

THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION. By William A. Donohue.¹ New Brunswick, N.J.: Transaction Books. 1985. Pp. xix, 366. \$29.95.

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Professor Donohue has given us what is at times a most exasperating book. There are three main sections, and in each Donohue recapitulates the history of the ACLU, thereby ruling out any possibility of narrative coherence. Further, Donohue has looked at his subject too narrowly. His research has been almost entirely confined to the ACLU's own documents, plus interviews conducted by him. Thus we see the ACLU for the most part in a vacuum, not as part of the larger context in which it actually functioned. He touches on practically every aspect of the Union's work, mixing the vital and the trivial at times indiscriminately. Donohue says he is going to use the Union as a case study that will expose the weakness of liberalism in general, but after some vague initial efforts he settles down to demolishing the ACLU's reputation. He does this with great singleness of purpose, leavened only by an occasional nod in the direction of fair play.

Despite such shortcomings, this is an important study. Our Bill of Rights, perhaps more than anything else, is what makes American democracy unique, and among private organizations only the ACLU can plausibly claim to be defending it on a full-time basis. Moreover, the Union is a large and effective organization with some 250,000 members and a record of having fought tens of thousands of court cases over several generations. It deserves considerable credit for the remarkable degree of legal protection now enjoyed by minorities—racial, sexual, and even criminal—in this country. Yet the ACLU has never been the subject of a full length critical investigation. It has often been attacked from both left and right. Almost without exception the critiques have been narrow, partisan, and superficial even when correct. The only history of the Union before Donohue's is reliable within its limits, which are those

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of a friend.³ Donohue is the first scholar to have closely examined the entire history of the ACLU with an eye to exposing its faults, and he has found a good many.

The author's success does not result, as he sometimes appears to think, from his being right on matters about which the ACLU is wrong. As a conservative Donohue disagrees with the Union on almost everything, and cannot always draw a line between what he knows for certain and what he takes on faith. The most telling sections of his book are those in which Donohue shows that the ACLU has violated its own principles, or reversed itself for reasons that cannot be made to square with them. A particular case in point, which he deals with early in the book, is the racial quota. Until recently the ACLU opposed quotas as unconstitutional, even when they discriminated in favor of minorities. Thus the New York CLU, as late as 1964, spoke against preferential treatment for blacks in housing and employment: "The constitution is color blind. It does not permit discrimination in favor of, any more than discrimination against." Likewise, to the national organization "reverse discrimination" was "no less evil than any other kind of discrimination, and is certainly just as contrary to the spirit of civil liberties."⁴ But in 1973 the Union decided that quotas were a good thing. When Alan Bakke sued the Regents of the University of California for denying him admission to the medical school at UC Davis the Union opposed him. There was no doubt that Bakke, a white, had been discriminated against; his test scores were higher than those of all the minority students admitted under the quotas then in force. Yet the ACLU claimed in its press release that it was just to discriminate against Bakke because the special admission program that kept him out of medical school had educational and social benefits, promoted equality, and was, the Union believed, constitutional.

The Supreme Court disagreed, ruling in Bakke's favor. This was a popular decision, as most informed persons, and even Roger Baldwin, venerable founder of the ACLU, thought that the Union was mistaken. When Donohue interviewed him, Baldwin said that the "ACLU is false to its own principles when it supports a quota." What had happened between 1964 and 1973, Donohue argues, was that the ACLU had moved beyond the traditional libertarian belief in equality of opportunity and was now demanding equality of results. In this he is probably correct. Donohue overstates his case as

3. C. MARKMANN, *THE NOBLEST CRY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION* (1965).

4. W. DONOHUE, *supra*, at 74.

usual by ascribing the change to liberalism as a whole. But unquestionably some liberals, with the ACLU in their van, have taken this fateful step. And in doing so the ACLU makes it abundantly clear that changing society, not defending the Bill of Rights, is its number one priority.

The chief strength of Donohue's book is that he establishes more clearly than anyone before him how politics has always shaped the ACLU's agenda. He shows, too, that the Union's history divides into three roughly equal parts. After an abortive start as the Civil Liberties Bureau of the American Union Against Militarism during World War I, the Union was reborn under its present name in 1920. For two decades the ACLU served as the legal arm of the "militant labor movement." Nominally nonpartisan, so as to remain tax-exempt and draw in genuine libertarians, the Union had little interest in the rights of anyone except workers and revolutionaries. During the 1930's this meant that it tended to follow the Communist line, even though its board of directors included Norman Thomas and a few other anti-Communists.

In 1940 this period of the ACLU's history came to an abrupt end with the forced resignation of its fellow-traveling chairman Harry Ward, and the expulsion of Elizabeth Gurley Flynn, the only admitted Communist on its board. Other fellow travelers left, too, after the passage of a resolution saying that no one could serve on the governing committee or the staff of the ACLU who supported "totalitarian dictatorships" abroad, or belonged to any organization that did. Leftists then and later attacked this purge as a betrayal of the Union's principles and a cowardly sellout to reactionaries.⁵ Everyone agrees that it was inspired by the Stalin-Hitler Pact of 1939, which obliged American Communists to shelve their anti-Fascist rhetoric and attack the Western democracies as enemies of peace. This reversal outraged non-Communist leaders of the Union, Baldwin included apparently, and it also made the Union vulnerable to the degree that Communists and fellow travelers held important offices. Forcing them out enabled the Union to express its feelings about Stalin's cynical deal with Hitler. And doing so saved the ACLU from being caught up in the anti-Communist

5. For some reason Donohue uses Corliss Lamont as chief spokesman for the left critics of the purge. Lamont, a life-long supporter of Soviet Communism, was a board member at the time and most active in Flynn's defense. He subsequently edited a transcript of the hearing. C. LAMONT, *THE TRIAL OF ELIZABETH GURLEY FLYNN BY THE AMERICAN CIVIL LIBERTIES UNION* (1969). He is unreliable as a source and unrepresentative of present day leftist critics. More characteristic is Jerold B. Auerbach. Auerbach, *The Depression Decade*, in *THE PULSE OF FREEDOM, AMERICAN LIBERTIES: 1920-1970s*, at 65 (A. Reitman ed. 1975).

backlash. For more than twenty years after this the ACLU, though it sometimes defended Communists, was scrupulously nonpartisan and middle of the road.⁶

The ACLU's third period began in the mid-1960's and continues to this day. The civil rights and new left movements reradicalized the organization and since then it has largely devoted itself to promoting social change. Sometimes real civil liberty issues are at stake, but whether they are or not often seems less important to the Union than its social agenda. And even when basic rights are involved, the Union is capable of taking them to absurd or even dangerous lengths. For instance, people of good will differ over whether pornography is shielded by the first amendment, but no one believes that the sexual exploitation of children is constitutionally protected. Almost no one, that is, for in 1977 the Union's Board of Directors resolved: "While the ACLU may vigorously dislike and reject sexual exploitation of children for commercial purposes, activities in publishing and disseminating printed or visual materials are wholly protected by the First Amendment."⁷ This curious statement appears to suggest that in their enthusiasm for free expression a majority of directors have come to regard the freedom to violate helpless children as an inalienable right. Perhaps equally unsettling, though less obviously harmful, is their repudiation of the Union's second period. In 1976 the 1940 vote to expel Elizabeth Gurley Flynn was rescinded and a 1967 action dropping the antitotalitarian clause reaffirmed. ACLU leaders may now support any foreign police state, however vicious or tyrannical, so long as they believe in liberty for Americans.

Using this and other evidence Donohue makes an overwhelming case against the Union's claim to be nonpartisan and libertarian. He establishes that for much of its history the ACLU has been relentlessly political and often hypocritical as well in its approach to civil liberties. But his argument would be even more convincing if Donohue were not himself so unrelentingly one-sided. Two examples will have to suffice. One might suppose that Donohue would approve of the Union's anti-Communist second period. To the contrary he repeatedly sneers at the ACLU in the 1940's and 1950's, which he calls its "era of expediency." The leaders are alleged to have altered courses only to save the organization and not out of conviction. My own research, during which I went through the ACLU's papers for this period rather carefully, has led me to think

6. The left wing critique of the Union in this period is M. MCAULIFFE, *CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS, 1947-1954*, at 89-107 (1978).

7. W. DONOHUE, *supra*, at 296.

otherwise. I believe that the transformation of the ACLU after 1939 was a principled response to the Stalin-Hitler agreement, which shocked and horrified many liberals formerly sympathetic to Communism, and led them to rethink their politics in a most fundamental way. World War II had an effect also, making national security requirements seem more valid to them than to a later generation.⁸ This would be a better book if Donohue at least allowed for the possibility that ACLU leaders became anti-Communist out of conviction rather than opportunistically.

Even when Donohue must concede that the Union has acted in a principled way he still finds fault. The ACLU's greatest display of loyalty to the first amendment in recent times was its defense, from 1976 to 1978, of the right of a small group of Nazis to demonstrate in the Jewish community of Skokie, Illinois. As a result the organization lost 75,000 members and had to slash its budget by fifteen per cent. This cuts no ice with Donohue, who argues that the ACLU should have refused the case because Nazis are not democratic and it is self-defeating for democrats to protect them. Donohue has a point, but it is tactical in nature and largely irrelevant to the moral and ethical questions he raises elsewhere. Whether it was a wise decision or not, Skokie showed the ACLU at its most selfless and principled. As he so often finds the ACLU lacking in these qualities it would seem only fair to acknowledge an exception when he comes across it. And doing so would, of course, make his larger indictment more convincing.

What are the lessons to be drawn from all this? Here Donohue is not much help, as for him the Union is damned if it does and damned if it doesn't. To me, on the other hand, the record shows that, flawed as it is and has been, the ACLU is still the only private organization with a serious interest in the rights of people it disagrees with. Most people jealously guard their own rights. Few care about rights in the abstract. The ACLU has, if not always, at least now and then, fought for the rights of everyone, sometimes at considerable cost to itself. Until a better organization comes along there would appear to be no substitute for it. I hope that the Union will take Donohue's strictures to heart. He is an honest and reliable critic so far as he goes, and his indictment of the Union's radical periods is especially compelling. Yet even in its second period, when it was most concerned with the Bill of Rights, the ACLU was far from perfect. During World War II it failed to protest the relocation of Japanese-Americans, the greatest violation of American

8. W. O'NEILL, *A BETTER WORLD: THE GREAT SCHISM, STALINISM AND THE AMERICAN INTELLECTUALS* (1982).

civil liberties in modern times. And during the fifties a few leaders established compromising ties with the FBI. Perhaps these lapses only show again how difficult it is to live by the clear light of principle. Yet, because what the Union seeks to do is so hard, a measure of charity would seem to be called for. Donohue's book withholds that charity. It is valuable all the same, but I hope someday there will be a history of the ACLU that strikes a better balance between sympathy and indignation.