that heritage. This has been, for him, a sometimes frustrating but ultimately rewarding task. I commend the editors of the *Annual Survey* for having elected to honor Norman on this delightful occasion.

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8. *Id.* at xvi.

