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DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES. By Herbert McClosky¹ and Alida Brill.² New York: The Russell Sage Foundation. 1983. Pp. x, 512. \$29.95.

*Sanford Levinson*³

*Dimensions of Tolerance*⁴ is primarily a report on two studies undertaken in 1976-77 and 1978-79 of American attitudes about various issues defined by the researchers as involving "civil liberties." As a report the book is undoubtedly of great interest. In spite of inevitable methodological problems, it offers significant insights into the structure of popular opinion concerning issues that are central to any society that defines itself as a liberal democracy.

Less happily, however, I believe that the book also epitomizes some of the confusions, if not outright incoherence, found in much contemporary invocation of the term "civil liberties." Moreover, the authors make assumptions throughout their book about what people should believe without ever establishing a framework of justification as to *why* people should hold such views. Constant reference is made to our constitutional tradition as if its content were undebatable or, even more seriously, as if the Constitution were self-justifying. Neither, of course, is the case, and the failure adequately to recognize these rather obvious points seriously weakens the book.

I shall treat each of these points in turn.

I

The primary source for the conclusions about popular attitudes is a Civil Liberties Survey (CLS) conducted in 1978-79. A national sample of almost 2000 adults plus an additional group of almost 1900 "community leaders and activists"⁵ were asked to answer an extensive questionnaire detailing their views about a plethora of issues. An earlier Opinion and Values Survey (OVS) had been conducted in 1976-77 on a national cross-sample of 938 respondents, supplemented by almost 3000 elite respondents chosen from mem-

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4. H. McClosky & A. Brill, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983).

5. *Id.* at 25.

bership lists of national organizations and listings in *Who's Who* and the *Black Who's Who*.⁶ These two surveys, in a conjunction with the authors' integration of earlier studies of popular attitudes toward civil liberties, undoubtedly constitute the most ambitious examination undertaken of the topic.

Perhaps the major theme of the book is the greater tolerance of community leaders and activists as compared with the public at large. Indeed, "participation in the elite roles of the society exerts an influence over and above the influences of education, status, place of residence, and other social characteristics." The authors hypothesize that participation in public affairs serves to "expose one to a wider range of influence that increase social learning and produce greater familiarity with the prevailing values of the political culture," and it is a central tenet of the book that that political culture is "predominantly libertarian."⁷ Part of the reason for greater tolerance, of course, may lie in the experience of having to work and deal with people of sharply differing views. Part of what it means to be a member of the elite, after all, is that one has the opportunity to move more often beyond the parameters (and limitations) of one's immediate surroundings.

If community leaders are generally more civil libertarian than the mass public, one group trumps even the former in their devotion to those norms—lawyers. With extremely few exceptions lawyers consistently register more support for what the authors define as civil libertarianism than either the public at large or the nonlawyer elite sample. Thus only 20% of the legal elite would ban sexually explicit novels from high school libraries, as compared with 35% of community leaders and 48% of the mass public.⁸ Eighty percent of the lawyers would grant college students the unfettered freedom to invite speakers to their campuses, whereas only 60% of the community leaders would be so latitudinarian. Indeed, 26% of the latter support screening speakers "to be sure they don't advocate dangerous or extreme ideas," as compared with only 12% of the lawyers. A full 45% of the mass public supports such screening.⁹

Perhaps the most dramatic difference between the lawyers' sensibility and that of other segments of society regards the fifth amendment right against self-incrimination. Ninety-three percent of the lawyers agreed that "[f]orcing people to testify against themselves in court is never justified, no matter how terrible the crime."

6. See *id.* at 25-27 for a brief description of the two surveys.

7. *Id.* at 253.

8. *Id.* at 60.

9. *Id.* at 56.

Only 40% of the mass public—and 67% of the community leaders—were willing to subscribe to such a categorical statement.¹⁰

This last example, about which I shall have more to say below, underscores the extent to which lawyers may be well-socialized into expressing support for existing constitutional norms. “By training and vocational leanings,” McClosky and Brill write, “lawyers are more disposed than any other segment of the population to adjust their beliefs to the rulings of the higher courts.”¹¹ The strongly libertarian thrust of the Warren Court certainly helped to create a somewhat libertarian bar. (Is it too parochial to suggest that the strong liberal presence in the legal academy also helped to encourage students to accept the legitimacy of what, to the older bar, were extremely controversial forays into judicial policy making?)

McClosky and Brill themselves suggest that “one must at least consider the possibility that if the courts were to become less libertarian, many lawyers would also move in that direction.”¹² This apt reminder points to one of the central, though unavoidable, methodological problems of the book—its time-boundedness. Both the OVS and CLS were conducted before the election of Ronald Reagan and the inauguration of the so-called Reagan revolution. Surveys today might well reveal significant movement rightward, as antilibertarian opinions have become legitimized by their enunciation from the nation’s highest offices.

One wonders also how many of the OVS and CLS leaders were drawn from the ranks of the so-called “New Right” organizations that are playing such a significant role in the politics of the 1980’s. Do the activists of the “Moral Majority,” for example, reveal the same relative levels of tolerance as compared with the mass public? McClosky and Brill cannot be faulted for having failed to read the future when compiling their samples in the mid- and late-1970’s, but the reader must always be aware of the peril of using their results to understand the 1980’s.

Returning to the subject of lawyers’ commitment to civil liberties, one may especially wonder about the implications of a second Reagan administration and of a Reagan-selected Supreme Court. If the level of support of lawyers for civil libertarian or due process norms is a function of their support by the judiciary, then there may be radical changes ahead. Insofar as many law students are content to parrot the judiciary rather than engage in genuinely independent thought, the bar of the future may be significantly different from the

10. *Id.* at 158.

11. *Id.* at 419.

12. *Id.*

bar that came to consciousness in the last two decades. Indeed, those of us who teach constitutional law will be forced more than ever to decide how much our task is simply socializing students into acceptance of legal norms as articulated by the Supreme Court, as opposed to fostering a much more critical, much less positivistic, understanding of what constitutes "the Constitution."

At the empirical level, then, McClosky and Brill present an image of the American polity that reveals sharp disagreement concerning the desirable level of civil liberties within our society. The book offers no solace to populists, for the mass public emerges as only partially committed to what most readers of this review presumably would regard as many of our basic norms.

Instead, corroborating earlier studies, McClosky and Brill find that members of elite groups, especially lawyers, are the supporters of the protection of diverse views and the rights of criminal defendants. All of these comparisons, of course, are relative. The 1980's seems to be featuring the coming to power of anti-civil libertarian elites whose base of power is a populist resentment of cosmopolitanism. Still, time-bound or not, the data presented in *Dimensions of Tolerance* amply reward the reader who wishes to understand more about American society.

II

McClosky and Brill treat freedom of speech, sexual freedom, the rights of criminal defendants, and prisoners' rights as civil liberties issues. Their only attempt to define "civil liberties" is their comment that "we have reserved the term 'civil liberties' for those rights which have mainly to do with the *freedom* of the individual." Among such rights purportedly is the right "to be free to live by whatever moral, sexual, and familial standards one prefers."¹³ To put it mildly, though, this last clause opens up a Pandora's box of problems.

In his valuable work on the theory of freedom of speech, Frederick Schauer has pinpointed the difficulty of cordoning off a closed set of protected civil liberties from the more general set of all claims of personal liberty.¹⁴ Insofar as much modern civil libertarian theory is based on notions of "freedom of expression," the separation from general libertarianism becomes close to impossible. Since Schauer is neither a libertarian nor, equally important, a proponent of the view that the Constitution incarnates libertarianism, he is

13. *Id.* at 326 (emphasis in original).

14. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 60-72 (1982); see also Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983).

wary of the path taken by many contemporary theorists. *Dimensions of Tolerance*, though not an explicitly theoretical work, offers added support for Schauer's concern.

Throughout their book McClosky and Brill regularly refer to "civil liberties" and to "libertarian values" and the "libertarian norms of the political culture."¹⁵ As a sometime historian and teacher of American political thought, I confess a degree of skepticism about these confident assertions about the underpinnings of our political culture. As Garry Wills once remarked, "Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights."¹⁶ Yet my qualms about their analysis run even deeper, for the terms they use are hopelessly unclear.

Bigamy, the use of heroin (or Laetrile), the sexual exploitation of teenagers, and employment below the minimum wage can all be defended within the ambit of some theory of liberty. None is properly considered a civil liberty.¹⁷ Nothing in the book, however, allows the reader to determine with confidence why these are *not* within the authors' ambit of concern.

McClosky and Brill seem unaware that "civil liberties" may not be a synonym for "libertarian values." Although they are not constitutional scholars, they should certainly be aware that the basis of such decisions as *Lochner v. New York*¹⁸ and *Coppage v. Kansas*¹⁹ was the "libertarian" value of "freedom of contract." Contemporary libertarians such as Robert Nozick have vigorously revived the tradition of libertarian natural rights associated with Justices Field and Peckham. This latter-day libertarianism seeks to delegitimize the modern welfare state. Taxation for purposes of redistribution is denounced as theft, and many other protective laws are dismissed as paternalist.

Perhaps the authors are in fact closet libertarians. Yet the tone of the book, plus their failure to test popular attitudes towards the progressive income tax as an incursion on individual liberty, leads

15. See, e.g., H. McCLOSKY & A. BRILL, *supra* note 4, at 232, 236, 238.

16. J. ELY, *DEMOCRACY AND DISTRUST* 60 (1980) (quoting Garry Wills).

17. For what it is worth, I would tend to define "civil liberties" as those rights necessary to maintain a "republican form of government." These can include not only traditional "negative liberties" like the freedom to speak and write without fear about the acts of government and other influential institutions, but also certain "affirmative rights" ranging from the right to vote to some kind of "right to know" about the activities of the state. See, e.g., M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983). The problem with this definition is not only that it excludes, say, protection of "privacy," but also that it has only an uncertain role for limiting the rights of the state to engage in censorship of culture, as with antipornography legislation.

18. 198 U.S. 45 (1905).

19. 236 U.S. 1 (1915).

the reader to suspect that McClosky and Brill are more conventional liberals.

The typical member of the ACLU, I suspect, supports both "civil liberties," including protection of "privacy" and "freedom of expression," and the modern interventionist, redistributive state. The typical member of the "New Right," I also suspect, embraces economic libertarians while supporting active state regulation of sexual and reproductive practices. An undue consistency may indeed be the hobgoblin of small minds, but one nonetheless may be allowed to wonder at the range of begged questions presented by purported devotees of liberty, whether general or simply "civil." *Dimensions of Tolerance*, however, does not seem even to recognize that there is a problem of consistency that must be addressed.

Noting that the case for tolerance is not "intuitively obvious," McClosky and Brill point to potential problems raised by protecting racist speeches by members of a white majority or the printing of lies by a newspaper or by forbidding public schools to set aside time and facilities for prayers. "Whether these and other liberties that exact a high price ought to be constitutionally protected raises highly vexing questions, and a fair amount of political sophistication is required to address them and make the case for freedom."²⁰ In all candor, the authors seem neither particularly vexed nor sophisticated enough to argue "the case for freedom" against a knowledgeable opponent.

Consider, for example, the data reported above concerning support for the right against self-incrimination, a right that the authors seem wholeheartedly to embrace. Although I consider myself a strong civil libertarian,²¹ I have grown increasingly dubious of the value of the fifth amendment insofar as it prohibits requiring a defendant to testify in open court²² or, at the least, permitting the prosecutor or judge to comment on the failure to testify. As I have argued elsewhere,²³ I believe that the fifth amendment has generated enormous side costs by encouraging methods of investigation, including infiltration by secret police, far more damaging to the values of civil libertarians than would be the calling of a criminal defendant to the stand. Thus I confess my agreement with the 60% of the presumptively unenlightened mass public that refused to agree

20. H. McCLOSKEY & A. BRILL, *supra* note 4, at 375.

21. I recently represented, on behalf of the ACLU, the Ku Klux Klan when Austin, Texas, refused the Klan a parade permit.

22. I completely support *Miranda* and other impediments to out-of-court interrogation. It is the ban on in-court testimony that I find dubious.

23. See Levinson, *Under Cover: The Hidden Costs of Infiltration*, 12 HASTINGS CENTER REP., August 1982, at 29-37.

that “[f]orcing people to testify against themselves in court is never justified, no matter how terrible the crime.” I do not, however, feel any less the civil libertarian for having this view.

This is only one of many examples that could be given of the difficulties of deciding what it means to be genuinely civil libertarian in today’s world.²⁴ The authors sound like the academics they are when they lament the “low levels of support for academic freedom,” as manifested by the failure of the American public “to have conclusively decided that the education of the young should be the exclusive province of educators.”²⁵ The authors seem not to realize that “proper education of the young”²⁶ is an inherently controversial concept, or that limiting the rights of parents to control their children’s education might itself raise profound problems of civil liberties. Instead, the book manifests an intellectual complacency about their own ill-defined and scarcely argued views together with a sense of alarm at the failure of most Americans to share those views.

As it happens, I am also discouraged by reading the data collected by McClosky and Brill for, notwithstanding the fifth amendment, I am in basic agreement with most of their apparent positions. But I am afraid that the book will quite understandably fail to impress readers not predisposed to be sympathetic. Indeed, I suspect that at least some readers will be relieved to discover the weak popular support for some of our most important liberties.

Despite the authors’ insensitivity to the problems raised by their undeveloped assumptions, *Dimensions of Tolerance* is important precisely insofar as it demonstrates the uncertain hold of many important values on the American political consciousness. Even its central defects are important insofar as they underscore the necessity for those of us who do support (at least most) traditional civil liberties to develop much more cogent arguments directed at skeptics rather than merely to celebrate our own enlightenment or lament the coming to power of the presumptively unenlightened.

24. I am writing this review in Jerusalem, where two days ago a Jewish terrorist apparently fired an antitank weapon at an Arab bus, killing one of the passengers. Among the responses was that of the racist thug (and member of the Knesset) Meir Kahane, who praised the act. Kahane has also sought to enter Arab villages in order to encourage their members to leave the country of which they are citizens. Defender of the (basically powerless) Klan though I may be, I find myself questioning how much freedom of speech should be allowed Kahane within the context of the continuing tragedy that is Israeli politics. Perhaps occasionally there really *are* “clear and present dangers,” however resistant we should properly be to invoking that term against our political adversaries.

25. H. McCLOSKY & A. BRILL, *supra* note 4, at 57.

26. *Id.* at 58.
