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Civil Rights, the Constitution and the Courts, by Archibald Cox, Mark DeWolfe Howe, and J.R. Wiggins

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CIVIL RIGHTS, THE CONSTITUTION AND THE COURTS. By Archibald Cox, Mark DeWolfe Howe, and J. R. Wiggins. Cambridge, Massachusetts: Harvard University Press, 1967. Pp. 76. $2.95.

This little book of seventy-six pages was in a sense an anachronism even before its publication in 1967. The murder of Dr. Martin Luther King, Jr., on April 4th of this year may well have cast it upon the sea of historical relics. Save for the paper by the late Mark DeWolfe Howe, the book is little more than a view of what might have been.

In the opening paper, Professor Archibald Cox focuses his attention on "Direct Action, Civil Disobedience and the Constitution." The question Professor Cox seeks to answer is whether or not the activist wing of the civil rights movement will lead us closer to justice for all. He notes the existence today of a major block of people who believe that civil disobedience of unjust laws is the only viable road to reform. In opposition to that position, he offers what I would assume he considers a rhetorical suggestion, that the widespread use of civil disobedience has undermined the charismatic foundation of American law.

At the outset Professor Cox seeks to define with a lawyer's particularity the general terms "direct action," "civil disobedience," and "nonviolent action." Unfortunately, the definitions, as is so often the case, become the argument. Immediately dismissed are what he considers to be

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the polar aspects of civil disobedience. The first, the validity of the disregard of the commands of civil authorities that clearly infringe a right guaranteed by the Constitution of the United States, is accepted by Cox without question. The second, which Professor Cox categorizes as "direct action" which violates a "plainly valid" law, is viewed as impermissible. In the middle remains the area of debate and concern. Though Professor Cox has made a substantial effort, it is plain that he, as others before him, has woefully failed to clarify the middle.

There are few if any who would seriously disagree that the intentional disobedience of a plainly unconstitutional law is intellectually and philosophically commendable. Beyond that, however, the agreement or disagreement with various forms of direct action necessarily depends upon the viewpoint of the actor. When Professor Cox asserts that "one can say categorically that there is no constitutional right of civil disobedience to a valid law,"[1] one can in response say categorically that Professor Cox has begged the question. The question, of course, is what is a "valid law"? It is inferentially suggested that an answer to that question can be found by drawing a dubious distinction between legal validity and moral validity. As I read this paper, Professor Cox assumes that the intentional disobedience of a law which one cannot seriously say is legally invalid must be condemned. That may have been the issue in 1965 when the present paper was given before the Massachusetts Historical Society. It clearly is not the issue now. The focus of American young people today is upon the moral validity of laws which affect them directly. The new morality, about which Henry David Aiken has written so articulately,[2] commands obedience first to one's conscience and then to civil society. The plight of the ghetto Negro and Spanish American and the plight of the white poor and the American Indian, has touched the conscience of the young of this nation, and they have made it plain to those of us who have passed the golden age of thirty that they will bring this country to its knees before they will join the Establishment on its terms.[3] The issue now is no longer one of the rightness or morality of their action. Direct disobedience of "valid laws" is an established continuing fact about which moralization is an exercise in futility. The issue can be answered only upon the basis of an a priori judgment about that morality. Such an answer, of course, is not subject to meaningful debate—it depends by definition upon the viewpoint of the believer.

The larger issue, and the one to which Professor Cox does not

1. A. Cox, M. Howe & J. Wiggins, Civil Rights, the Constitution and the Courts 10 (1967).
2. Aiken, *The New Morals*, Harper's, Feb. 1968, at 58.
3. *See, e.g.*, Oglesby, *A Program for Liberals*, Ramparts, Feb. 1968, at 20.

address himself, is the public-spirited lawyer's problem of preserving our institutions in the face of open rebellion. Civil disobedience of Professor Cox's "plainly valid law" is a sad but simple fact of life in 1968. The issue to which lawyers must address themsleves is: what can and must be done to preserve for all the benefits of an organized society?

The answer demonstrably lies in the word "communication." The young, middle-class, white drop-out who has rejected contemporary society; the young, black militant; the migrant farmworker; and the prosperous but concerned college student have something meaningful to say. Their dissatisfaction and, I suspect, the basis of their "direct action" lies in the fact that the "Establishment" will not listen to them. If one reads *Ramparts*, the *Village Voice*, or any of the various "underground" papers that have emerged throughout the country, it will become plain that those journalistic endeavors are directed to the "true believer" alone and proceed from the assumption that the "power structure" does not listen and will not hear.

Black militants have in the last few years developed and espoused the concept of "black awareness."[4] Yet the National Advisory Commission on Civil Disorders has rejected the most basic tenets of that proposition and has, as least for black people, continued to assert the efficacy and moral validity of traditional welfare systems, integration, and urban renewal.[5] But all one must do to discover the patent unworkability of continuing "the system" while rejecting out of hand the new proposals is to talk to the young leaders in the black ghettos of this nation. One can there see that a substantial number of black people in America no longer wish to be white. Natural haircuts, African clothing and a concern with "black awareness" now permeate the ghetto and demonstrate the attempt to legitimatize the black American. Those young people no longer want to become a part of what is in their view a morally bankrupt white society; rather they wish to develop black society, economically, spiritually, and culturally and to do it on their terms. Until we understand and react realistically to the demands now being made upon us, we cannot reasonably expect that violent civil disobedience will end. Certainly, the concern with the morality of violence became painfully academic in Watts; it remains academic today.

The more affluent, but equally disenchanted, white youth suffer equally from a failure of communication. The hippies, the yippies, and the Berkeley activists cannot be dismissed by America's elders as a passing

4. *See* J. BALDWIN, THE FIRE NEXT TIME (1963); S. CARMICHAEL & C. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION (1967); WRIGHT, BLACK POWER AND URBAN UNREST (1967); Lasch, *The Trouble with Black Power,* N.Y. REV. OF BOOKS, Feb. 29, 1968, at 4.

5. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, Ch. 17.

phenomenon. The movement of some of America's brightest young people toward a total rejection of American society is not a fad, but is rather an intensely ethical movement—an almost total rejection of the moral foundation of the American middle class. A substantial number of young people today exhibit no desire to own a color television set, an expensive automobile, a fancy house in the suburbs, or any of the other status impedimenta that have "made America what it is today." Instead, they seek a moral justification for the economic amelioration of our culture and find none. They have rejected the Calvinist ethic and substituted a concept of love and brotherhood, decidely Christian and mystical in its cast. They cannot be preached to but they can be listened to if someone will listen and hear.

Professor Cox closes his paper with the following view:

> [t]he hope of mankind is always that a new generation may begin to make the world over quickly. The wrong, in the simplest terms, is the damage to the foundation upon which rests the best, if not the only, real opportunity for the making-over.[6]

Few would disagree with Professor Cox's observation. The problem lies not in its intellectual validity but in its failure to recognize the existence in today's society of an articulate and powerful group of young people who would say to Professor Cox that the foundation he seeks to preserve is not worth preserving if its moral underpinnings are not open to discussion. The answer to that challenge lies in the establishment of a dialogue—the opening of issues and the discussion of problems confronting the young, sometimes affluent, but woefully unhappy youth of our society.

The second essay in the book, by the late Mark DeWolfe Howe, touches upon the deeply historical roots of the violence and immorality that are sweeping our country:

> [t]he southerlies are still blowing. They have told us of the killing of Medgar Evers, William Moore, James Reeb, Andrew Goodman, James Chaney, Michael Schwerner, Lemuel Penn, Viola Liuzzo, and Jonathan Daniels. They brought us the names of others, but those others we have forgotten because they were merely four little children at church in Birmingham. The breezes from the South have told us these ugly tales, but they have not spoken of convictions of the guilty. They tell us, instead, of murders, acquittals, mistrials, and local pride.[7]

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6. A. Cox, M. Howe & J. Wiggins, *supra* note 1, at 29.
7. *Id.* 31.

With that invocation Professor Howe sets for himself the task of identifying and illustrating the invalidity of "the concept which, above all others, has served to incapacitate the nation's conscience."[8] To achieve that goal Professor Howe delves with his customary finesse into the depths of American legal history and in so doing demonstrates that perhaps the only real discipline of our day is the study of history.

The history of the black man in America has been far from happy. Our nation was born into a moral-legal dichotomy: the acceptance of the legality of slavery and the rejection of its asserted morality. That pluralism is demonstrated by the pronouncement of Lord Mansfield that "the state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law."[9] From that beginning, Professor Howe traces the history of American constitutionalism as it has affected the issue of slavery. The crux of his article is his discussion of the Reconstruction legislation where he shows that the original legislation passed by the Congress to protect the rights of black Americans was not limited by the concept of "state action" which has so hindered and obsessed American courts and scholars. Congress, Professor Howe asserts, "wanted to make sure that the institution and the badges of inferiority with which it had degraded the Negro should be wholly eradicated."[10] To do so it passed the Civil Rights Act of 1866, vetoed by President Andrew Johnson and then passed over the veto.

The historical difficulty arises because the framers of the Reconstruction legislation were cautious and conservative men. In order to assure the constitutionality of the Equality Act of 1866, the fourteenth amendment to the Constitution was proposed. The result of that indiscretion is now a well-known part our constitutional history. The civil rights cases in 1883 forgot the thirteenth amendment background of the Equality Act (which had in 1870 been transposed to the center of a new civil rights act) and held that the prohibitions against discrimination therein contained were limited by the requirement of "state action." As Professor Howe demonstrates beyond doubt that incorrect decision has been the basis of the continuing polemic over the power of the American Congress to regulate the affairs of private men engaged in private discrimination and indeed private murder. The absurdity of that proposition, however, does not deter the racial terrorists who seemingly populate this nation in increasing numbers. Although the Supreme Court has continually refused to face squarely the issue of state action, it is

8. *Id.*

9. *Id.* 32 (quoted from The Case of James Sommersett, 20 How. State Trials 2, 82 (1772)).

10. A. Cox, M. Howe & J. Wiggins, *supra* note 1, at 47.

indeed possible that it may do so this term in a case presently pending before the Court.[11] If it does reconsider the efficacy of the doctrine and its application to the Civil Rights Act of 1870, it cannot ignore Professor Howe's scholarship; acceptance of it would indeed be a fitting legacy to one of America's great legal scholars.

So ends the little book, though there is in the last nineteen pages an essay by one J. R. Wiggins entitled "The Press and the Courts." Mr. Wiggins is a reporter and his essay is directed to the asserted right of a newspaper to convey to the American public a picture of criminal justice. The thrust of Mr. Wiggins' article, though it is indeed covered over with a great many libertarian platitudes, is to be found in the following paragraph:

> [t]he plain truth of the matter is that the newspapers do not print enough crime news; they do not follow closely enough the conduct of the police, the operation of the courts, the administration of penal institutions, the functioning of the probation system—or any other aspects of society's handling of the whole enormous problem of crime.[12]

Few would doubt the desirability of creating a public dialogue about our penal system, but Mr. Wiggins is not content to stop there. He wants increased news coverage at all steps of the criminal process and his response to the publication of the Reardon Report indicates that concern:

> [s]ince this paper was written the Reardon Committee of the American Bar Association has issued its report, *Fair Trial and Free Press.*
>
> The recommendations of this committee, if carried into effect, would diminish public scrutiny of the law enforcement process. As James Bryce pointed out in 1893: "Democratic theory, which has done a mischief in introducing the elective system (for judges) partly cures it by the light of publicity which makes honesty the safest policy." If this light of publicity is shielded and obstructed enough fully to protect the accused it will be darkened enough fully to protect corruption, malpractice, and fraud in the law-enforcement process.[13]

At bottom, I suspect that Mr. Wiggins is only advocating the now timeworn assertion that the right of a newspaper to make a trial public is constitutionally protected. I would view the matter as cutting the other

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11. See Petitioner's Brief for Certiorari at 23-39, Jones v. Meyer, 379 F.2d 33 (8th Cir.), *cert. granted,* 389 U.S. 968 (1967) (No. 645).
12. A Cox, M. Howe & J. Wiggins, *supra* note 1, at 57.
13. A. Cox, M. Howe & J. Wiggins, *supra* note 1, at 76 n.9.

way and protecting the right of the *defendant* to have, *or prevent*, a public trial as he sees fit. It seems somehow incongruous to assert that the right to a public trial cannot be waived by an intelligent and informed citizen. That, in sum, is the implication of Mr. Wiggins' paper.

This book is, as I noted above, a book about what might have been. In the sadness of this April, however, it can be read by men of good will and concern and found to be thought-provoking but terribly sad. It is a lawyer's book written for laymen and deserves to be a part of every library.

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