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Freedom of Expression

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BOOK REVIEW

Archibald Cox, *Freedom of Expression*, Cambridge, Mass., Harvard University Press, 1981. Pp. 89.

Reviewed by Howard C. Anawalt*

Professor Cox's book, *Freedom of Expression*, is likely to be of interest to both lawyer and nonlawyer. The book is primarily a survey of first amendment decisions made by the Burger Court between 1969 and 1980. Such a survey is helpful because so much has been written on and off the bench concerning the first amendment. In the 1970's, in opinions alone, there were 141 decisions dealing with freedom of speech or press announced by the United States Supreme Court. Professor Cox has captured essential aspects of this litigation and presented his research in a slim volume. He has, for the most part, retained enough description of the facts of the cases so that the reader can understand the context of the legal development and assess the important issues involved in the cases.

The book is divided into six sections. The first section deals with content regulation and the second with regulation of time, place and manner of expression. This organization presents the reader with a major line of departure in first amendment analysis. The Supreme Court has repeatedly emphasized the difference between content regulation and regulation of formal aspects of communication. The court has insisted that regulation of the substance or the content of a communication must stand up to the most severe form of judicial scrutiny. "Our cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content."[1] Time, place and manner restrictions on speech, however, have been given more lenient treatment by the Court in order to protect states' interests in such things as public safety and welfare.

The third section, entitled "Expressive Conduct," deals with

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1. Widmar v. Vincent, 454 U.S. 263, 276 (1981).

the distinction between speech and conduct. This is a distinction fundamental to first amendment law, although as we shall see, Professor Cox contends that the distinction has little utility.

The fourth section of the book, "Regulation of Conduct Affecting Publication," delineates certain incidental restrictions on communication rights. The examples chosen include obligations of reporters to testify concerning their news sources, the requirement that journalists comply with discovery procedures in public figure defamation cases, and the validity of warrants for the search of newspaper publishing premises.[2] In each of these areas the Supreme Court has sustained the restrictions, viewing them to be only an incidental impact on freedom of expression. By contrast, the Supreme Court has given a thorough and exacting review to government restrictions on both content and the time, place and manner of exposition of ideas.[3] Discussing the distinction, Professor Cox states:

> Taken as a whole, this group of cases emphasizes the contrast between the strong bulwark provided by the first amendment against direct suppression or regulation of publication or expression and the kind of factual inquiry and balancing necessary when a special privilege is sought because of the indirect effects of a generally valid legal obligation.[4]

In the fifth section of the book, Professor Cox discusses the difficulties encountered when money is mixed with first amendment rights. This section reviews Supreme Court cases involving legislative limitations on political contributions and expenditures and cases involving limitations on communication activity by corporations and labor unions.[5]

In the final section of the book, Professor Cox makes several modest generalizations concerning the Burger Court's first amendment decisions. First, he concludes that the 1970's "brought many fewer initiatives [with respect to the first

2. The cases are respectively, Branzburg v. Hayes, 408 U.S. 665 (1972), Herbert v. Lando, 441 U.S. 153 (1979) and Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

3. *See, e.g.*, Consolidated Edison v. Public Service Commission of New York, 447 U.S. 530 (1980) (content) and Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (time, place and manner restrictions).

4. A. COX, FREEDOM OF EXPRESSION 67 (1981).

5. The principal cases discussed are Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

amendment] than the two preceding decades."[6] Curiously, he then acknowledges that these initiatives include first amendment protection of commercial speech and first amendment protection of money in politics. These two areas will indeed prove to be bombshells with respect to first amendment development.

Professor Cox finds the most noteworthy facet of the cases of the 1970's lies in the area of judicial technique, rather than first amendment doctrine. "The most striking aspect of the work of the Burger Court has been the insistence of the Justices upon presenting individual views, and their persistence in advancing those views even after a majority has disagreed."[7] In addition, he notes that the first amendment decisions of the 1970's "seem to me to bear other marks of an exceedingly pragmatic and particularistic jurisprudence, even though doctrinal development is not always neglected."[8] Finally, he observes, somewhat wistfully, that the value of judicial review really depends on the Court's capacity to eliminate subjectivity in its constitutional rulings. This last conclusion is left hanging, for Professor Cox really does not develop a thesis one way or the other with respect to the Burger Court's success or failure in this area.

The Speech/Conduct Distinction: The idea that the distinction between speech and conduct is fundamental in first amendment law has been subject to a number of objections. One of these objections is strictly along logical or linguistic lines. All speech is a form of conduct. Since this is so, speech cannot be distinguished from conduct. All cows are mammals, therefore cows cannot be said to be something distinct from mammals. A second line of objection is that the distinction between speech and conduct is underinclusive. That is, many forms of conduct, other than speech, are certainly communicative, and thus must be protected by the basic norms included in the first amendment.[9]

Professor Cox joins those who criticize the speech/conduct distinction. He states, "[t]he speech/conduct distinction is too

6. A. Cox, *supra* note 4, at 86.

7. *Id.* at 87-88.

8. *Id.* at 88.

9. *See infra* the discussion in Dean Ely's work noted at note 14. *See also* L. Tribe, American Constitutional Law 598-601 (1978).

superficial to be useful."[10] He urges that a speech, the distribution of leaflets and the burning of a tyrant in effigy are three examples of expression and that each "should be protected against suppression for their 'dangerous' ideas."[11] There are certainly many situations in which the speech/conduct distinction becomes vexing as a line of demarcation. For example, an intercontinental satellite television broadcast involves an enormous amount of activity, including satellite launching, radio transmission, financial and legal arrangements, which are not pure speech. The difficulties attending a definition of "communication" or "speech" as distinct from "conduct" do not, however, justify undermining this basic line of demarcation. First of all, the first amendment itself creates the distinction. It does not protect all conduct from excessive governmental interference; rather it protects speech. The problems presented are ones of definition and are not unfamiliar to the lawyer. Basically, the lawyer is asked the question, "What is protected?" He or she must respond, roughly, "Speech and things which are like it."[12]

It is equally important to recognize that the distinction serves important practical demands. The lawyer, the judge and the citizen all recognize that communication is often inextricably mixed with other conduct. However, each will quickly protest that conduct should not be accorded legal privilege solely because it communicates. Assassinations, for example, are intended to communicate politically, and often succeed in doing so. However, I am confident that we will never hear the argument that such murders are privileged first amendment "communications."[13]

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10. A. COX, *supra* note 4, at 60.

11. *Id.*

12. The fastidious linguist or logician should be amply satisfied with a distinction between speech (or communication) and *other* conduct. This avoids the erroneous suggestion that speech is not conduct. It is clear, however, that those who use the distinction merely mean to draw a line between that which is primarily communicative and that which is something else. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 375-79 (1968). The first amendment states its categories of protection in terms of speech, assembly and petition. The Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, state their correlative rights in terms of "freedom of opinion and expression." *See, e.g.*, article 19 of the Universal Declaration of Human Rights, General Assembly Resolution 217(III), December 10, 1948.

13. After Professor Cox finished his book, the Supreme Court decided a case which is particularly uninformative with respect to the speech/conduct distinction. In Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) the Court struck down a zoning ordinance which, as applied, prohibited a merchant from exhibiting short paid per-

There are many instances where conduct must be assessed to determine whether it is primarily communicative, and thus protected like speech. A dancer on stage may well claim such protection. But one who sells the use of his or her body for an act of prostitution can scarcely make the same claim even if the activity "communicates."[14] Thus, contrary to Professor Cox's position, the distinction between speech (or communication) and other conduct is useful in first amendment law, if only because it draws a line of demarcation which is readily understood by laymen as well as lawyers.

The discussion of the speech/conduct distinction in Professor Cox's book is too abbreviated to provide the reader with sufficient insight into the problems which it presents.[15] This is not necessarily a failing of the book, as every author must choose an emphasis in framing a work. Professor Cox has attempted to keep his book short and informative. Thus, while the book serves as a starting point for research, the careful student should turn to additional sources to amplify the discussion on the speech/content distinction.[16]

Rights of Access: One of the primary functions of a free press is to inform the public. In order to do so adequately, the press must often have access to material which some party, including the government, wishes to keep secret. Professor Cox

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formances of a nude dancer. The Court's opinion did not analyze whether such performances are primarily communication as opposed to some other activity. Instead, the Court merely observed that claims concerning live entertainment "are rooted in the [f]irst [a]mendment." *Id.* at 66. The ordinance was then struck down because the town had not demonstrated that the ordinance was narrowly drawn, had not shown that the town's interest could not be secured by less intrusive restrictions, and did not leave open other adequate channels of communication. One senses, almost instinctively, that the Supreme Court would not apply such strictures to ordinances which regulate "massage parlors" or houses of prostitution simply because these places are "entertaining" or places of "communication." The *Schad* opinion, however, fails to give guidance on whether such activity would receive first amendment protection because it fails to analyze why the entertainment involved is communication.

14. A discussion of the problem of regulating communicative conduct is contained in Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

15. The book devotes three pages to the speech/conduct distinction and 54 pages to the distinction between content regulation and time, place and manner regulations.

16. For example, one might refer to the Court's opinions in Spence v. Washington, 418 U.S. 405 (1974), Cohen v. California, 403 U.S. 15 (1971), Street v. New York, 394 U.S. 576 (1969) and United States v. O'Brien, 391 U.S. 367 (1968). *See* Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 76-82 (1968); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968). *See also* Ely, *Flag Desecration*, *supra* note 14 and T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80-90 (19—).

discusses several of the Supreme Court cases that deal with this question. One of these is *Richmond Newspapers, Inc. v. Virginia*, a case in which the Court overturned a trial court order which, at the request of defense counsel, excluded newspaper reporters from a murder trial.[17] The court ruled that without a showing of an overriding need to exclude the public, the trial of the criminal case must remain open. Professor Cox concludes that the *Richmond Newspapers* case stands for a narrow right of access, a right of the public to attend a criminal trial,[18] but does not herald the development of a general right of access to government information. Concerning the possibility of a general right of access, he states that "[t]he task of developing a body of law delimiting such a right appears overwhelming."[19]

Though the task may be overwhelming, Professor Cox suggests that the task might well be undertaken, since "recognition of the right may well be essential if the first amendment is to continue to serve the basic function of keeping the people informed about their government."[20] I definitely agree that development of various rights of access to information is essential to preservation of the role of the first amendment as a tool of self-government. I do not find, however, that the task of such a development is by any means overwhelming. If rights of access are to develop, they will do so by accretion. A series of individual rights of access, such as the one to criminal trials, can create a pattern of law which should force the government to justify the secrecy of its information. The problem of adjusting government interests in privacy and public interests in disclosure is no more difficult than the problem of reconciling other competing interests, such as the use of schools or use of fairgrounds.[21]

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17. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and A. Cox, *supra* note 4, at 24.

18. Although there was no opinion of the Court, this result and holding are clear. *See* A. Cox, *supra* note 4, at 25; Globe Newspaper Company v. Norfolk Superior Court, 102 S. Ct. 2613, 2618 (1982). "The court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials."

19. A. Cox, *supra* note 4, at 28.

20. *Id.*

21. *See* Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) and Tinker v. Des Moines School District, 393 U.S. 503 (1969). I believe that public scrutiny of much of the information that the government holds is a modern necessity. In this regard, Professor Cox and I express very different understandings of

The *Richmond Newspapers* case also serves as an entree to a brief discussion of several "worrisome characteristics of constitutional adjudication under the Burger Court."[22] One of these characteristics, one which Professor Cox calls a major fault, is the fact that the individual justices insist on writing separate opinions and thus fail to "articulate the consensuses necessary to maintain an evergrowing but continuous body of law."[23] Consensus is important because the Constitution is intended to rule or at least guide our people. To accomplish this task court decisions must be clear, and taken as a whole, they must be coherent. Otherwise, the people simply cannot follow the constitutional mandates. If the justices fail to be clear in their pronouncements, they fail to provide the practical guidance which the country needs.

The author finds that the Court has definite shortcomings in its role as a primary policy maker. He offers several suggestions for improvement. One is a plea for greater craftsmanship—the authors of opinions should work harder to fit "new decisions into the body of precedent."[24] Complaints concerning lack of consistency in Supreme Court legal development are familiar. The most colorful of these is no doubt the statement of Justice Roberts in a dissenting opinion in 1944. In his view, the Court evidenced a tendency to freely disregard prior precedent to such an extent as "to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good

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the facts and import of Snepp v. United States, 444 U.S. 507 (1980). Professor Cox discusses the *Snepp* case at some length earlier in his book, at 9-13. In that case, a former CIA agent, Snepp, was sued by the United States government after he published a book which was based on information which he obtained while he was an agent of the Central Intelligence Agency. Snepp's publication was in violation of certain post-employment covenants in his original employment contract. A constructive trust over the profits of Snepp's book, *Decent Interval*, and an injunction concerning future writings by Snepp were affirmed by the Supreme Court. Professor Cox states: "On the facts found below, Snepp's publication of *Decent Interval* was not merely the deliberate breach of a binding contract but a shabby violation of a personal confidence voluntarily accepted." A. Cox, *supra* note 4, at 10. My review of the *Snepp* case has led me to conclude that the injunction with respect to future publications should not have been imposed, and that Snepp and other former government employees who publicize writings concerning their government employment should be accorded judicial protections which include "the right to litigate the ownership of the information, the right to fair apportionment of profits, and the right to obtain modification of unreasonable post-employment restraints." Anawalt, *A Critical Appraisal of* Snepp v. U.S.: *Are There Alternatives to Government Censorship?*, 21 SANTA CLARA L. REV. 697, 726 (1981).

22. A. Cox, *supra* note 4, at 29.

23. *Id.* at 30.

24. *Id.* at 31.

for this day and train only."[25]

The author does not, however, urge that there be rigid adherence to precedent. The static demands of precedent must be balanced against demands for change which are evident in the fabric of our society. "A coherent body of law need not be static."[26] After all, some precedents are old while others are very new.[27] The justices bear a definitive obligation to make their decisions cohere when possible and to acknowledge contradiction when necessary.

The Relation Between Court and Legislature: A second constructive suggestion appears later in a portion of the book which comments on Supreme Court rulings in the area of commercial speech. Professor Cox states that "delineation of the respective institutional functions of the judicial and legislative branches is essential to the development of a coherent body of principles governing constitutional adjudication."[28] This plea is not new, and Professor Cox does not attempt a thorough discussion in his book. However, in a footnote he spells out five specific questions which he believes must be addressed if such elaboration is to occur. The footnote, in its entirety, is as follows:

> Determining the relationship between court and legislature with respect to the relevant conditions and the tendencies of a legislative remedy for a social evil requires examining a number of specific questions, on some of which Justices from time to time express opinions, but which the Court has never systematically confronted and attempted to resolve:
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> (1) When, if ever, are express legislative findings required to supply the justification for a law subject to more than minimal judicial scrutiny?
>
> (2) To what extent will the Court accept express and/or implied legislative findings? Is the standard the same in all cases of more than minimal scrutiny?
>
> (3) When, if ever, do counsel supporting the constitutionality of a measure subject to more than minimal judicial scrutiny have a duty to "prove" the facts showing justification?

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25. Smith v. Allwright, 321 U.S. 649, 669 (1943) (Roberts, J., dissenting). *See also* CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 177-78 (1974).

26. A. COX, *supra* note 4, at 31.

27. Snepp v. United States, 444 U.S. 507 (1980) and the *Richmond Newspapers* case are two powerful new precedents with broader implications. *See also* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 1 (1976).

28. A. COX, *supra* note 4, at 37.

(4) Is the necessary "proof" to be established by evidence in the trial court or by argument in a "Brandeis brief"?

(5) If the proof is provided by evidence, what weight will be given the trial court's finding of fact?[29]

These five questions converge on a basic problem: the appropriate *constitutional* role of court and legislature in identifying (and addressing) economic and social conditions which have a broad impact on the people of our country.

Many more comments could be made concerning the book, for it is one which invites discussion. I enjoyed the book. The book is well written, clear and helpful to the understanding of first amendment law. Keeping in mind the limitations of a survey, I recommend it to others with all varieties of backgrounds who are interested in constitutional questions.

29. *Id.* at 38.