

1968

Book Review: The Supreme Court: A Question of Relevance—A Review of *The Warren Court, Constitutional Decision as an Instrument of Reform* by Archibald Cox

Leonard V. Kaplan
University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Leonard V. Kaplan, *Book Review: The Supreme Court: A Question of Relevance—A Review of The Warren Court, Constitutional Decision as an Instrument of Reform* by Archibald Cox, 48 Neb. L. Rev. 183 (1969)
Available at: <https://digitalcommons.unl.edu/nlr/vol48/iss1/7>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

BOOK REVIEW

THE SUPREME COURT: A QUESTION OF RELEVANCE—
A REVIEW OF "THE WARREN COURT, CONSTITUTIONAL
DECISION AS AN INSTRUMENT OF REFORM"
BY ARCHIBALD COX

*Leonard V. Kaplan**

Archibald Cox has written a short, controversial and rather comprehensive analysis of the Warren Court. The book is a blend of legal analysis covering the "political issues" which have confronted the court, how the court did confront these issues, and how the author agrees or disagrees with the court's judgment. An added dimension to the analysis suggested by the book's title, "Constitutional Decision As An Instrument of Reform", reveals some of the political subtlety which necessarily underlies many of the Court's constitutional probes. The core question which presents itself traditionally and in this analysis goes to the constant question of judicial passivity or activism. In the author's words: "[H]ow broad a commission should the Supreme Court assume to police the interpretation of the Constitution by the other branches of government?" (*The Warren Court* at 20) In other terms, what is the charge of the Constitutional Court in a tripartite "balanced" system of government and how can the Court meet this charge which actually it fixes for itself from its own reading of the Constitution and its adherence or non-adherence to past posited guidelines?

The Table of Contents adequately indicates the topic coverage and the nature of the book itself: 1) The Basic Dilemma, 2) Civil Rights: Judicial Innovation, 3) Civil Rights: Legislative Power, 4) The Reform of Criminal Procedure, 5) Political Democracy: Speech and Association, 6) Political Democracy: Voting Rights and Legislative Reapportionment. If I were to review the book in a straight-forward manner, I would analyze the author's handling of one or several of these issues, put his handling into a place in the extent literature germane to that issue(s), add my personal critical belief and end with a quote summing up the net worth of the book so that the reader of this review would have an indication of whether I thought the book worth reading, and so that he would be apprised of any weaknesses alleged by me.

* LL.B., 1965, Temple Law School; LL.M., 1966, Yale Law School; Member of the California Bar; Assistant Professor of Law, University of Nebraska; Presently on leave to the University of Chicago, Department of Clinical Psychology.

It seems to me that the review on the book jacket itself adequately conveys the kind of summation any potential reader needs, and if that reader is an expert or at all knowledgeable in the Constitutional Law area, he can almost project with great accuracy the analysis presented by Professor Cox of the Court's particular decisions on which he has chosen to comment. In short: "Although not uncritical of the grounds on which several of the Court's crucial decisions have been reached, Mr. Cox comes to the conclusion that the trend of the rulings has been in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions." (*The Warren Court—Jacket*) And indeed all the words Mr. Cox and the author of the above blurb use on the Court are essentially applicable to Mr. Cox's point of view itself.

This book is a series of lectures expanded for publication delivered originally in the summer of 1967 under the aegis of the Harvard Law School and the University of Hawaii, and it would do the book no wrong to state that the style is the type of critically sound law review effort one would expect from an expert as powerful as Professor Cox. And herein lies the issue that I would like to join with Professor Cox and the Court which he describes eminently well. The issue is one of style and style is indicative of relevancy. And the question of relevancy presents the obvious trite ideological rejoinder, relevant to whom?

A recurrent theme throughout the analysis is that the Warren Court has intervened into many areas such as school segregation only when the other branches of the government have totally failed to act and where action was imperative in keeping with the articulated spirit of American justice—a rather vague standard. Cox approves of such intervention but would often require a better use of nice legal tools, of esthetically pleasing arguments as taught in the classroom, which bring a gleam (rather dull, but a gleam) to the professional eye and a quickening of the pulse to the legal logician; in psychoanalytical terms, the Court should cater to the anality implicit in legal craftsmanship. In Cox's words: "There have always been occasions when the courts, to shape the law to these objectives, have had to pay the price of revealing that judges sometimes make law to suit the occasion. Nor should we forget not to pay that price may even defeat the object of obtaining voluntary compliance, because law, to command consent, must deserve it." (*The Warren Court at 26*).

The former sentence catches much of the ambivalence Cox feels toward the Warren Court and toward the problem of Constitutional decision-making itself. Cox has specifically acknowledged the non-judicial power of the Court as keeper of the Nation's conscience, (*The Warren Court* at 27), but still wants form, the form of legally nice posit following legally nice posit—even though as he has indicated in the above quote, he knows the impossibility of the demand. He wants and if on the Court (one senses he would be an activist and perhaps a better technician than some present Court members) would undoubtedly push for intervention much in the tradition of the Warren Court where his perception of justice and his perception of the commonalties of the Nation's feeling of justice of the particular issue demanded change by some governmental branch. He would prefer the other branches to carry the ball. This is for no reason of cowardice but to preserve and insulate the institution of the Court from untoward and vitriolic attack. The guidelines apportioning what Cox believes to be a case where the Court should intervene in a non-judicial (conscience function) way are unclear, the kind of intuitive process one gets from the reflections of such great jurists as a Cardozo. And Cox candidly admits the insolubility of the problem.

I have suggested strong disagreement with Professor Cox concerning style which I blended into a question of relevancy. The issues are ones which I must confront at this point and are issues which I think Professor Cox either smudged or did not consider in any way near the analytical manner in which he treats specific case analysis in such areas as housing discrimination. (His handling of *Reitman v. Mulky* (*The Warren Court* at 46) is masterful.) He states: "The craftsmanship or lack of it in judicial opinions strongly influences the judgments that lawyers pass upon the work of the Court. Professor Richard Neustadt [he goes on to say], in writing about the power of the President, propounded the thesis that one of the determinants of what a President can accomplish is the judgment of a small number of professionals upon the professional competence of his performance. The thesis has even greater validity as applied to the Court, for a large segment of public opinion looks to lawyers to appraise its performance." (*The Warren Court* at 48). He does candidly admit he cannot pursue his point and states his basis for legal artistry. His proposition clearly indicates a belief that cogency of legal reasoning developed out of principles is necessary for any continued faith in the Court's decisions—"... the effectiveness of the Court, its very ability to slay dragons, is eroded by any failure to show how the novel decisions required by changes in human condition and the realization of bolder aspirations nonetheless draw their sanction from a continuity continging of prin-

ciple." (*The Warren Court* at 48-49). "The more rapid the pace of social change, the faster the law must develop. But the faster pace of legal development would seem to create still greater need for striving to preserve, through the articulation of sound rationale, that sense of impartiality and continuity that gives legitimacy, and thus provide the sanction, for the judgments of a court." (*The Warren Court* at 49).

The words are well articulated, the principle propounded is seemingly obvious. I just do not know what Professor Cox means. I do not know how his extra footnote, or force of legal articulation will at all vary the response of the public to this commonly held perception of justice. Nor suffice it to say, do I think that private citizens, "the unwashed masses", "the enlightened electorate", or what you will, really give a damn concerning the legal niceties which titilate or inspire the legal mind. Nor do I feel that any but the professors and perhaps a few eminent practitioners are really swayed by the force of legal argument expressed in an emotion fraught value area. No amount of legal education could have changed the opposition to *Brown v. Board of Education*, *Miranda*, *Baker v. Carr*, *Reitman v. Mulkey*, etc. The question of the Court's sleight of hand ability (for this is how I posit most citizens and most practitioners view the legal reasoning underlying significant decisions which lie in civil liberties areas) is a straw man for the much more difficult question of the community sense of justice and of the ability of the Court, or for that matter a legislative decision-maker's ability, to raise or lower that commonality of sensed justice concerning abiding issues. The large segment of the population following George Wallace cares little for *any* articulation of reasons why they must sell their homes or send their children to school or work with Negroes. Nor am I (a trained lawyer and teacher of the law) happy about a Court which cannot hear cases concerning the legality of the war in Vietnam *no matter* how the legal issue is raised. And if I am unhappy, I who am seduced by Professor Cox's view (having spent time in legal classrooms on both sides of the desk) what chance does the Court have of maintaining the respect of the earnest supporters of McCarthy and the late Senator Kennedy who cannot see the Vietnam operation as anything but an immoral and *illegal* conflict. *Their* felt sense of injustice is exacerbated by the denial of even a forum to articulate their view on the only level of the judiciary that has pertinency, the Supreme Court. Nothing less will do, so Supreme has the Court become. We have been led to expect too much from the Warren Court—an ironic state of affairs—and now sizable portions of the population want no less than justice—no legal quibbling and not denials of certiorari—which we lawyers assure them are only procedural and bear no rela-

tionship to the Court's substantively held perception of the particular issue. And of these sizable portions of the country demanding justice—there is very little basis for compromise. The shared sense of equality is not so shared or at all understood by the white middle class or the whites of Appalachia, let alone the blacks of Chicago or Watts and the prototypical and much abused Alabamian whose faith is placed in their deft Mr. Wallace—a true friend of an unrepresented class—a class who want to hold their economic gains but feel a fear towards blacks, big government, toward “them”, they feel, just like the ghetto black, a need for manhood—for dignity.

And why does the Court refuse to hear cases concerning the legality of the war in Vietnam? Professor Cox gives us no answer. He states: “If those rules [on standing to sue] are applied, there may never be a Supreme Court ruling upon the constitutionality of the grants [to parochial schools], just as there probably can be none (*albeit for a different reason*) upon whether fighting a war in Vietnam without a declaration of war by Congress violates the Constitution.” (*The Warren Court* at 19) (emphasis added).

I can speculate certainly why the Court refuses to hear Vietnam cases and the reasoning is easy and justified if, and only if, the institution of the Supreme Court is more important than the ideals propounded by the very vitality and strength of the Warren Court. In short, if the Court hears cases concerning the war's legality, an answer affirming the war as legal will in no sense affirm any sense of justice by a great number of Americans who are certain of the immorality of the war; these laymen equate immortality with illegality. They are not sophisticated lawyers nor are they sophists. (One should remember the advent of separation of issues of morality from “positive” law in Nazi Germany as a tendency toward arbitrary law, *toward* non-law: the issue is much more complex with a wealth of rich literature but the literature is not available nor would it in any way persuade the layman who understands Soloman's wisdom, not artful distinctions of lesser mortals.) If the Court held the war illegal: 1) the executive very probably would ignore such a ruling, 2) as a subset of 1) the Court would be trespassing on the authority of an independent branch who *need not* respond, 3) those citizens, relatives and friends who lost those close to them in the war would be enraged, by the imputation that the loss was for nothing, either against the Court itself or against the government as a whole—an obnoxiously serious undermining of an already weakened credibility projected by the government.

The Court seems to feel that non-action will preserve institutions of justice against these speculated objections. Perhaps so

But certainly perhaps the Court by avoidance will render itself irrelevant to the truly significant legal questions (i.e., questions which can meet that form necessary for Constitutional decision-making as "case or controversy" etc. which continually confront it). The Court will be attacked not only by the establishment, e.g., against Mr. Justice Fortas, representing the Warren Court, but also by those from whom the Court expects its succor—who have greater expectation and needs engendered by the Court's past high standards (or believed high standards).

There is one other issue broached and I think fobbed off by Professor Cox which demands explanation, i.e., "civil disobedience" or "civil dissonance" (a more modern form). Professor Cox traces the concept back to our noble freedom fighter in the South—the marchers, set-inners, all of those who knew as we all know that the South had "unconstitutional laws". Cox states: "So long as civil rights demonstrators were violating unconstitutional Jim Crow laws, as in the freedom rides and possibly in the lunch counter sit-ins—so long as the restrictions upon marches and picketing were imposed under local ordinances void for vagueness or the excessive delegation of censorial power—the challenge to established local authority was only a superficial form of civil disobedience. One may disregard with legal impunity the commands of civil authorities (but not of a court) if what the authorities forbid is in truth only the exercise of a privilege guaranteed by the United States Constitution. *Such action involves no civil disobedience—no violation of law in the ultimate sense—because the only orders that are violated, being unconstitutional, are not law. There is no constitutional right of civil disobedience to an otherwise valid law.*" (*The Warren Court* at 112) (emphasis added) Professor Cox goes on to state that the only true civil disobedience in the South was on the part of Governors Wallace and Barnett who refused to desegregate schools despite court rulings. The key, to Professor Cox, is revealed in these words: "Similarly, I can recall no instance in which civil rights demonstrators used the sheer weight of numbers 'non-violently' to obstruct the lawful activities of others, to suppress argument, or in an effort to impose their views upon the community by sheer harassment." (*The Warren Court* at 113) The key to Professor Cox is obviously one of *style!* I cannot see how he can state that the freedom marchers *et. al.* in the South knew of the unconstitutionality of Jim Crow laws *a priori* any more than protestors against the Vietnam war who feel the principles of Nuremberg applicable *a priori* feel that war unconstitutional. If the freedom marchers are absolved because they are not truly civil disobeyers neither are the war protestors civil disobeyers or those who "civilly disobey" on a myriad of issues they

feel *a priori* to be unconstitutional. Professor Cox's view is the kind of sophistry which can only hold the Court and the law up to the scorn of the feeling laymen. But the issue is not so simple, the logic of the Cox position is forced because he feels: "The man who is willing to deny the force of law, in order to impose his views upon society must be peculiarly arrogant or extremely shortsighted." (*The Warren Court* at 113) I resent this statement deeply. The Bill of Rights was designed to protect many who would assert their rights over society and the Supreme Court in its checkered career has not always been so cognizant of those *explicit* rights. Were those men who advocated a right guaranteed by the Constitution as they read it, but not "read into" the Constitution until a later era or not at all, arrogant or shortsighted? Were all the minority dissenters, the Holmes, the early Harlan, the Brandeis so arrogant because they violently agreed with many unconstitutional actors? And certainly Jesus Christ would be made arrogant indeed by the arrogantly stated proposition of Professor Cox. And most arrogant of all was the international tribunal at Neurenberg which tried and convicted citizens of one nation for concordance with the enforced societal expectations of that nation. No, Professor Cox, no indeed. The man who willingly denies the force of law might be most humble, most foresighted and most right indeed for himself and for his country. He is no enemy of the people.

But I commiserate because Professor Cox does not want to impute bad to the "good workers" in the South who were gentlefolk and whom we liberals like and would count in our company if we had their guts. But the long haired "arrogant" youth who is so ill graced as to throw himself in front of a troop train is interfering with private property, is too violent for us, despite his good faith, despite his intentionality or our perception of his intentionality. The long haired youth cause trouble, stop processes, seek confrontation. They are ill-mannered, they smell bad, they are often arrogant, and they are often right, and they are out practicing the principles they have learned from us and from our recognition of good civil disobedience. They are perplexed by "bad" civil disobedience. And they should be if they paid attention only to the principles of constitutional law as Professor Cox advocates by stressing legal cogency. The issue is style. Neither the society, nor the majority of the Court likes their style, it is dangerous, as pre-*gaged* from down South. We have new and finely honed sensibilities in youth and they brook of no compromise on justice—a justice we, I again stress, taught them. Lock them up if you will but do not pretend to distinguish their case from those who marched for freedom on an *a priori* belief of rectitude. That would be dene-

grating the standards of legal esthetics I learned in law school. Better say like Vietnam, the Court cannot handle the issue because of the politics of the situation.

If the Court cannot really handle Vietnam issues, or civil disobedience issues, perhaps it is no longer relevant as an institution of justice, which has pre-empted onto itself the role of nation's conscience. Perhaps the Court is no longer relevant to issues concerning significant questions of justice where there is no consensus of perception of justice in regard to these issues in the society itself. Then the Court should perhaps reduce its role to one of a lesser level aspiration.

But certainly the Warren Court has accomplished much, so much as to create the expectation for more than it can deliver as I have suggested throughout this review. Professor Cox indicates the impact the Court has had in the criminal procedure area. And, in fact, the Court has made great *symbolic* attempts to restructure criminal procedure more in consonance with individual dignity embodied in the essence (again a rather hazy term) of the Constitution. But I suspect all the "*Miranda*" cases have very little and very low impact on actual police practice; the real impact of these reforms is like *Brown v. Board of Education* and similar cases a balm to sorely tried liberal consciences. Schools are not desegregated nor do all alleged criminals get their constitutional rights as articulated by the Court. The standards promulgated by the Warren Court are important to a few to whom they directly pertain and who because of effective counsel or some fortuity are granted these rights. It is romantic and prestigious to write of the Supreme Court; the real job of analysis and dispensation of justice is in Federal District Courts and more particularly in local common pleas courts. Judicial justice perhaps can be meted out in cases involving no political issues, and there may be few issues now confronting this society that are not broadly based politically.

I do not enjoy even suggesting the possibility of the Supreme Court's irrelevance to the real issues of the day; e.g., Vietnam, race relations, poverty. It would perhaps be better to admit this irrelevance and look for other institutional means of justice dispensation or else self-help (often a perfectly fine legal answer and certainly psychologically satisfying) which will necessarily have to suffice and fail.

Despite the fact that Warren still sits as Chief Justice—the era of his Court and its hardships and triumphs have, it seems, ended. Cox indicates in his last sentence "[t]hat the institution of constitutional adjudication works so well on the whole is testimony not

only to the genius of the institution but to the wisdom and courage of the individual justices." (*The Warren Court* at 134). I obviously do not feel the Court is working so well as an institution. I feel it will work less well in the immediate future and can only hope for a rehabilitation and reemergence as an institution capable of dispensing and acting with justice. But this is not a function of the Court; rather the Court is a function of a pluralistic society which is in increasing danger, and the court as an institution of that society reflects the types of confrontations that are increasingly occurring. The eminent sociologist, C. Wright Mills, has referred to the law as a middle class power, and I fear he is right. The law can help to keep the peace, maintain tranquility etc., but first the condition for that tranquility must be in the society, and this means the type of economic and psychological reform that abounds in all the new paperbacks but nowhere in the Halls of Congress, and, I fear, little in the heart of the people.

Cox is fine with cases: his criticisms are justified generally and well taken, he has done justice to the Warren Court which has done its best to give justice to us. It is now beyond the parameters of the institution that seems to maintain that expectation. Professor Cox indicates that the Court is not a Council of Wise Men, but perhaps that is what is now necessary for the Court to carry on. (*The Warren Court* at 22). But I fail to see how Wise Men can do what the Court cannot, nor do I feel faith in such philosopher-kings. The image is important though, its mention as a literary device could ironically presage what will happen with the Court *and* our other governmental branches. But I doubt that these "Wise Men" will be so benevolent. They will be, if they materialize, repressive—to be fought by Professor Cox and then I hope to be in his number. At this point Professor Cox is not "where it is at" nor am I. I hope we can both continue to publish in law reviews and publish manuscripts no matter *how* irrelevant they may be and still keep our ethical stances in tact. Let us learn from the great psychoanalyst Bruno Bettelheim who described the Nazi atrocities and the head hiding of its victims in his *The Informed Heart* and let us keep our metaphysical hearts as well as our hard legal heads informed.