



Judy Kutulas. *The American Civil Liberties Union and the Making of Modern Liberalism, 1930-1960*. Chapel Hill: University of North Carolina Press, 2006. 320 pp. \$35.00 (cloth), ISBN 978-0-8078-3036-9.

Reviewed by Samuel Walker (Department of Criminal Justice, University of Nebraska at Omaha)

Published on H-Law (April, 2007)



Civil Liberties and Modern Liberalism: A Tangled Tale

The relationship between civil liberties and modern liberalism is an important topic in American legal and political history. The growth of constitutional law protecting individual rights reached the point that, by the late 1970s, the United States was dominated by what some commentators call a “rights culture.” Protest against that culture—over separation of church and state, pornography, abortion rights, and lesbian and gay rights—has been the mainspring of a politically powerful conservative religious movement. Criticisms of the rights culture have also come from legal and political scholars, such as Harvard law professor Mary Ann Glendon, who, while committed to civil liberties values of free speech and equal protection, are concerned about the broader social impact of the relentless pursuit of individual rights. At the same time, there is little question that liberalism dominated American politics for a half century, from the election of Franklin Roosevelt in 1932 until the late 1970s, with the election of Ronald Reagan in 1980 marking the end of that era.

In this context, the relationship between civil liberties and modern liberalism merits serious examination. To what extent did civil liberties principles shape the development of mainstream liberalism? Alternatively, did liberal politics influence the development of civil liberties in the United States, pulling it in certain directions and away from alternative interpretations of the Bill of Rights? This is not an idle question. The National Council for Civil Liberties, the equivalent of the American

Civil Liberties Union in England, was deeply influenced by its ties to the Labor Party.

The history of the American Civil Liberties Union is a good way to explore these questions. The ACLU has been the nation’s leading civil liberties advocate since its founding in 1920, and has had a major impact on the development of constitutional law. One could also examine these questions through a study of the Democratic Party, the institutional home of modern liberalism, but the book at hand focuses on the ACLU.

In a history of the ACLU between the 1930 and 1960, Judy Kutulas makes the provocative argument that the ACLU was seduced by the lure of respectability, and as a result made significant compromises in its fight for civil liberties. By 1960, she argues, the ACLU had abandoned its earlier radicalism and become “chic,” a comfortable part of the liberal mainstream. Kutulas writes that ACLU leaders “steered their Civil Liberties Union into the liberal mainstream” (p. 41).[1]

Kutulas’s book is the first scholarly treatment of a critique of the ACLU that first appeared in the 1940s and accuses the ACLU of trimming its sails during the Cold War. The signal event was a 1940 resolution barring members of totalitarian groups from leadership positions in the ACLU, which resulted in the expulsion of Elizabeth Gurley Flynn, a Communist Party member, from the ACLU Board. Further compromises flowed from this initial compromise of principle, according to this argument.

Given the importance of the subject, it is sad to report that Kutulas's book is extremely unpersuasive. Most important, she fails to develop a substantive analysis of modern liberalism and the place of civil liberties within it. Consequently, we never know exactly to what the ACLU was allegedly striving to conform. When she refers to "liberalism," does she mean the Democratic Party or a certain intellectual school of thought? She does not say. With reference to civil liberties, she ignores some of the most important issues of the period she covers. Finally, there are some serious factual errors regarding the history of the ACLU.

In examining specific civil liberties issues that embroiled America between 1930 and 1960, Kutulas's argument, that the ACLU developed a comfortable relationship with modern liberalism, collapses. (In the absence of a clear definition by the author, this review will define modern liberalism in terms of the policies of the national Democratic Party.)

Separation of church and state, one of the ACLU's high priority issues, provides a particularly telling example. Mainstream liberals did not pursue the elimination of religious exercises from schools and other public places, and in fact tried to avoid it at all costs. Outlawing prayer in public schools has always been extremely unpopular with the majority of Americans because it strikes them as "anti-religious." It has been a special problem for the Democratic Party because it divides important constituents within the party. From this perspective, it is hard to argue that the ACLU became a comfortable part of mainstream liberalism by 1960. Significantly, Kutulas never discusses church-state issues.

Nor does Kutulas discuss in depth the most controversial free speech issues. In the mid-1930s the ACLU formulated its view that the First Amendment protected all forms of political speech, including the views of Communists, domestic Nazis, the Ku Klux Klan, and other groups. The ACLU's famous defense of the right of a domestic Nazis group to demonstrate in Skokie, Illinois in the late 1970s was consistent with that original policy. Rarely if ever have mainstream liberals defended the First Amendment rights of hate groups. As is the case with separation of church and state, defending Nazis or the Klan offends important liberal political constituencies. On this issue as well, therefore, it is hard to argue that the ACLU fit comfortably with mainstream liberalism.

In a more general sense, Kutulas never fully addresses the basic idea of a principled nonpartisan stance on the

First Amendment, and the place of that idea in contemporary American democracy. Instead, she trivializes the ACLU's nonpartisan approach to the First Amendment, notably in her handling of the Gerald L. K. Smith episode in the late 1940s. Smith was then the nation's most prominent racist and anti-semitic, provoking clashes over his free speech rights in many local communities. Kutulas suggests that the ACLU defended Smith only to project an image of non-partisanship and therefore to deflect criticisms that it defended only Communists and other leftists. She offers not one document—memo, letter, memoir, or interview—to support a point that is central to her basic argument.

With respect to the history of the ACLU, Kutulas makes a number of serious errors regarding its operations over the years. Describing the ACLU's litigation program in the 1930s and 1940s, for example, she writes that General Counsel Arthur Garfield Hays and Morris L. Ernst "oversaw a staff of attorneys" (p. 33). The ACLU did not have a paid staff attorney until the 1950s and did not add a second (Eleanor Holmes Norton, in fact) until 1965. Several of her observations about the ACLU's role are glib and without empirical support. She writes that many ACLU activists enjoyed the "guilty pleasure" of "intrigue" in fighting injustice (p. 21). Here again, she offers no documentary evidence to support this dismissive judgment. Her entire thesis about the ACLU's preoccupation with being "chic" seems to owe a lot to Tom Wolfe's famous 1970 essay (and later book) on "radical chic." Whatever its validity with respect to Wolfe's subjects, there is a serious absence of empirical evidence here about thirty years of ACLU history.

On the issue of the ACLU's response to anti-Communist hysteria, there is no question that the ACLU made some serious compromises. The 1940 Resolution was a grievous violation of the ACLU's own principles, and in the Cold War the ACLU turned a blind eye to illegal activity by the FBI, and was embarrassingly wish-washy on the Fifth Amendment. Those actions are hardly the full story of the ACLU and the Cold War, however. Even as it barred Communists from leadership positions in 1940, it testified against the Smith Act and fought attempts to bar the Communist Party from the ballot in several states. Kutulas writes that the ACLU did not oppose Truman's 1947 Federal Loyalty Program, but that is simply not true, as even a quick glance at board of directors meetings minutes or annual reports clearly indicate. The ACLU immediately protested that Truman's loyalty program was so fraught with civil liberties problem that it should be scrapped altogether. Along the same lines, Ku-

tulas is wrong in writing that the ACLU did not challenge the Smith Act prosecution of Communist Party leaders in 1948-49 (p. 144). The history of the ACLU's relationship to the anti-Communist movement was, in short, extremely complex and filled with many contradictions.

The United States today is indeed pervaded by a rights culture, and controversies over that culture—the so-called culture wars—are at the center of national politics. How that culture developed, the role of the ACLU in that pro-

cess, and the relationship of that culture to mainstream liberalism are topics of extreme importance. We are still waiting a good scholarly treatment of those issues.

Note

[1]. Readers should know that this reviewer is the author of a history of the ACLU, *In Defense of American Liberties* (1990), and a past member of the boards of directors of both the national ACLU and the Nebraska affiliate.

If there is additional discussion of this review, you may access it through the network, at:

<https://networks.h-net.org/h-law>

Citation: Samuel Walker. Review of Kutulas, Judy, *The American Civil Liberties Union and the Making of Modern Liberalism, 1930-1960*. H-Law, H-Net Reviews. April, 2007.

URL: <http://www.h-net.org/reviews/showrev.php?id=13056>

Copyright © 2007 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.msu.edu.