

REVIEWS

The Warren Court. ARCHIBALD COX. Harvard University Press, Cambridge, 1968, Pp. 144. \$4.95.

Tom C. Clark†

According to Attorney General Wickersham, every decision of the Supreme Court “becomes a page of history.”¹ Professor Archibald Cox in his compact little volume, *The Warren Court*, goes further. He says that largely due to the egalitarianism of the Court it has in the short space of fifteen years not only rewritten the major constitutional history of “race relations, the administration of criminal justice and the operation of the political process” but has brought it about with “profound social consequence.” And he does it in a concise, direct and readable style that bespeaks his four years’ service as Solicitor General of the United States.

However, my Brother, Justice Fortas, put it in fewer words when he said that the Court had “ushered the country into the modern world . . . this was the greatest Court in history . . . it had exactly the right mix in the carburetor.” Presently, there is quite a difference of opinion on this among people. But none can deny that the Court has, as the former Solicitor General concludes, helped the lot of the ordinary man. It has for the first time since John Marshall’s days made judicial power a chief instrument for the attainment of the central purpose of our society.

I

The “unifying theme” of the book concerns itself with what the author calls the “strange paradox which vests in the Judicial branch the responsibility of deciding ‘according to law’ major aspects of our most pressing and divisive social, economic and political questions.”² Inquiring of himself just what role the Judicial branch should play in the government of the American people, Mr. Cox in succeeding paragraphs relates the question to the basic dilemmas posed in litigation involving civil rights and criminal procedure, speech and association, voting rights and legislative apportionment. He concludes that

† Former Associate Justice of the United States Supreme Court, 1946-67.

¹ 219 U.S. xv (1911).

² P. 6.

the dilemma is insoluble, finding that there is no fixed rule for the judge to follow nor any scale by which a critic can fairly measure the balance which the judge strikes.³

Despite this inconclusiveness the author, with apparent reluctance, persuades himself that there are areas where the balance was blindly struck by the Court. His misgivings are largely in the areas of state action under the equal protection clause of the 14th Amendment, eavesdropping, and reapportionment. He believes the Court should have deferred to the legislature in the two latter respects and sees the Court as gradually relaxing the requirement of state action. While not specifically disciplining the Court it seems fair to say that Mr. Cox leaves clear connotations that the Court should give more attention to professional method and less to dogma; more emphasis on practicality and less on emotion; more thought to the general welfare and less to egalitarianism and more action according to law and less as a "Council of Wisemen." Lest I be wrong in this conclusion I hasten add that his peroration on the Court strikes a happy balance:

For myself, I am confident that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the maintenance of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions.⁴

II

The former Solicitor General states that his years of advocacy before the Court have left him "deeply prejudiced" in its favor.⁵ He leaves it to the reader "to judge for himself how far personal involvement . . . has impaired" his ability to review the Court's work "with academic detachment."⁶ In my view his treatment of the Court is, as Elizabeth Barrett Browning would say, "as frank as rain on cherry blossoms," and I add, as sincere as his arguments before it. As did his advocacy, however, his book has some misteachings.

For example, in discussing *Brown*⁷ he declares that *Plessy v. Ferguson*⁸ was "still authoritative" [at the time of *Brown*] and that the

³ Pp. 22-3.

⁴ Pp. 133-4.

⁵ P. v.

⁶ P. vi.

⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

Court rejected its "established doctrine" in that case. This is but dealing with shadows rather than substance. *Plessy* had long been in disrepute. Its shadow still remained, but in a series of school cases it had been ignored or set to one side as a precedent for public school segregation.⁹ In *Sweatt v. Painter*,¹⁰ rather than relying on *Plessy*, the Court struck down segregated school facilities, relying on those "qualities which are incapable of objective measurement but which make for greatness in a law school." And on the same day in *McLaurin*¹¹ emphasis was placed on those intangible considerations that "impair and inhibit his (the student's) ability to study, to engage in discussions and to exchange views with other students, and, in general, to learn his profession." Words that were a premonition of what was to come in public grade and high school segregation! Indeed, they were specifically used by the Chief Justice in *Brown* when he said of the doctrine of *Sweatt* and *McLaurin* that their findings "apply with added force to children in grade and high schools."¹²

Mr. Cox also makes reference to the "extent and rapidity" with which the Court has acted in these fields. This is hardly true. For example, in race relations *Shelley v. Kraemer*¹³ announced the doctrine of "equality in the enjoyment of basic civil and political rights" back in 1948, six years before *Brown*. The Court in refusing enforcement of restrictive covenants in deeds said:

The historical context in which the 14th Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of these rights from discriminatory action on the part of the states based on considerations of race or color.¹⁴

As for the school cases, they had before the 1954 decision been under study in the Court for several years. *Brown* itself had been argued twice at different Terms and its companion case, *Briggs v. Elliott*,¹⁵ was here as early as in 1951 and in January 1952 was remanded without argument, and came here the second time in 1952, after which it

⁹ See *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹⁰ 339 U.S. 629, 634 (1950).

¹¹ *McLaurin v. Oklahoma State Regents For Higher Education*, 339 U.S. 637, 641 (1950).

¹² 347 U.S. 483, 494 (1954).

¹³ 334 U.S. 1 (1948).

¹⁴ *Id.* at 23.

¹⁵ 342 U.S. 350 (1950).

was argued twice at different Terms; *Davis v. County School Board of Prince Edward County, Virginia*,¹⁶ came to the Court in the 1951 Term and was argued in 1952 and again in 1953; and *Gebhardt v. Belton*,¹⁷ from Delaware, was likewise argued twice. *Bolling v. Sharpe*,¹⁸ from the District of Columbia, was also argued twice, in 1952 and 1953. In fact the Court awaited disposition of these cases from five different jurisdictions—four States and the District of Columbia—before finally hearing all of them together in late 1953. And even then judgment implementing the opinion of May 11, 1954, on the merits, was put off for a full year in order to give the Attorneys General of the various States opportunity to be heard.

Nor were the advances in criminal procedure to which Mr. Cox refers decided in haste. *Betts v. Brady*,¹⁹ holding that counsel was not required in noncapital cases, was decided in 1942, twenty-one years prior to *Gideon*,²⁰ which overruled it. Even if one assumed, without agreeing, that *Griffin*²¹ was the onset of the reform movement in criminal law, still the Court moved slowly. It took five years for *Mapp*,²² seven years for *Gideon* and ten for *Miranda*.²³ In the reapportionment field it took a score of years to overrule the *Colegrove v. Green*²⁴ doctrine. And even after *Baker v. Carr*²⁵ the Court took several more years to finally enforce the one man-one vote rule. And only last Term was that doctrine applied to counties and other small units of government. Rather than being rapid and extensive the Court, I submit, was only as expansive as the cases brought to it required and not nearly so rapid as the "run of the mill" cases received.

III

Under the heading of "Civil Rights: Legislative Power" Mr. Cox takes up "the broader reaches of our social and economic system where activities of enormous public consequence are conducted by individuals and private (*i.e.*, nongovernmental) institutions."²⁶ This leads to a most provocative discussion of the doctrine of "state action." There is a

¹⁶ 347 U.S. 483; 349 U.S. 294.

¹⁷ *Id.*

¹⁸ 347 U.S. 497; 349 U.S. 294.

¹⁹ 316 U.S. 455 (1942).

²⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²¹ *Griffin v. Illinois*, 351 U.S. 12 (1956).

²² *Mapp v. Ohio*, 367 U.S. 643 (1961).

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁴ 328 U.S. 549 (1946).

²⁵ 369 U.S. 186 (1962).

²⁶ P. 51.

clear implication that the Court is in the process of abolishing the requirement of state action and applying the equal protection clause directly to private activity.²⁷ He cites my concurring opinion in *United States v. Guest*²⁸ where it was said that the "specific language of § 5 [of the 14th Amendment] empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with 14th Amendment rights." Declaring that there are no 14th Amendment rights, Mr. Cox says that "it speaks only of duties." However, this Court has recognized personal rights under the 14th Amendment for many years and enforced them.²⁹ Moreover, when the Congress implements the 14th Amendment by legislation under § 5, the Court is obligated to enforce it, if it is within rational limits. Section 241³⁰ is just such a statute and has been so recognized for scores of years.³¹ Our construction leaves the power within the legislative jurisdiction where § 5 placed it and where it is hoped that it may be nurtured more speedily and effectively than the facilities of the judiciary permit.

IV

In discussing the eavesdropping cases, Mr. Cox criticizes *Berger*³² on the ground that it is obscure as to the criteria necessary to show probable cause. The Court has written hundreds of cases on the tests for probable cause and we saw no need to rehash them. The opinion did discuss *Osborn*³³ in detail and indicated complete agreement with the criteria laid down there.

Miranda v. Arizona "can hardly be explained by the words of the Constitution," Mr. Cox says.³⁴ For more than a century and a half the presence of a lawyer was not required during stationhouse interrogation, he adds. Some of the reasons "for overturning the consistent line of precedents are in the Court's opinion. The rest can fairly be guessed," he opines.³⁵ The guesses include the effort "to eliminate some of the hypocrisy of our criminal procedure"; the egalitarianism

²⁷ In this regard Mr. Cox might get some comfort from the denial of certiorari in the Girard College Case, *Pennsylvania v. Brown*, 270 F. Supp. 272 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

²⁸ 383 U.S. 745 (1966).

²⁹ *Id.* at 779-81.

³⁰ 18 U.S.C. § 241 (1964).

³¹ *See Screws v. United States*, 325 U.S. 91 (1945).

³² *Berger v. New York*, 388 U.S. 41 (1967).

³³ *Osborn v. United States*, 385 U.S. 323 (1966).

³⁴ P. 84.

³⁵ *Id.*

that has become "a dominant force in the evolution of our constitutional law"; "the very notions of guilt and punishment"; and, finally, the default of the states in reform.³⁶ In Mr. Cox's view, "The gravest questions are raised by the radical revision of the structure of government that results from shifting the ultimate responsibility for the administration of criminal justice from the States to the Nation . . . a point the majority refuses to discuss despite Justice Harlan's dissents."³⁷

In my view, rather than shifting the ultimate responsibility, the Court has only tightened the rules. The responsibility remains where it was. In addition, I submit that the reform in criminal procedure has been a gradual and understandable one. Griffin obtained his transcript but of what use was it without a lawyer; Gideon got his lawyer but of what use was he if a confession had already been obtained; Escobedo³⁸ already had his lawyer in the next room at the stationhouse but of what avail since he was not permitted to talk to his client; and, finally, Miranda asked, what good is a lawyer if you do not have him at the initial interrogation, a vital point in the process of criminal detection! One step in this progression leads surely to the next and eventually to *Miranda*. Though I dissented in *Escobedo* and *Miranda*, they were the logical offspring of *Gideon* and my disagreement with the latter was on timing rather than substance. *Escobedo* was a sporting case in my view.

V

Perhaps the most pronounced conflict over the Court has arisen in the legislative branches of government. The Congress felt the pinch that the Court placed on its investigations, the restrictions imposed on criminal detection, and the reapportionment of House seats. The stress became so acute that in the pay raise for the Judiciary the Congress clipped \$2,500.00 a year from the Justices' proposed increase in 1964, while leaving all other judges at their proposed levels. And only last June *Miranda's* restrictions were relieved, *Berger*³⁹ was circumscribed and *Mallory*⁴⁰ nullified.⁴¹ In addition, there was much grumbling about the reapportionment decisions but nothing resulted.

It appears that the author deals rather superficially with apportion-

³⁶ Pp. 85-7.

³⁷ P. 89.

³⁸ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³⁹ 388 U.S. 41 (1967).

⁴⁰ *Mallory v. United States*, 354 U.S. 449 (1957).

⁴¹ Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197.

ment. He emphasizes that it would have been best to have left the problem with the legislatures. But this is exactly what the Court did for over a half a century—and absolutely nothing happened. Indeed, our present ghetto problems might well be traced at least partly to the failure of the States to recognize the plight of the metropolitan housing situation, which resulted from discrimination in apportionment. The leading case of *Baker v. Carr*⁴² was premised on the refusal of the Tennessee legislature to reapportion for 60 years, even though its Constitution called for reapportionment every decade, and the unavailability of other processes for change through referendum or executive action. The invidious discrimination that the people of Tennessee had suffered cried out for correction. The Court had been talking of “justiciable issues” for years and had staked the reapportionment area as a political thicket where it refused to enter. Democratic processes continued to fail, invidious discriminations to increase, and urban conditions to deteriorate. At this juncture there was no other recourse and the Court was obligated to act. In so doing it acted in its true tradition as the guardian of the national rights of the individual. It could have done no less. And it did no more when it came to the rescue of the victims of such an invidious discrimination.

Three major problems in the apportionment area, Mr. Cox finds, remain unsettled. The first has to do with the absolutes in the one man-one vote rule. It appears that the Court has answered this by holding legislatures to strict accountability to the one man-one vote shibboleth. The second has to do with the extension of the rule to counties and other governmental districts which has now been done in *Avery v. Midland County, Texas, et al.*⁴³ And the third involves the application of the constitutional rule to gerrymandering. It would, of course, be applicable to gerrymandering where it resulted in invidious discrimination or the district lines were drawn with racial discrimination in mind.⁴⁴ Aside from these considerations it is doubtful if customary gerrymandering would come under the present rule.

VI

This leaves but one topic for consideration, which Mr. Cox deals with in his chapter on “Political Democracy: Speech and Association.”⁴⁵ He discusses such cases as *New York Times v. Sullivan*,⁴⁶ *Time, Inc. v.*

⁴² 369 U.S. 186 (1962).

⁴³ 390 U.S. 474 (1968).

⁴⁴ *Wright v. Rockefeller*, 376 U.S. 52 (1964).

⁴⁵ P. 92.

⁴⁶ 376 U.S. 254 (1964).

Hill,⁴⁷ *NAACP v. Alabama*,⁴⁸ and the civil disobedience demonstration cases. Of course, all of this started, not with the present Court, but over 40 years ago when the 1st Amendment was incorporated against the States through the due process clause of the 14th Amendment.⁴⁹ The importance of the chapter under discussion lies in the coverage of the demonstration cases, wherein Mr. Cox points out with clarity the "elementary distinction" between civil disobedience and "violating unconstitutional Jim Crow laws."⁵⁰ It was in the latter category that, with the exception of *Adderly v. Florida*,⁵¹ all of the cases reached the Court.

All in all—despite a few barbs, innuendoes and dissatisfactions with the Court—Mr. Cox has produced a provocative, useful and handy manual on a spirited and memorable era of the Court. It is crammed full of legal lore that makes it most interesting and informative. Perhaps it might have been more challenging if the former Solicitor General had discussed more of his own cases, of which there were many in which he prevailed that had far-reaching and lasting consequence. But in any event, we are agreed that *The Warren Court* is a most interesting and important book about an exciting era that time will value both by acceptance and precept.

⁴⁷ 385 U.S. 374 (1967).

⁴⁸ 357 U.S. 449 (1958).

⁴⁹ See *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵⁰ P. 112

⁵¹ 385 U.S. 39 (1966).