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The Concept of the Public Forum: Cox v. Louisiana

Harry Kalven Jr.

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"How come you're not saying *we* any more?"

From cartoon of prizefighter who has just been knocked out and is being carried toward the dressing room. He is addressing his manager walking beside him.

I. THEME

It is familiar knowledge that, during the decades of the thirties and forties, the Jehovah's Witnesses, a sect "distinguished by great religious zeal and astonishing powers of annoyance,"[1] brought to the Supreme Court of the United States a large and varied number of issues about the exercise of freedom of speech and religion in public places.[2] Indeed, in their robust evangelism, they appear to have stimulated the expression by the Court of a full chapter of constitutional law. Perhaps in no other corner of First Amendment theory have we had so ready a supply of relevant precedents.[3]

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[1] CHAFEE, FREE SPEECH IN THE UNITED STATES 399 (1948). A vivid description of their tactics is given in Mr. Justice Jackson's opinion in Douglas v. Jeannette, 319 U.S. 157, 166–74 (1943).

[2] There are more than 30 cases in all beginning with Lovell v. Griffin, 303 U.S. 444 (1938), the large majority of which involve Witnesses.

[3] The cases are conveniently collected and discussed in Mr. Justice Frankfurter's concurring opinion in Niemotko v. Maryland, 340 U.S. 268, 273–89 (1951); see also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 926–28, 946–47 (1963).

Despite an occasional celebrated overnight shift in doctrine, as between *Jones v. Opelika*[4] and *Murdock v. Pennsylvania*[5] or, again, between *Saia v. New York*[6] and *Kovacs v. Cooper*,[7] and a frequently brilliant angry dissent from Mr. Justice Jackson,[8] the Court seemed to have the matter well in hand and to have an agreed framework for handling it. As the Communist issues came to the fore in the fifties, the problem receded and the story of the streets became a bit quaint. We were likely to regard the law that had been developed as one that concerned a luxury civil liberty. It was a sign of how tolerant toward a sharply dissident minority our society could be, if the minority was small and eccentric.

It appears now that the story is not over. A year or two ago, the guess would have been that the Negro protest would raise its most interesting legal issue over the use of private property.[9] But the civil rights legislation has largely put to rest the problem of the sit-in,[10] and there is every indication that the civil rights movement is going back onto the streets. While prediction in these matters is always imprudent,[11] it appears that the Court's formidable business in the immediate future will require it to confront the issues raised by today's Negro "evangelism."

The Court has had two major encounters with problems raised by Negro protest in public places. In 1963 it decided *Edwards v. South Carolina*[12] and last Term it added *Cox v. Louisiana*.[13] The

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[4] 316 U.S. 584 (1942), *judgment vacated*, 319 U.S. 103 (1943).

[5] 319 U.S. 105 (1943). [6] 334 U.S. 558 (1948). [7] 336 U.S. 77 (1949).

[8] See, *e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 166 (1943); Saia v. New York, 334 U.S. 558, 566 (1948); Terminiello v. Chicago, 337 U.S. 1, 13 (1949); Kunz v. New York, 340 U.S. 290, 295 (1951).

[9] See Harlan, J., concurring in Garner v. Louisiana, 368 U.S. 157, 185 (1961); KALVEN, THE NEGRO AND THE FIRST AMENDMENT 123–72 (1965).

[10] See Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[11] *Cf.* David Riesman's brilliant but erroneous prediction about the coming problem of a Fascist exploitation of the American law of defamation. Riesman, *Democracy and Defamation*, 42 COLUM. L. REV. 727, 1085, 1282 (1942).

[12] 372 U.S. 229 (1963). In the interval between *Edwards* and *Cox* the Court decided two other Negro protest cases, albeit in a cryptic form. Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964). The *Fields* litigation was first reviewed by the Supreme Court of South Carolina in 1962 when, in State v. Brown, 240 S.C. 357, it affirmed a series of convictions for breach of peace. It appears that some 1,000 Negro students in three groups paraded two abreast along the sidewalks in the business section of a town

frustrating variety of opinions within the Court in *Cox*, and the sharp contrast in tone between the opinions in *Edwards* and those in *Cox*, make of *Cox* an appropriate occasion for venturing some reflections about the problems of speech in public places, an occasion for re-examining the concept of the public forum implicit in the earlier cases. The Court having just a year ago, in the *New York Times* case,[14] underwritten the policy that speech on public issues be "uninhibited, robust and wide open" may find its exuberant formula put to hard tests when the speech is in public places.[15]

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of 20,000, ostensibly on their way to the city square. They refused to disband at request of police and were arrested. The state court held that the background of "high tension between the races in the community" justified a breach-of-peace conviction. The Supreme Court of the United States vacated the state court judgment and remanded for consideration in light of *Edwards*. 372 U.S. 522 (1963). The state court on remand reaffirmed in a per curiam opinion. 242 S.C. 357 (1963). Finally, the Supreme Court, in a per curiam order citing *Edwards*, reversed. 375 U.S. 44 (1963).

Henry had much the same career: the state court again relied on community tension to support convictious for breach of peace. 241 S.C. 427 (1962). It, too, was remanded for consideration in light of *Edwards*. 375 U.S. 6 (1963). In a full opinion expressing bewilderment that the Court in *Edwards* could have meant "to hold that one has an absolute right to commit a breach of peace, provided one is engaged at the time in the exercise of a right protected by the First Amendment to the United States Constitution," the South Carolina court reaffirmed its earlier judgment. 244 S.C. 74, 78 (1963). The Supreme Court reversed in a two-page per curiam opinion. 376 U.S. 776 (1964).

Finally, at the end of last Term, the Court vacated the judgment in Cameron v. Johnson, 381 U.S. 741 (1965), and remanded it to the District Court for reconsideration in light of Dombrowski v. Pfister, 380 U.S. 479 (1965). The case involved a suit by civil rights demonstrators to enjoin enforcement of a Mississippi anti-picketing statute. The Supreme Court did not pass on the merits but ouly on the procedural question whether there was a basis for federal jurisdiction. There is a sharp and interesting dissent by Mr. Justice Black. See note 89 *infra*.

[13] 379 U.S. 536, 559 (1965).

[14] Sullivan v. New York Times, 376 U.S. 254 (1964); see Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* [1964] SUPREME COURT REVIEW 191.

[15] I am, perhaps somewhat cavalierly, putting the complex story of the labor picketing cases to one side. What is involved in the cases I am discussing is what might be called "public issue" picketing, there is no picket line, there is no specific target, there need be no evoking of economic pressures. I go with Mr. Justice Frankfurter's judgment in *Niemotko* that the picketing cases, although "logically relevant" are set apart by the different "economic and social interests" they involve. 340 U.S. 268, 276 (1951). Further, since there is no argument here that speech in public places is beyond the reach of any regulation, it is not clear what the picketing cases would add. In brief the thesis does not, as I see it, rise or fall with the vicissitudes of Thornhill v. Alabama, 310 U.S. 88 (1940).

II. Preface: Edwards and Cox

The flavor of these cases depends so much on nuances in the facts that there is no tidy way to compare them. Each involved mass parade, picketing, and protest in a public place by Negro students. In each a sizable crowd of white onlookers gathered and there was some suggestion that the crowd was restive. In each the performance was closely watched by police, who were out in force. In each the legal crisis arose when the police, after many minutes of surveillance, finally decided to move in and order the groups to disband.

There are, to be sure, important differences in the location and nature of the public place selected for the demonstrations, in the legal grounds urged against them, and possibly in the fact that in *Edwards* all 179 of the demonstrators were arrested whereas in *Cox* only the leader was subjected to legal proceedings.[16] But before turning to the relevance of such points of difference, it will be helpful to establish the style of the two protests, a style it seems to me they shared.

Mr. Justice Stewart, writing for the majority, set the stage in *Edwards*:[17]

> Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there at about noon they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was to "submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with present conditions of discriminatory actions against Negroes, in general, and to let them know we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed."
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> Already on the State House grounds when petitioners arrived, were some 30 or more law enforcement officers who had advance knowledge that petitioners were coming. Each group of petitioners entered the grounds through a driveway and parking area known in the record as the "horseshoe."

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[16] Cox was sentenced to four months in jail and a $200 fine for disturbing the peace; to five months in jail and a $500 fine for obstructing public passages; and to $5,000 fine and one year in jail for picketing the courthouse. The sentences were cumulative.

[17] 372 U.S. at 230–31.

> As they entered they were told by the law enforcement officials that they had a right as a citizen to go through the State House grounds as any other citizen has, as long as they were peaceful. During the next half hour or 45 minutes, the petitioners in the same small groups walked single file or two abreast in an orderly way through the grounds, each group carrying placards bearing such messages as "I am proud to be a Negro" and "Down with segregation."

And here is Mr. Justice Goldberg describing the scene for the majority in *Cox*:[18]

> On December 14, 1961, 23 students from Southern University, a Negro college, were arrested in downtown Baton Rouge, Louisiana, for picketing stores that maintained segregated lunch counters. . . . [After a mass meeting on campus that night,] the students resolved to demonstrate the next day in front of the courthouse in protest of segregation and the arrest and imprisonment of the picketers who were being held in the parish jail located on the upper floor of the courthouse building.
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> [Next day the students left the campus in mass and marched five miles to Baton Rouge. The student leader having been arrested for violation of an anti-noise statute while using a sound truck, the defendant Cox, a Congregational minister, field secretary of CORE, and adviser to the student movement, came to "pick up this leadership and keep things orderly."] When Cox arrived 1,500 of the 2,000 students were assembling at the site of the old State Capitol building two and one half blocks from the courthouse. Cox walked up and down cautioning the students to keep to one side of the sidewalk while getting ready for their march to the courthouse. The students circled the block in a file two or three abreast occupying about one-half the sidewalk. . . . They walked in an orderly and peaceful file, two or three abreast, one block east, stopping on the way for a red traffic light. . . .
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> [The students were joined by another group and came to a halt in the next block opposite the courthouse. A colloquy with police officials followed.[19]] The students were then directed by Cox to the west sidewalk across from the courthouse, 101 feet from its steps. They were lined up on this sidewalk about five deep and spread almost the entire length of the block. The group did not obstruct the street. [Several

[18] 379 U.S. at 538–43.

[19] It is this colloquy that turns out to he decisive for Mr. Justice Goldberg's disposition of the convictions for picketing near the courthouse. See note 33 *infra*.

hundred onlookers gathered on the sidewalk near the courthouse and some 75 to 80 police and members of the fire department also turned out.]

Several of the students took from beneath their coats picket signs similar to those which had been used the day before. The signs bore legends such as "Don't buy discrimination for Christmas," "Sacrifice for Christ, don't buy," and named stores which were proclaimed "unfair." They then sang "God Bless America," pledged allegiance to the flag, prayed briefly, and sang one or two hymns, including "We Shall Overcome." The 23 students who were locked in jail cells in the courthouse building out of the sight of the demonstrators responded by themselves singing; this, in turn, was greeted with cheers and applause by the demonstrators.

[Cox then made a speech uging them to sit in at the downtown lunch counters that had refused to serve Negroes but admonished them against violence.[20] At this juncture the police moved in and the protest group was disbanded.]

The style of the protest, as I said, seems to me essentially the same in both cases, and the style is worth noting. These are structured ceremonials of protest; they are not riots. The demonstrators were not, as the majority recited the record,[21] trying to bring government to a halt; rather they were expressing the concern of the young Negro about his situation. What was symbolized was a deep grievance, a break with the society. They prayed, they pledged allegiance to the flag, they sang "God Bless America," and—in *Cox*—they even stopped for a red traffic light. Whatever the power, pressure, and anxiety generated by such huge numbers, the demonstrations showed a tact, a grace, a patience, and a distinctive rhetoric of their own.

The tone of the two opinions, on the other hand, is very different. The memorable thing about *Edwards* was that Mr. Justice Stewart,

[20] For the chief of police this speech was the critical, unlawfnl act and moved him to intervene and disband the meeting. The issue raised by this advocacy of sit-in demonstrations dropped out of the case, however, thus eliminating a difficult free-speech issue. On what would the legality of advocating sit-ins depend? Clear and present danger of sit-ins? Legality of the sit-ins? *Cf.* Hall, *Free Speech in War Times,* 21 COLUM. L. REV. 526, 531 (1921).

[21] Mr. Justice Clark in dissent read the record less sympathetically: "The appellant in an effort to influence and intimidate the courts and legal officials of Baton Rouge . . . agitated and led a mob of over 2,000 students in the staging of a modern Donnybrook Fair across from the courthouse. . . ." 379 U.S. at 585. Mr. Justice Goldberg reviewed the record in some detail in notes 9, 10, and 12 of his opinion. *Id.* at 546–48.

speaking for everyone but Mr. Justice Clark, said of the defendants and of their "rights of free speech, free assembly, and freedom to petition for redress of their grievances":[22] *"The circumstances of this case reflect an exercise of these basic constitutional rights in their most pristine and classic form."*

At one point in *Cox*, Mr. Justice Goldberg spoke of the "influence or domination by either a hostile or friendly mob"[23] and again "mob law is the very antithesis of due process."[24] Further, in a curious echo of the idiom of *Edwards*, he wrote that the Court was not dealing here with speech "in its pristine form but with conduct of a totally different character."[25] And Mr. Justice Black found it relevant to say:[26] "Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country."

As a logical matter the decisions in *Cox* and *Edwards* are fully consistent. In *Edwards* the single charge was for breach of the peace, and the Court upset the convictions, emphasizing among other things the absence of a precisely drawn statutory offense. In *Cox* one of the charges was for breach of the peace, and again the convictions were upset, with the Court relying heavily on *Edwards* as precedent. Further, although the Court in *Cox* split on other issues, all nine Justices agreed that the convictions for breach of the peace could not stand.[27]

There was more to *Cox* than a generalized breach-of-peace charge, however, and the additional charges suggest obvious differences between it and *Edwards*. There were two specific statutory violations, one for obstructing a public passageway[28] and the other

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[22] 372 U.S. at 235. (Emphasis added.)

[23] 379 U.S. at 562.

[24] *Id.* at 562.

[25] *Id.* at 566.

[26] *Id.* at 584.

[27] Mr. Justice Clark, however, would invalidate the breach of peace convictions only on equal protection grounds. *Id.* at 591.

[28] "No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

"Providing however nothing herein contained shall apply to a bona fide legiti-

for picketing near a courthouse.[29] Although in the end the Court also upset the convictions under these two heads, the opinions, as I have said, bristled with cautions and with a lack of sympathy for such forms of protest.

The obstruction charge, which might have forced a fruitful clarification of the law on the public forum, was handled so as to satisfy no one. The Justices split 7 to 2, with Justices White and Harlan voting to uphold the convictions. Further, the seven-man majority in turn split 5 to 2, with Justices Black and Clark finding the statute bad only because it exempted labor picketing and thus, on their view, ran afoul of the Equal Protection Clause. Justices Black and Clark, however, were insistent on making clear their view that a flat nondiscriminatory prohibition of all such activity would be constitutional. The remaining Justices, in an opinion by Mr. Justice Goldberg, faced neither the equal protection issue nor the issue of flat prohibition. Instead they found some evidence that in practice the obstruction-of-public-way statute was administered by an informal permit or licensing arrangement.[30] Because this informal dis-

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mate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions. . . ." LA. REV. STAT. § 14:100.1 (Cum. Supp. 1962).

[29] "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both. . . ." LA. REV. STAT. § 14:101 (Cum. Supp. 1962).

[30] The step was made rapidly. Mr. Justice Goldberg asserted, without citation to the record, that "city officials . . . clearly indicated that meetings and parades . . . obstructing traffic 'are permitted' provided prior approval is obtained." He then simply added that counsel for the state confirmed this in oral argument before the Court. 379 U.S. at 555–56. The record on this point was reviewed more explicitly by Mr. Justice White's dissent: "The sole indication in the record from the state court that such has occurred was contained in the testimony of the Chief of Police who, in the process of pointing out that Cox and his group had not announced the fact or purpose of their meeting, said 'most organizations that want to hold a parade or a meeting of any kind . . . have no reluctance to evidence their desires at the start.'

". . . At the oral argument in response to Mr. Justice Goldberg's question as to whether parades and demonstrations are allowed in Baton Rouge, counsel said, 'ar-

cretion of the licensing official was not properly delineated and bounded, the statute was found bad. The use of this stratagem suggests that there may have been more than four Justices who would have found a flat prohibition valid. But the issue is deliberately left muddied.

The Justices divided 5 to 4 on the issue of courthouse picketing, with Justices Black, Clark, Harlan, and White dissenting. This time the majority, again speaking through Mr. Justice Goldberg,[31] used a different stratagem[32] to upset the convictions. In a colloquy between Cox and the police chief at the time of the demonstration, Cox was allegedly told by the chief that it was all right for the demonstrators to stay on the side of the street opposite the courthouse. To the exasperation of the dissent this was elevated into an official construction of the word "near" in the statute so as to estop the state from prosecuting.[33] This time, however, the majority too was explicit that the statute is constitutional.

Two relevant factors emerge then from *Cox*, read against the background of *Edwards*. First, there is the extraordinary ambivalence of the Court's reaction. As the parade leaves the State House grounds and moves down toward the courthouse, it changes from an attractive group of concerned citizens using democratic avenues of protest on public issues to a mob, heavy with the promise of anarchy, seeking to dominate. Second, despite the awkward split of opinions in *Cox*, a certain scheme of legal results can be discerned: (1) At one extreme, it is clear that this kind of use of public streets

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rangements are usually made depending on the size of the demonstration, of course, arrangements are made with the officials and their cooperation is not only required it is needed where you have such a large crowd.'" *Id.* at 591–92.

Mr. Justice White also complained that this was an issue of the Court's "own invention" and consequently one on which the parties had no chance to "develop or refute the factual basis underlying the Court's rationale."

31 There were two separate appeals: No. 24, involving breach of peace and obstructing, reported at 379 U.S. 536 (1965); and No. 49 involving picketing the courthouse, reported at 379 U.S. 559 (1965).

32 It is true that the case is complicated by the difference between the police image of what was illegal in Cox's conduct and the issues on which he was finally convicted. See note 20 *supra*.

33 Mr. Justice Clark was moved to an unusually acid dissent: "However, if the Chief's action be consent, I never knew until today that a law enforcement official —city, state or national—conld forgive a breach of the criminal laws. I missed that in my law school, in my practice and for the two years I was head of the Criminal Division of the Department of Justice." 379 U.S. at 588–89.

and places cannot be summarily suppressed as a breach of the peace, even though there is some expectation of violence.[34] (2) At the other extreme is the unequivocal clarity of the point that no matter who you are or what your grievance, you cannot picket the courthouse. (3) In the middle, so to speak, is the question of obstructing public passageways, a question that the full Court colored with dicta but studiously avoided deciding, although it is the question on which future use of public places by protest groups will in all probability turn.

To bring matters to a focus as sharply as possible, I would note that there are references in the stated facts in *Edwards* to some blocking of traffic, at least in the sense of forcing other pedestrians off the sidewalks and into the streets, although the majority and the dissent read the record somewhat differently on this point.[35] In *Cox* the statute made it an offense to block traffic, even when that was not the intention. What is left in doubt after *Cox* is whether the exercise of rights "in their pristine and classic form," as in *Edwards*, would nevertheless have been punishable as a crime had the state proceeded under an obstruction statute like that of Louisiana.

I turn now to some reflections about this category of speech problem, reflections that claim no more than to invoke a slightly different way of looking at familiar issues.

III. Toward a Theory of the Public Forum

It may prove helpful to risk the pretentiousness of distinguishing among three closely related gestures of protest often lumped together in popular discussions of the civil rights movement: revolution, civil disobedience, and protest. A revolutionary gesture

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[34] Like *Edwards*, the *Cox* case touches on the perplexing speech issue of "the heckler's veto." To what extent is the violent reaction expected from the audience a basis for suppressing the speaker? See Kalven, *op. cit. supra* note 9, at 140–41, 145; Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 Colum. L. Rev. 1118 (1949); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U. L. Rev. 489 (1951).

The Louisiana Supreme Court had held that the bringing of the 1,500 Negroes into the "predominantly white business district" was so explosive a move that it "had to be an inherent breach of the peace." The Court, however, found that in fact the police had the situation under control and thus did not find it necessary to confront the full dilemma. See also the *Fields* and *Henry* cases, note 12 *supra*.

[35] *Compare* Mr. Justice Stewart's opinion, 372 U.S. at 232 nn. 5, 6, *with* Mr. Justice Clark's opinion, *id.* at 240 n. 3.

is intended as direct defiance of law and order; it is a declaration of open war; it is coercive and obstructive. It may well be morally justifiable, but only under the stringent conditions by which Western tradition has measured a right of revolution. The suggestion, for example, that Negroes let their water taps run in New York to aggravate the water shortage is just such a revolutionary gesture.

Civil disobedience is deliberate violation of law for the sake of protest and as a matter of individual conscience. It is a gesture we associate with Socrates, Thoreau, and conscientious objectors. In the famous formnla of Plato's *Apology* and *Crito* this gesture requires that the actor accept the punishment.[36] It is a refusal to obey the law coupled with a willingness to accept the legal consequences. Insofar as it is symbolic, it is also an intense form of protest. To an uncertain extent, especially in the sit-in demonstrations, the Negro movement has in this sense courted arrest.[37] The important point is that civil disobedience claims exemption from the obligation to obey particular laws on moral grounds but not immunity from punishment.

Finally, there are the various forms of mass protest in public places using parades, picketing, and so on. Here the essential feature is appeal to public opinion.[38] The intention is not to violate the law, and the claim is one of privilege in the exercise of basic rights. Most of the civil rights demonstrations to date, as I see it, fall in this category. This has been one of the extraordinary achievements of the movement. It is this gesture of protest that I am concerned with in this essay. These distinctions are undoubtedly difficult to draw from the facts, and the Negro movement has not itself always been clear about which strategy it was pursuing. The Negro movement shares with the rest of us the task of working out the appropriate forms for its protest.

It is simplistic, if tempting, to reduce the issue to a choice between order and anarchy. I suggest three interrelated propositions for examination. First, that in an open democratic society the streets, the

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[36] The tension between the two dialogues is lucidly explored in MEIKLEJOHN, POLITICAL FREEDOM 21–24 (1960).

[37] In Bouie v. City of Columbia, 378 U.S. 347 (1964), for example, the dissent argued that the defendants in their sit-in could not have been misled by any ambiguity in the trespass statute because they "intended" to be arrested. *Id.* at 367 n. 4.

[38] Thus, in his opinion in Garner v. Louisiana, 368 U.S. 157, 201–02 (1961), Mr. Justice Harlan eloquently recognized this aspect of the sit-in. See KALVEN, *op. cit. supra* note 9, at 129–33.

parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom. Second, that only confusion can result from distinguishing sharply between "speech pure" and "speech plus." And, third, that what is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty. As will be apparent, there is much in *Cox* that bears on these three points. The Court in strong dicta seems to becloud the first; to rely heavily on the distinction that is denied by the second; and to avoid examining the problem in quite the manner suggested by the third.

I shall pursue my inquiry by recalling two famous dicta, and then revisiting a familiar series of precedents.

A. THE PRINCIPLE AND TWO DICTA

The initial questions are whether the citizen using the street as a forum and not as a passageway is making an anomalous use of it, and whether he is, in a sense, always out of place and out of order when he chooses the streets for his meeting place. Certainly it is easy to think of public places, swimming pools, for example, so clearly dedicated to recreational use that talk of their use as a public forum would in general be totally unpersuasive. Is the street, however, a kind of public hall, a public communication facility?

One would have thought the theoretical issue had been put to rest a generation ago by the collision of dicta in *Davis v. Massachusetts*[39] and *Hague v. C.I.O.*[40] *Davis*, it will be recalled, was one of the less admired efforts of Justice Holmes, then still on the Massachusetts Supreme Judicial Court.[41] In reviewing a conviction for speaking on the Boston Common without a permit, in violation of an ordinance inhibiting many varieties of uses of the Common including "the discharge of cannon" thereon, Justice Holmes observed:[42] "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

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[39] 167 U.S. 43 (1897).

[40] 307 U.S. 496 (1939).

[41] 162 Mass. 510 (1895).

[42] *Id.* at 511.

When the case reached the United States Supreme Court, the Court endorsed the Holmes decision and its rationale. Said Chief Justice White:[43] "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." This position has at least the virtue of clarity. The citizen uses the streets for political purposes at the sufferance of the state; his use is anomalous and marginal and can be terminated whenever and for whatever reason the state decides.

This view survived until 1937 when Mayor Hague of Jersey City got into an argument, not with Jehovah's Witnesses, but with the CIO, then seeking energetically to organize New Jersey labor.[44] In a complicated lawsuit, the Court passed on the city's claim that its ordinance requiring a permit for an open air meeting was justified by the plenary power rationale of the *Davis* case. In rejecting the point, Mr. Justice Roberts uttered the counter dictum:[45]

> Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

On this view the matter is perhaps not quite so clear, but there is the aura of a large democratic principle. When the citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement. If so generous a statement of principle does not tell us exactly when his privileges may be curtailed in the interest of other speech or other uses of the street, it does give us a good starting point for the argument.

Perhaps two details about the *Hague* dictum deserve notice. First, it is not altogether clear for whom Mr. Justice Roberts was speaking, as the Court was reminded in 1947 in Mr. Justice Jackson's dissent in *Saia*.[46] On one view of the case he was speaking only for himself and Mr. Justice Black, who joined his opinion, and inferentially

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[43] 167 U.S. at 48.

[44] The background of the case is sketched in CHAFEE, *op. cit. supra* note 1, at 409 *et seq.*

[45] 307 U.S. at 515.

[46] 334 U.S. at 568 n. 1.

for Chief Justice Hughes, who concurred in part.[47] This is probably too stringent a reading, but it is true that the Roberts dictum, despite its eloquence, is launched with a shaky endorsement from his fellow Justices.

The second detail is that the Court was aided, and obviously made use of a major amicus curiae brief filed by the Bill of Rights Committee of the American Bar Association, among whose members were Zechariah Chafee and Grenville Clark.[48] The brief said in part:[49] "There are many different kinds of benefits to be derived from parks, and one of the most important is the constitutional right of assembly therein. The parks are held by the city subject to this right."

It is not so easy as it should be to tell how the Roberts dictum fares today. It is not enshrined as the starting point for judicial analysis in cases of speech in public places, although it is true that in *Kunz*[50] Chief Justice Vinson did announce: "In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts. . . ."

There are subtle but definite transformations of it in two prestigeful opinions, that of Mr. Justice Black in *Jamison v. Texas*[51] in 1943, and that of Mr. Justice Frankfurter in his opinion in *Niemotko*[52] in 1951. In *Jamison*, a leaflet distribution case, Mr. Justice Black said:[53] "But one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by spoken word." Somehow this strikes my ear as a good deal less enthusiastic about the immemorial right of the free man than does the text of Mr. Justice Roberts.[54]

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[47] Justices Frankfurter and Douglas did not participate; Justices McReynolds and Butler dissented; Mr. Justice Stone filed a concurring opinion objecting to Mr. Justice Roberts' reliance on the Privileges and Immunities Clause as the basis for federal injunctive relief against enforcement of state law. For a rundown of the various positions, see CHAFEE, *op. cit. supra* note 1, at 413 n. 77.

[48] Parts of the brief are reprinted in 307 U.S. at 678–82. And see the extended discussion of it in CHAFEE, *op. cit. supra* note 1, at 413–35.

[49] 307 U.S. at 682.

[50] 340 U.S. at 293.

[51] 318 U.S. 413 (1943).

[52] 340 U.S. at 273–89.

[53] 318 U.S. at 416.

[54] Mr. Justice Black continued to phrase the principle this way in *Cox:* "The First and Fourteenth Amendments, I think, take away from government, state and

In *Niemotko*, Mr. Justice Frankfurter made an elaborate summary of all the public-place cases up to that time and a major effort to bring order to them. He was careful to state the issue as one of "how to reconcile the interest in allowing free expression in public places with the protection of . . . the primary uses of streets and parks."[55] If this is the correct phrasing of the issue,[56] it is difficult to see why the primary uses of the streets and parks should not always and easily outweigh the subordinate uses as public forums, again a result not easy to square with the Roberts dictum. Moreover, in summarizing the *Hague* case itself, Mr. Justice Frankfurter carefully abstained from referring to the Roberts formula and asserted the holding to be simply that the state cannot claim totally arbitrary control over its public places.[57]

It is probably not profitable to brood further over the verbal differences among Roberts' immemorial claim of the free man, Black's notion that he does not lose any rights of free speech simply by going out on the street, and Frankfurter's formula that the state cannot be arbitrary in its control of the streets. Since Mr. Justice Roberts was quick to say in *Hague* that these immemorial rights were subject to reasonable regulation in view of other demands for the streets and public places,[58] it is arguable that all three formulations, however different in emotional tone and color, will lead to the same operative results in any actual case.

B. THE TEST QUESTION AND FOUR DECISIONS

The test question is whether the state can bar the use of public places for speech altogether, not on a claim of plenary power as in *Davis*, but in the interest of other uses of the facility. This may well prove to be tomorrow's issue, since municipalities burdened with the perplexities of regulating the current protests may be greatly tempted to opt for flat nondiscriminatory prohibition on the use of streets and parks for anything but transportation and recreation.

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federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.*" 379 U.S. at 578. (Emphasis added.) Thus, in an important sense, for him the questions of speech are subordinate to questions of property. See his dissent in Bell v. Maryland, 378 U.S. 226, 318 (1964); KALVEN, *op. cit. supra* note 9, at 170–72.

[55] 340 U.S. at 276; see also his rephrasing *id.* at 279.

[56] It is true that this is very close to some of the language of Mr. Justice Roberts in *Schneider*. See Schneider v. State, 308 U.S. 147, 160 (1939).

[57] 340 U.S. at 279.

[58] See note *56 supra*.

In four cases, all involving leaflet distribution, *Schneider*, *Jamison*, *Valentine*, and *Talley*, the Court has given impressive content to the Roberts dictum.

In *Schneider*, Mr. Justice Roberts got the first chance to put his own dictum into operation.[59] The case combined four separate controversies over municipal ordinances, three of which are relevant for our immediate purposes.[60] Each invoked a flat prohibition against the distribution of handbills, circulars, dodgers, etc., in public places. The defendants, Jehovah's Witnesses, were convicted for violation of the ordinances, and in an 8 to 1 decision, Mr. Justice McReynolds dissenting, the Court upset the convictions. What is important here is that the state did not argue its plenary power but argued rather that the purpose of the restraint was to prevent littering the streets. There was, therefore, no need to go back to *Davis*.

At the outset Mr. Justice Roberts made clear that although "pamphlets had become historic weapons in the defense of liberty," the right to distribute leaflets was subject to certain obvious regulations:[61] "For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street contrary to traffic regulations and maintain his position to the stoppage of all traffic."

What was called for was a balancing of the conflicting interests, but with a weight of enthusiasm for the personal rights involved. "This court," Mr. Justice Roberts paused to note,[62] "has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used." He continued:[63]

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative

[59] Schneider v. State, 308 U.S. 147 (1939). He did not get to use it directly in *Hague* itself because that case turned on the invalidity of a prior licensing ordinance.

[60] The fourth ordinance involved prior licensing of solicitations.

[61] 308 U.S. at 160. [62] *Id.* at 161.

[63] The phrasing of how the balance is to be struck is in the idiom of "preferred position"; hence it might be argued that the case is no longer fashionable. But whatever the vicissitudes of the preferred position controversy or its relevance for other speech issues, it seems quite clear that *Schneider* is a live precedent for the Court today and is frequently cited with respect.

It is evident, however, that Mr. Justice Frankfurter would have erased this emphasis from the *Schneider* formula; witness his concurring opinions in *Niemotko*, 340 U.S. at 273, and *Kovacs*, 336 U.S. at 89. See note 76 *infra*.

> preference or beliefs respecting matters of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as the cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

He then moved swiftly and surely to the evaluation of the contested ordinances:[64]

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.

The Milwaukee ordinance could not be saved by the argument that in actual practice prosecutions under it were limited to cases where the recipients throw it into the streets. The answer was still that "public convenience in respect to cleanliness of the streets" did not justify an interference with free communication. Nor could the Los Angeles and Worcester ordinances be saved by the circumstance that they were limited to streets and alleys, leaving other public places open. Here the point was met in language with echoes from the *Hague* dictum:[65] "[A]s we have said, the streets are natural and proper places for the dissemination of information and opinion;

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[64] 308 U.S. at 162. Mr. Justice Roberts went on to suggest that the city had alternative ways of achieving its objective such as arresting the recipient who tossed the leaflets on the street. The case thus might be read as simply upsetting a gratuitously broad regulation. *Cf.*, *e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960). It is difficult to take seriously so impractical an alternative. Moreover, at most this ground points to what is in Mr. Justice Roberts' eyes an additional vice in the regulation and not its decisive flaw. *Cf.*, *e.g.*, Mr. Justice Frankfurter's reading of *Schneider* in his *Niemotko* summary, 340 U.S. at 276.

[65] *Id.* at 163. Does this mean that a city could not solve its problems by setting aside special areas for protests and demonstrations and closing its streets and parks to them otherwise? The American Bar Association committee in its brief in *Hague* considered explicitly the setting-up of "Hyde Parks." See CHAFEE, *op. cit. supra* note 1, at 418–19. Ironically, one difficulty with the Hyde Park solution may be that it does not afford an adequate opportunity to secure an audience, see note 88 *infra*.

and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

The result, whether or not one likes it as a policy, had an impressive bite.[66] Leaflet distribution in public places in a city is a method of communication that carries as an inextricable and expected consequence substantial littering of the streets, which the city has an obligation to keep clean. It is also a method of communication of some annoyance to a majority of people so addressed; that its impact on its audience is very high is doubtful. Yet the constitutional balance in *Schneider* was struck emphatically in favor of keeping the public forum open for this mode of communication.

Two years later Mr. Justice Roberts etched in his point still more firmly in *Valentine v. Chrestensen*.[67] Once again there was an ordinance prohibiting discrimination of handbills and circulars. The one distinguishing feature of this ordinance was its limitation to commercial and advertising matter. The defendant was the owner of a former United States submarine that he sought to exhibit for profit. Accordingly he prepared handbills advertising the ship and soliciting visitors for a stated admission fee. Advised by the police that only handbills on public issues would be lawful, the defendant resourcefully attempted to alchemize his leaflet into a message of social significance by printing a protest against the police and the ordinance on one side and his advertisement on the other. He then proceeded to distribute his double-edged leaflet. Threatened further by police displeasure, he brought suit to enjoin the police from interfering with his distribution. He won in the lower courts, but the Supreme Court reversed in a unanimous decision, and in so doing added meaurably to the point made by *Schneider* and the *Hague* dictum.

Mr. Justice Roberts began with a sturdy reaffirmation of the dictum:[68]

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating in-

[66] "And yet, much as I like this broad language, there is something about the handbill and phonograph cases that makes me uncomfortable. The limitations they impose on governmental control of street distributions and solicitations look a bit fragile in a rough and tumble world. I wonder whether they can last." CHAFEE, *op. cit. supra* note 1, at 405.

[67] 316 U.S. 52 (1942).

[68] *Id.* at 54.

> formation and disseminating opinion and that though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares.

He then made short shrift of the distributor's claim. The stratagem was transparent; this was still advertising matter. The issue is a different one where distribution of commercial advertising is at stake. Here the judgment of the legislature concerning the appropriate accommodation of interests is final.[69] There was clear recognition of the principle of public use that was urged in *Schneider*:[70] "The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated."

It is now apparent that what was involved in *Schneider* was imperfectly characterized as freedom from arbitrariness in the state's control of public places, for that, after all, was the measure of the commercial distributor's claim. What was involved was reasonable regulation of the immemorial claim of the free man to use the streets as a forum. The regulation in order to be deemed reasonable, the Court was telling us, must recognize the special nature and value of that claim to be on the street.

The pattern was developed slightly by *Jamison v. Texas*[71] in the following year. Again we had a Jehovah's Witness charged with violation of a municipal ordinance forbidding the distribution of leaflets on the streets. In a unanimous decision the Court reversed the conviction. For the most part the issues were repetitions of those already decided. The city once again argued for plenary power, citing *Davis*, and was told by Mr. Justice Black that the argument had been "directly rejected by this Court."[72] The one

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[69] *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951), drawing again the sharp distinction between commercial and political or religious use of the streets. For discussion of the underlying principle involved, see Meiklejohn, *The Priority of the Market Place of Ideas;* Director, *The Parity of the Economic Market Place;* and Freund, *Competing Freedoms in American Constitutional Law,* UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON FREEDOM AND THE LAW 3, 16, 26 (1953).

[70] 316 U.S. at 54–55.

[71] 318 U.S. 413 (1943).

[72] *Id.* at 416.

new point was that the city was unsuccessful in its effort to bring the case within *Valentine* on the ground that the activity was commercial, because the Witnesses solicited contributions in the course of their distribution. The Court thus indicated that it had a realistic functional distinction in mind when it so sharply separated commercial from noncommercial speech.

The handbill sequence may be brought to a close for my purposes with consideration of *Talley v. California*,[73] a 1960 decision related only obliquely to the previous cases. It represents, however, the high-water mark of the Court's protection of speech by handbill. The case is set apart by the fact that the ordinance banned, not all handbills, but only those that did not carry the name and address of the author, printer, and sponsor. It is a key precedent, therefore, for problems of compulsory disclosure.[74] The defendants were arrested for distributing handbills, without the required identification, urging boycotts of certain merchants for discriminating in employment against "Negroes, Mexicans, and Orientals."

The Court upset the convictions, but this time there was disagreement within the ranks. Mr. Justice Harlan filed a separate concurrence[75] and there were dissents from Justices Clark, Whittaker, and Frankfurter. The majority opinion of Mr. Justice Black framed the issue in a curious manner. The ban on leaflet distribution, we were told, fell under the rulings in *Schneider* and *Jamison*, "unless the ordinance is saved by the qualification that handbills can be distributed 'if they carry the appropriate identification.'" In an interesting and important passage, the Court then analyzed the virtues of anonymity in the fight for freedom, and concluded that the qualification did not save the ordinance. Nor was the state's interest in preventing fraud sufficiently related to the identification requirement to justify the ordinance.

At the very least the decision can be read as saying that leaflet distribution cannot be barred except for very good reasons and that anonymity of the leaflets is not a good enough reason, whatever its connection with preventing fraud. More generously, the case can

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[73] 362 U.S. 60 (1960).

[74] See KALVEN, *op. cit. supra* note 9, at 120–21.

[75] Mr. Justice Harlan placed his decision squarely on the state's failure to show a rational connection between the objective of preventing fraud and the means used. 362 U.S. at 66.

be read as treating the distribution of leaflets in the public forum as so basic a right that it cannot be burdened with even the modest sanction of compulsory disclosure of sponsorship.

Although there are some differences between a lone distributor of leaflets on a city street and two thousand pickets at a courthouse, the leaflet cases furnish the relevant model for analysis of the complex speech issues involved.[76] The operative theory of the Court, at least for the leaflet situation, is that, although it is a method of communication that interferes with the public use of the streets, the right to the streets as a public forum is such that leaflet distribution cannot be prohibited and can be regulated only for weighty reasons. And the distinctive First Amendment underpinning for this protection is reflected in the fact that the privilege does not apply to commercial leaflets.

IV. Cox Revisited

The above theory is clearly not that with which the Court approached its problem in *Cox*. Mr. Justice Goldberg, after citing

[76] The sound-truck cases deserve a special word since the sound truck rather than the leaflet might be thought to provide the relevaut analogy for protest speech. The analogy is spoiled, however, by the peculiar history of the issue in the Court.

The initial case, Saia v. New York, 334 U.S. 558 (1948), although it speaks of "loud speakers as today indispensable instruments of effective public speech," *id.* at 561, decides no more than that the prior licensing scheme involved was bad because of the unfettered discretion of the public official, a familiar point not involving any distinctive evaluation of the sound truck.

The second sound-truck case, Kovacs v. Cooper, 336 U.S. 77 (1949), has at times been loosely read as a reversal of the protection given in *Saia*. The 5 to 4 decision is difficult to scan for several reasons. The five-man majority produced three separate and different opinions. Mr. Justice Frankfurter, in his concurring opinion, elected this as the occasion for a major opinion attacking any "preferred position" principle. Mr. Jnstice Jackson in his concurring opinion read the result as "a repudiation" of *Saia*. Further, the ordinance in question was ambiguous on whether it banned all sound trucks or only "loud and raucous" ones. The angry dissenters read the decision as sweepingly as possible to intensify their dissents. Mr. Justice Rutledge appropriately complained of "such a hashing of different views of the thing forbidden." *Id.* at 105. But if the four dissenters in *Kovacs* (Black, Douglas, Rutledge, and Murphy) are taken with the majority other than Frankfurter and Jackson (Burton, Reed, Vinson), we have seven Justices who certainly did not decide that all sound trucks could be banned.

The sound truck may invite the question whether a form of speech, a sound truck or a parade, might not be so collaterally disruptive as to make total barring of it appropriate, regardless of time, place, or circumstance. I think the answer is no, so long as we are talking of behavior intended as communication. *Cf.* Martin v. Struthers, 319 U.S. 141 (1943); see note 88 *infra* on the captive-audience aspects of protest speech.

all the relevant cases, concluded:[77] "The rights of free speech and assembly, while fundamental in democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." The "falling off," to use Hamlet's phrase, between this dictum and that of Mr. Justice Roberts in *Hague* is not to be explained on the ground that the Court had forgotten, or even that it would like to forget, the Roberts theory, but rather that it sees great differences between leaflets, which are "speech pure," and parades, pickets, and protest, which are "speech plus."

Mr. Justice Goldberg made this point explicit:[78] "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways as these amendments afford to those who communicate by pure speech." Mr. Justice Black was equally emphatic:[79] "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.* This does not mean, however, that these amendments also grant a constitutional right to engage in conduct of picketing or patrolling whether on publicly owned streets or privately owned property." And at an earlier point in his opinion Black spoke of the state regulating patrolling and marching as distinguished from "*speech.*" (The emphasis was his.)

It is now clear how the Court wished to conceptualize its problem. There are two kinds of communication activity—"speech pure" and "speech plus." Out of respect for precedent, the Court will be generous to "speech pure" in public places, but this does not apply to the cases at hand involving "speech plus." Hence, if there were a concept of the streets as a public forum, it does not protect "speech plus." Mr. Justice Black was willing to say outright that there is no constitutional bar to the flat prohibition of "speech plus"

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[77] 379 U.S. at 554.

[78] *Id.* at 555. See also *id.* at 563: "The examples are many of the applications by this court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited."

[79] *Id.* at 578. (Emphasis in original.) See also *id.* at 581: "Standing, patrolling, or marching back and forth on streets is conduct not speech, and as conduct can be regulated and prohibited."

in the streets. Mr. Justice Goldberg was unwilling to decide that issue, although he was quite willing to raise it gratuitously.

A. SPEECH PURE AND SPEECH PLUS

The Court's neat dichotomy of "speech pure" and "speech plus" will not work. For it leaves us without an intelligible rationale. For one thing the exercise of constitutional rights in their "most pristine and classic form" in *Edwards* has become an exercise in "speech plus." For another the Court seems to have forgotten *Valentine*. What in this scheme is commercial speech? Or is there now a three-level theory of speech[80] in public places: "speech pure," "speech plus," and "speech commercial," each with its appropriate degree of regulation?

To begin with, I would suggest that all speech is necessarily "speech plus." If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter. Indeed this is why the leaflet cases were an appropriate model: they involved speech with collateral consequences that invited regulation. But the leaflets were not simply litter; they were litter with ideas.

Perhaps this is the time to bring into the discussion a classic distinction in speech theory. It is the distinction between regulations like Robert's Rules of Order and regulation of content. No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules, and any concessions on this front should not be taken as relevant to the questions most central to speech theory—questions of control of content. The point then is that, in any theory, speech has always been dependent on some commitment to order and etiquette. There is, therefore, nothing novel in the vulnerability of protest speech to regulation on this score. This is not, as the Court was willing to assume in *Cox*, a characteristic setting it apart from traditional speech and hence summarily subject to regulation.

Listen for a moment to Alexander Meiklejohn describing a town meeting:[81]

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads,

[80] Some commentators have discovered a two-level theory at work in the obscenity cases. See Kalven, *The Metaphysics of the Law of Obscenity*, [1960] SUPREME COURT REVIEW 1.

[81] MEIKLEJOHN, *op. cit. supra* note 36, at 24–28.

schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules. His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. . . .

These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right. No one, for example, may, without consent of nurse, or doctor, rise up in a sickroom to argue for his principles or his candidate. In the sickroom, that question is not "before the house." The discussion is, therefore, "out of order." To you who now listen to my words, it is allowable to differ with me, but it is not allowable for you to state that difference in words until I have finished my reading.

> Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.

The Meiklejohn passage demonstrates that there is something askew in the distinction between "speech pure" and "speech plus." Certainly his recalcitrant participant at the town meeting is engaged in "speech plus"; but if he is, who is not? And surely it is sobering to note that the call for regulation of such activity on behalf of the rational use of speech resources comes from the champion of the position that the First Amendment is an abolute.[82]

B. COX V. NEW HAMPSHIRE

The Supreme Court has one great precedent on the issue, *Cox v. New Hampshire*,[83] another Jehovah's Witness legacy. The city of Manchester had an ordinance requiring a permit for any "theatrical or dramatic representation . . . parade or procession upon any public street or way." The defendants were convicted of parading without a permit. The case come to the same Court that had just decided *Hague* and *Schneider*, with the exception that Justice Murphy had replaced Justice Butler. In a unanimous decision, the Court affirmed the convictions. As in the distinction between *Schneider* and *Valentine*, the Court once again had a firm principle in hand. The case had come to it with the great advantage of a strong construction of the ordinance by the New Hampshire Supreme Court.[84] It was, therefore, established that discretion in granting permits was limited exclusively to considerations of time, place, and manner, and in effect to the unbeatable proposition that you cannot have two parades on the same corner at the same time.

Chief Justice Hughes began by restating the *Hague-Schneider* formula:[85] "As regulation of the use of the streets for parades and

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[82] Meiklejohn, *The First Amendment Is an Absolute*, [1961] SUPREME COURT REVIEW 245.

[83] 312 U.S. 569 (1941).

[84] 91 N.H. 137, 148 (1940): "A license to permit its enjoyment may not be required as a form of censorship, but a license to permit its enjoyment in fair adjustment with the enjoyment of other relations and conditions is not understood to be under the ban of the federal constitution."

[85] 312 U.S. at 574.

processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." The Court noted that the New Hampshire arrangement had the "obvious advantage," not merely of avoiding overlapping parades, but also of giving the public authorities notice in advance so "as to afford opportunity for proper policing."[86] And the state court was pellucidly clear that the licensing officials had only the most limited authority under the ordinance. "The defendants, said the court, 'had a right under the Act to a license to march when, where, and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such changes in conditions or changes in time, place, and manner as would avoid disturbance.' "[87] All that the ordinance required was that the parade not be, in Mr. Meiklejohn's phrase, "out of order."

Of course, *Cox v. New Hampshire* did no more than to give a general standard for accommodation of the conflicting interests. It did not tell whether certain congested areas or certain times of the day might not always be held unavailable for parading, nor whether the size of some crowds might always be too large. But it seems to me to symbolize the ideal of Robert's Rules of Order for use of the public forum of the streets.

Admittedly there is a difference between the town meeting and the street. In the former the only problems of order and competing use relate to speakers, and the problem can be solved under a formula seeking to provide the maximum opportunity for speech at the meeting. The streets on the other hand, although a meeting place for free men from time out of mind, are also dedicated to other uses, such as travel. Hence, the speech interests compete in this instance with non-speech interests and the appropriate accommodation is more difficult.[88] Despite this difference it strikes me that

[86] *Id.* at 576. [87] *Ibid.*

[88] On Mr. Justice Black's view there is an additional complication. "Were the law otherwise, people on the streets, in their homes, and anywhere else could be compelled to listen against their wish to speakers they did not want to hear." 379 U.S. at 578. The implications for free-speech theory of the concept of the captive audience are profound. See KALVEN, *op. cit. supra* note 9, at 156–60. It is not easy to

Robert's Rules are a happy analogy because they make it so clear that the concern ought not to be with censorship, or with the content of what is said; what is needed is a phasing or timing of the activity, not a ban on it. It remains to be seen, of course, whether even under this generous view, the protest movement may not generate sharp controversies by asking for "prime time." But so long as the intention is not obstruction or harassment, as in general it has not been in the past demonstrations, it should be possible, if difficult, to work out mutually satisfactory arrangements.

Thus, Mr. Justice Roberts really had it all worked out in *Schneider*. Since all speech was "speech plus," it was subject to regulation of time, place, manner, and circumstance, but to be acceptable the regulation had to weigh heavily the fact that communication was involved. It is not clear to me why that formula was not the appropriate one for evaluating the protest conduct in *Edwards*. And, finally, to take the last step, why it was not also a good formula to be applied to the conduct in *Cox*.[89]

C. ECCE! TWO HOBGOBLINS: BALANCING AND PRIOR RESTRAINTS

The *Schneider* rationale may, however, seem to have unwanted overtones for free-speech enthusiasts. Does it not embrace two hobgoblins, a balancing test of First-Amendment interests, and a commitment to prior restraints by licensing?

It is, of course, clear that a formula calling for the weighing of speech interests in the public forum against interests in the other uses of public places requires that the Court engage in balancing.

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see, however, why they bother Mr. Justice Black so much more here than did the leaflets in *Schneider*, the street-corner speech in Feiner v. New York, 340 U.S. 315 (1951), the sound truck in *Saia* or *Kovacs*, or the door-bell ringing in Martin v. Struthers, 319 U.S. 141 (1943).

[89] Arguably, the anti-picketing statute involved in Cameron v. Johnson, *supra* note 12, will ultimately provide the test of the thesis. The statute prohibited picketing which interfered with ingress or egress into public buildings or obstructed the free use of public streets and ways "contiguous thereto." It was thus substantially more limited than the obstruction statute in *Cox*. The Court did not pass on the merits but remanded the case on procedural grounds and is almost certain to have to confront it again. Mr. Justice Black, in dissent, made even sharper his position that there was no constitutional bar to banning such activity from the streets altogether and that, a fortiori, the Mississippi statute was not unconstitutional on its face. He said, among other things, "Every person who has the slightest information about what is going on in this country can understand the importance of these issues." 381 U.S. at 742.

Perhaps it is but another indication of how fruitless the controversy over balancing has been and of how awkward for many speech problems the clear-and-present-danger test has proved.[90] Here the balancing test comes down to us with the *Schneider* mandate that the thumb of the Court be on the speech side of the scales, and there is the further reminder, if one is needed, from *Valentine* that this is not pure, or "mere," substantive due process with full deference to legislative judgment. Finally, the matter should be put to rest by the fact, never more conspicuous than in his opinion in *Cox*,[91] that this is the one kind of speech case in which Mr. Justice Black has always been willing to balance.

The judgments of time, place, and manner required must be so linked to the factual situation as to make detailed legislative regulation a clumsy, inflexible device. The result is that the citizen may need a license to use the public forum. It is true that prior licensing has come down to us bearing some historical stigma. And, as we all know, it was once thought with Blackstone that the chief meaning of freedom of speech was simply absence of prior restraints.[92] Indeed, the first of the series of public forum cases, *Lovell v. Griffin*[93] in 1937, invalidated an ordinance requiring a permit for the distribution of circulars of any kind, because it was construed to apply to all kinds of literature and all methods of distribution anywhere in the city, without any limiting criteria for licensor discretion. The Court, after calling on John Milton, said:[94] "Legislation of the type of this ordinance in question would restore the system of license and censorship in its baldest form."

But there is little, if anything, left today to the idea that prior licensing is bad per se, regardless of the criteria used.[95] It now appears that the historical reaction was against general licensing with

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[90] See Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate between Justice Harlan and Justice Black*, 21 LAW IN TRANS. 155, 173–79 (1961); KALVEN, *op. cit. supra* note 9, at 120–21.

[91] "This Court does, and I agree that it should, 'weigh the circumstances' in order to protect, not to destroy, freedom of speech, press, and religion." 379 U.S. at 578.

[92] The relevant history of ideas is traced in Chief Justice Hughes's opinion in Near v. Minnesota, 283 U.S. 697, 713–16 (1931).

[93] 303 U.S. 444 (1938).

[94] *Id.* at 452.

[95] Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONT. PROB. 648 (1955); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951).

unlimited or unspecified grounds for exercise of discretion.[96] The recent *Times Film* case[97] has definitively put to rest any question whether all prior restraints are necessarily bad.[98] And, in any event, *Cox v. New Hampshire* stands as a strong and healthy precedent for use of a prior restraint, at least in regulating the public forum.

D. EQUAL PROTECTION AND CENSORSHIP

The rise of the Equal Protection Clause as a major weapon for the current Court has been the subject of comment.[99] It will be recalled that Justices Clark and Black made use of it in *Cox* as their ground for upsetting the convictions for obstructing public passageways. It is likely to provide a second line of defense for vigorous users of the public forum. If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other uses of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place, and circumstance into a concern about content. The result is that equal-protection analysis in the area of speech issues would merge with considerations of censorship. And this is precisely what Mr. Justice Black argued in *Cox*:[100]

> But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It is thus trying to prescribe by law what matters of public interest people it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form. . . .

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[96] The definitive discussion is found in Kunz v. New York, 340 U.S. 290 (1951), and Niemotko v. Maryland, 340 U.S. 268 (1951). See also A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

[97] Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[98] There has not been time as yet to digest all the implications of Freedman v. Maryland, 380 U.S. 51 (1965), upsetting a Maryland movie censorship scheme because of the absence of procedural safeguards insuring prompt final determination. The opinion revives talk of the "heavy presumption" against prior restraints. *Id.* at 57.

[99] Kurland, "*Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*," 78 HARV. L. REV. 143 (1964).

[100] 379 U.S. at 581.

The point should have considerable practical significance. Everyone at some time or other loves a parade whatever its effect on traffic and other uses of public streets. Municipalities pressed by concern with the protest movement may be inhibited in any rush to flat nondiscriminatory prohibitions by the difficulty of distinguishing between the parades we like and others. Equal protection may, therefore, require freedom for the parades we hate.

In the Jehovah's Witness cases, the Court has been outspokenly sensitive "to the poor man's printing press"[101] theme. Labor picketing apart, perhaps, the parade, the picket, the leaflet, the sound truck, have been the media of communication exploited by those with little access to the more genteel means of communication. We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing.

What this consideration implies, I suggest, is not that the Negro, because he lacks control of television, radio, newspapers, and national magazines, be allowed compensating privileges to irritate on the streets, but rather that his unusual means of communication be recognized as robust and amateur means of communication and not be too quickly read as tactics of obstruction and harassment.

V. The Picket, the Courthouse, and the Narrow Statute

The one clear point that emerges with the force of precedent from the mixture of views in *Cox* is that you cannot picket the courthouse. I have no particular enthusiasm for picketing courthouses as a form of protest nor do I think the issue is likely to be one of practical importance. But it is worth pausing for a moment to see, by way of conclusion, what the rule that you cannot picket the courthouse adds to the notions of the public forum we have been pursuing.

The *Cox* ruling bristles with perplexities, noted but not fully resolved in the opinions. Would this same protest, the obstruction issue aside, have been permissible if moved a few blocks away? Could one, for example, distribute leaflets highly critical of the court near the courthouse? Is there pressure and intimidation in the protest in front of the courthouse that ceases to be present when it is in front of the state house? Or is the principle that it is all right

[101] *E.g.*, Mr. Justice Black, in Martin v. Struthers, 319 U.S. at 146: "Door to door distribution of circulars is essential to the poorly financed causes of little people."

to intimidate legislatures but not courts?[102] Is the vice in the picketing not so much in the time, place, and manner as in the message addressed to the court, and, if this is the vice, how can the result be squared with the insistent line of precedents on contempt by publication?[103] And, is it that in the courthouse situation the Court finally perceives the reality behind the gesture, so that *Cox* is a harbinger of increasingly stringent restrictions on protests? Or is the point the precise opposite, that only the special sensitivity of the law to the decorum of court proceedings makes the conduct bad? Few if any other places can claim such special protection. Hence, *Cox* may be the exception that will prove the rule of freedom.

Mr. Justice Goldberg made a most elaborate effort to deal with these points, but the unpersuasiveness of several of his reasons, given the other commitments the Court appears to have, is striking. "Mob law," we are told, "is the very antithesis of due process."[104] And so it is, but again there is the shadow of *Edwards*. What about "mob law" and the legislature? Again we are told that a state may protect "its judicial process from being misjudged in the minds of the public."[105] If the judge, however staunch and independent, happens to decide in favor of the protest side, is there not a risk that the public will misunderstand and think he yielded to pressure? But if this is a valid point, does it not apply equally to editorials and telegrams from labor leaders?[106] And, again, when confronted with the clear-and-present-danger formula, which still thrives in the contempt by publication cases, Mr. Justice Goldberg manfully said that if the formula is to be the test for such speech then "crowds, such as this, demonstrating before a courthouse . . . inherently threaten the judicial process,"[107] although the editorial and the telegram do not.

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[102] Perhaps this is just one more sign of the conventional view of the permissible non-rationality of the legislative as contrasted to the judicial process. Mr. Justice Goldberg is careful to say that different considerations would apply if the demonstrators were "picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building." 379 U.S. at 567.

[103] Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962).

[104] See note 24 *supra*.

[105] 379 U.S. at 565.

[106] See note 103 *supra*.

[107] 379 U.S. at 566.

One cannot entirely escape a feeling that Mr. Justice Goldberg had forgotten the facts about the demonstration he himself had summarized. Although the group was enormous in size and did very pointedly march up to the sidewalk opposite the courthouse, the demonstration meeting appears to have paid little attention thereafter to the judicial process. The picket signs protested discrimination in the stores, the group sang anthems and hymns, while the jailed students joined in responsive singing. The defendant, in his speech to the group, simply said that the arrests were illegal because other people were allowed to picket and then urged them to go forth and sit in at lunch counters.

These are genuine difficulties in the *Cox* opinions, but the rationality and circumspection of the result is saved by one further circumstance on which the Court explicitly placed some stress. The circumstance is that the Court had the benefit of a narrow, precise state statute representing a legislative judgment that in this one limited area picketing is improper. The result would have been different had the state courts in the absence of the statute proceeded to treat the picketing as contempt. The point is not simply that a precise statute avoids vagueness[108] or reduces the chances of unequal administration or even that by leaving other places and times available it presents the Court with only a modest restriction. It is rather that, in the difficult balancing process these cases force upon the Court, it has the benefit of the counsel of a deliberate, specific, and relevant legislative judgment.[109] This is all, in the end, that the flaming commandment against picketing the courthouse in *Cox* should forebode for regulation in other cases.

VI. Conclusion

Cox v. Louisiana is not one of the Court's more impressive performances. The Court has among its precedents a fine tradition about the public forum on which it did not sufficiently rely. Rather is displayed irritation and anxiety in confronting one of the most difficult practical issues of the moment. Among the many hallmarks of an open society, surely one must be that not every group of people on the streets is "a mob," and another that "its streets time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

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[108] This seems to be Mr. Justice Black's view of the point.

[109] *Cf.* Mr. Justice Roberts' opinion in Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).