Vol. 13 No. 4 (April 2003)

A VIRTUE LESS CLOISTERED: COURTS, SPEECH AND CONSTITUTIONS, by Ian Cram. Oxford, England, and Portland, Oregon: Hart Publishing, 2002. 226 pp. Hardcover $54.00. ISBN 1-84113-038-9.

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We live in an era characterized by strong preferences for democratic institutions and constitutional rights. Two of the most cherished of those rights are free expression and impartial trials. Most of the citizenry of most democracies, most of the time, accept the coexistence of these freedoms as unproblematic birthrights.

In A VIRTUE LESS CLOISTERED, Ian Cram undertakes a comparative study of the interplay in the jurisprudence and practice exhibited by some democratic societies in the exercise of these two core rights. His survey fleshes out in some detail the profound and interesting tensions that the full realization of both rights often embody. His analyses are concerned primarily with the laws that regulate press access to and right to comment on criminal proceedings in the United Kingdom, United States, Canada and Australia, but he also devotes significant attention to developments in the European Court of Human Rights (ECHR) and the Tribunal Constitucional of Spain.

There are seven chapters to the book. Chapter 1 is a thematic and detailed rehearsal of the claims and arguments that are particularized in the subsequent chapters. Here, Cram summarizes basic justifications advanced in support of free expression in a democratic polity: it encourages and permits the informed scrutiny of the exercise of power by the state and its officials; truth, to the extent it is a social good, is more likely to emerge from the free competition of ideas a free press engenders than from the suppression of ideas deemed *a priori* to be false; free expression permits individual self-realization, which may encourage wider participation in societal governance; and as an historical matter, governments have shown themselves to be poor regulators of speech, tending to prefer their own narrow institutional interests over those of the larger society.

Chapter 1 also heralds a theme and methodology consistently employed by Cram throughout much of the rest of the book. The theme is that the balance struck by United States courts in their constructions of the First and Sixth Amendment rights to free expression and fair trial is paradigmatic of the proper accommodation of these rights. Among other things, United States courts virtually never permit prior restraint of publication of information. Rather, they attempt to ameliorate the potential prejudicial consequences of such publication through a variety of judicially crafted devices, including extensive use of the *voir dire*, jury instructions, jury sequestration, forum transfer, delay of trial, or, even in exceptional circumstances, dismissal of prosecution. These, of course, can entail substantial social and personal costs to both the defendant and the victim, but it is perhaps a testimony to the strength of Cram's belief in the primacy of First Amendment rights that, while certainly not unaware of these costs, he devotes virtually no attention to them.

In terms of methodology, there follows in Chapter 1 a country by country survey of evolving judicial practices in seeking to strike the appropriate balance between free expression and fair trial rights. Thus, Cram explains how, starting from a baseline that distinctly favored realization of the "fair trial" norm over the right to publish, Canadian courts, interpreting the 1982 Charter of rights, increasingly have come to be more tolerant of the freedom of the press to scrutinize judicial proceedings. But, as any one who lives south of the border and who pays attention to the occasional whimsical story from the North knows, Canadian tolerance remains a far cry from permissible practices in

the United States.

Australian courts, similarly, increasingly have departed from the standard common law treatment of the right to free expression by the press as "what remained after laws relating to defamation, contempt, public order etc, had been taken into account" (p. 33). They have done so, however, without the benediction of a constitutional provision. Rather, during a particularly activist period in the 1990s, the Australian Supreme Court recognized a privileged place for political expression – defined to cover criticism of governmental action, a recognition that has redounded to the benefit of press coverage of criminal prosecutions.

Canada and Australia, of course, inherited the common law standards that they have sought to reshape from the English courts. Interestingly, the change in English and Scottish judicial practices are likely to flow more from the decisions of the European Court of Human Rights in Strasbourg than from any internally generated rules deemed by the courts to be responsive to the demands of English and Scottish societies. Such changes will derive from their constitutional bases, in part, from the United Kingdom Human Rights Act of 1998, which is generally seen as enshrining a set of rights requiring UK judges to balance statements of individual freedoms against competing individual and state interests (p. 36). Two of those enshrined rights are those of free expression (Section 10 of the European Human Rights Act) and free trial (Section 6).

Chapter 2 is devoted to a discussion of the balance that the European Court of Human Rights has struck in its construction of the intersection of these two rights, and a comparison of that balance with United States practice. Cram points out that the provisions of the European Human Rights Charter relating to fair and public trials (Art. 6) are emphatic, while those relating to the freedom of expression (Art. 10) are made subject to restrictions when deemed necessary to protect a host of other interests such as "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information given in confidence, or for maintaining the authority and impartiality of the judiciary." This qualified formulation of the protection of free expression stands in marked contrast to the absolutist statement found in the First Amendment of the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech or of the press". Yet, the ECHR, Cram demonstrates, increasingly has come to open up space in Europe for wider press participation in criminal proceedings, so that there now seems to be more congruence in European and U.S. justificatory rationale – and in many ways practice as well -- than the language of the relevant constitutions might suggest.

The United States Supreme Court has interpreted the First Amendment as precluding any regulation by government of the content of speech, while permitting reasonable "time manner and place" restrictions, even where such regulations may arguably affect the intensity (and one might therefore contend content) with which the information is imparted or received. United States courts have viewed judicial proceedings as public fora, and have read the First Amendment as strictly constraining the ability of the government to limit access to them, or to restrict speech about them.

The apparent exception, however, appears to be with regard to commentaries that might be viewed as bringing into question the impartiality of judges. Here, the ECHR, deploying the institutional concept of "margins of appreciation" (i.e. deference for pluralism in the national means that may be employed to achieve a common object), has been particularly tolerant of national legislation that limits the ability of the press to express views that might be seen as challenging the authority or impartiality of the judiciary, or of specific judges. Cram is critical of this aspect of ECHR jurisprudence.

In chapters 3, 4 and 5, Cram takes up issues that have posed distinctive challenges to the capacity of judicial proceedings to accommodate free speech rights. Chapter 3 focuses on what is perhaps the quintessential situation that the lay person has in mind when asserting the existence of a dilemma between press rights and the right to a fair trial —namely, when it is or ought to be permissible to publish information regarding a crime that is to be tried before a jury. Cram's description of the case law on this issue in the various common law jurisdictions under study is reasonably exhaustive and well sourced. Scottish courts, the reader learns, are highly protective of the judicial process, being all-too-ready to grant injunctions against publication of material deemed to be prejudicial to a criminal proceeding and all-too-willing to penalize newspapers and editors who violate the "*sub judice*" rule. English courts, by contrast, have become less willing to issue gag orders, while the notion of prior restraint of publication is almost

unheard of in the United States. But Cram's analysis is sufficiently nuanced to permit him to observe that, notwithstanding trials like the OJ Simpson case (and a few others), "[t]hose comparatively rare instances of alleged criminal wrongdoing which do capture and retain national media attention even beyond their legal conclusion have tended to combine a variety of factors which allow the trial to serve as the forum for a wider debate about societal institutions" (p. 94). Constraining free speech rights in such an environment therefore would be counterproductive. Moreover, as Cram persuasively demonstrates through the retelling of the results of empirical studies of jury behavior, there is in fact little authoritative support for the proposition that extensive publicity prior to a trial – whether in the form of information disclosure or of biased commentary – irremediably taints jurors. His conclusion that one ought to adopt a skeptical stance on the actual effect of media influence on jury trials, and his call for further research on the subject seem appropriate.

In chapter 4, Cram discusses the development and practice of special proceedings for juveniles and younger persons. To the extent that societal interest in the welfare of these individuals as defendants in criminal proceedings includes screening their identities and offenses from general public knowledge, open press publicity can hardly be the norm. Cram provides an extensive survey of the approach of the various common law jurisdictions to this thorny issue, and in the process discloses the wide variation that exists, as well as the changes in those approaches that have occurred, even within the same jurisdiction over time. A notable development in this area is the contrast between the increasing tendency within national criminal systems to cut back on the recognition of the special interest in privacy that might be due juvenile and young offenders, on the one hand, and the growing trend within international law to carve out a separate sphere for the rights of children. Cram ably dissects and comments on these competing movements.

Chapter 5, which Cram, borrowing from Justice Felix Frankfurter titles "The English Foolishness" is a discussion of the bounds of permissible criticism of courts and members of the judiciary. The basis for penalizing speech on this ground is, of course, that it has the potential of bringing into disrepute a vital social institution. Notwithstanding the title, the last prosecution in England on this count dates back to 1931, and is virtually unheard of in the United States. But Cram's discussion shows that penalizing criticism of courts and judges on account of the content of the criticism remains alive in such jurisdictions as Canada and Australia. And, as Article 10(2) of the European Human Rights Charter explicitly provides for, free expression may be regulated in the interest of "maintaining the authority and impartiality of the judiciary." Nor is criminal prosecution necessarily the only effective means of censuring overly aggressive criticism of the judiciary. The availability of libel actions against the press in many jurisdictions, and indeed – as was recently the case in the State of Indiana, in the United States – disciplinary actions against members of the Bar remain possible means for regulating speech that is critical of judicial proceedings.

The last two chapters are detours into two discrete topical issues. Chapter 6 presents the jurisprudence of the Tribunal Constitucional of Spain on the balancing of free speech and fair trial rights. The material attempts to serve three distinguishable functions. First, it might be seen as presenting a Civil Law take on a study that essentially has focused on common law jurisdictions. Second, it may be viewed as indicating the path taken by a democratic society that hitherto had operated under authoritarian rule. And finally, it may be seen as a study of a legal system that seeks to incorporate international legal standards directly into domestic law. These are all interesting and useful undertakings, but to attempt to do all of these in a single chapter of an already exhaustively researched book leaves this material comparatively thin.

The final chapter is a very brief exploration of the potential consequences that the internet might have on the capacity of individual jurisdictions to regulate speech relating to judicial proceedings. Here, Cram makes several of the obvious points: No single state, acting alone, can effectively regulate the internet. Any efforts to regulate speech on the internet will run into difficulties of identifying the speaker, locating, policing and prosecuting a violator, and effectively enforcing any resulting judgment. This is by far the weakest chapter in the book.

Cram has written a well-crafted work on a very important set of issues. It is a thoroughly researched and particularly well argued book. He does not merely advance propositions, but he also presents their counter-arguments and attempts to evaluate the strengths of the contending perspectives. This is one of the persistent strengths of the book. It is a methodology he employs with regard to virtually all of the issues that he deems to merit extended treatment. It is a book that can be used almost in its entirety in courses dealing with the significance of free speech for social institutions, or selectively for special topics or seminars on issues relating to free trial rights. The troves of information

to be found in both the text and footnotes are well worth the price.

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