BOOK REVIEW

NIMMER ON FREEDOM OF SPEECH. By Melville B. Nimmer.* New York: Matthew Bender & Co., 1984. Pp. xv, 510. $75.00.

REVIEWED BY FRANKLYN S. HAIMAN**

Despite the absurdly immodest claims of the publisher that this is "the first thorough analysis of the reach and limitations of freedom of speech"[1] and that "[t]here's simply no other source that brings together the case material and definitive analysis available here,"[2] Melville Nimmer's "Treatise on the Theory of the First Amendment" is a substantial and important addition to the presently available literature on freedom of expression. One must trust that the author, whose own writing reflects a decent respect for the work of those who have gone before him, is embarrassed by such puffery. Certainly the merits of his treatise are sufficient to make a significant mark without exaggerating their uniqueness.

What is entirely unique about this volume, distinguishing it from earlier analyses of free speech theory and cases,[3] is its physical format. Published in a hardcover loose-leaf binder, with pages, chapters, and sections coded in statutory form, the book is designed for later additions of material. Nimmer notes in the Preface that in its present state the volume "deals primarily with the theory of the First Amendment."[4] Although some applications of the theory are provided on particular issues, such as flag desecration and newsmen's privilege, "there is scarce mention"[5] of issues such as national security, obscenity, and commercial speech, which are planned to come later.

Before dealing with the substance of this work, there are a few problems of style worth mentioning. Although the prose is for the most part clear and lively, there are instances where the author belabors a point somewhat or writes as though the famil-

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1 M. NIMMER, NIMMER ON FREEDOM OF SPEECH (1984) (publisher's introduction flyer) [hereinafter cited by section and/or page number only].

2 *Id.*

3 *See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1948); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1971); F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981); L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 12 (1978).

4 *Preface*, at vii.

5 *Id.*

iar material under discussion is something brand new. An example of the former is his extended analogy to reckless driving when explaining the difference between ad hoc and definitional balancing.[6] An illustration of the latter is his handling of the doctrines of absolutism versus balancing.[7] Perhaps a reader who is entirely naive in the first amendment area would need such treatment, but it is hard to imagine such a reader making use of this sophisticated book.

There is also, on occasion, a bit of obscurity in the writing, notably in the section on the speech of government employees.[8] It is also not made immediately clear, although it becomes clear later, whether a set of principles offered for evaluating restrictions on speech[9] is intended as descriptive of present law or prescriptive of what Nimmer thinks the law should be. Further, the treatise is occasionally repetitive, perhaps due to the fact that some of the sections are rewrites of earlier law review articles that have not been thoroughly integrated with one another.

Finally, it is mildly disturbing, at least to this reader, to find a book published in 1984 still using the generic "he" and "men." I had thought that where authors fail to write in the unisex style, contemporary editors have their red pencils poised to make corrections. Apparently not yet, or not at Matthew Bender.

Proceeding to more substantive matters, I find that Nimmer's most valuable contribution to first amendment theory, enunciated in an earlier law review article[10] and elaborated upon and applied in this treatise, is his distinction between "anti-speech" and "non-speech" restrictions on expression—restraints which are provoked by the meaning of a message as against those which would be imposed on a particular mode or act of communication regardless of its meaning. This concept is used by Nimmer to clarify many difficult issues, among them the problem of so-called "symbolic speech" (or non-verbal expression), the question of time, place, and manner regulations, and the right to gather information.

Other especially noteworthy and useful contributions are his skillful reconciliation of the United States Supreme Court's decisions in *Rowan v. United States Post Office Department*,[11] *Bolger v.*

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6 § 2.03, at 2–19.
7 § 2.01.
8 § 4.09[D][1][c], at 4–98 to –99.
9 § 2.05[B], at 2–30 to –41.
10 Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973).
11 397 U.S. 728 (1970).

Youngs Drug Products Corp.,[12] *Lamont v. Postmaster General*,[13] and *Consolidated Edison Co. v. Public Service Commission*;[14] his enlightening analysis of performative speech;[15] his incisive explanation as to why the intent of a communicator engaging in symbolic speech should be of less concern to the law than the effect of the behavior;[16] his lucid discussion of flag desecration (one of the best treatments of that issue anywhere in current literature);[17] his persuasive analysis of restrictions on hair and dress styles (perhaps the boldest segment of the book);[18] and his thoughtful championing of the "incompatibility" standard for deciding when a public or quasi-public forum may be closed to the exercise of free speech.[19]

Although I found myself in broad agreement with most of what Nimmer has written, no book review would seem complete without a few quarrels regarding positions taken by the author. Let me identify a few points which I found unpersuasive. First, on the matter of defamatory speech, Nimmer's position is generally on the side of the present state of the law, a conclusion reached by measuring this kind of communication against the values of free speech which he identified at the outset of the treatise—the enlightenment function, the self-fulfillment function, and the safety valve function—and finding defamation to be wanting. Curiously, however, with defamatory speech, in contrast to other kinds of speech that he evaluates elsewhere, he neglects to measure the *restrictions* on defamation against his principles for testing anti-speech regulations, such as whether more speech would be an adequate remedy or whether the least restrictive means of control is being employed. Presumably he regards this as an unnecessary step in this particular balancing process because he finds the weight on the side of the speech interest to be so slight. But that does not appear to be an adequate reason for assuming, without evaluation, that the anti-speech interests are being protected in ways that are acceptable.

This example illustrates the hazards of segregating the several values of free speech and assessing each of them separately when weighing speech against competing interests, rather than

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12 103 S.Ct. 2875 (1983).
13 381 U.S. 301 (1965).
14 447 U.S. 530 (1980). These cases are discussed at § 1.02[F], at 1-25 n.58.
15 § 3.05.
16 § 3.06[C], at 3-46.
17 § 3.06[E][1].
18 § 3.06[E][2].
19 § 4.09[D][1][a], at 4-73 to 74.

operating from the premise that the various values underlying the first amendment, *taken in combination*, always give speech a strongly preferred presumption, no matter what its particular form or substance. The process Nimmer has followed in giving short shrift to defamatory expression is the same unfortunate process by which the Supreme Court has concluded that "adult" theatres and bookstores[20] and "indecent" language[21] are more easily outweighed by anti-speech interests than are other types of communication.

I also disagree with Nimmer, and thereby agree with his colleague, Steven Shiffrin,[22] on the issue of whether the *New York Times Co. v. Sullivan*[23] limitations on libel suits should apply to non-media speakers. Nimmer argues that defamations addressed to small groups of people are deserving of less first amendment protection than those disseminated by the mass media because, among other things, the possible enlightenment function of such speech is so minimal.[24] Yet, in what seems like a self-contradictory footnote, he asserts that although fewer people are enlightened by private than by media speech, the injury to reputation caused by privately communicated defamations may be as great as if addressed to the public at large if the audience includes "those who matter in the subject's life such as his employer, spouse, union foreman, pastor, commanding officer, etc."[25] It is difficult to understand how the potential for enlightenment can be dismissed in situations where the capacity for harm is said to be substantial. It seems more plausible to assume that the two possibilities would be directly correlated.

On the issue of rights of public access to privately owned and operated mass media, although I agree with Nimmer's conclusion that some recognition of such rights is compatible with the first amendment, I arrive there by a slightly different route. His rationale is that the problem involves competing claims of "speech" and "press"—in his view two differently based interests—and that a clearer perception of the appropriate balance to be struck would follow if the nature of those opposing forces were "more squarely faced."[26] My own belief is that speech and

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[20] Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
[21] Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978).
[22] § 2.05[C][1], at 2-53 n.138. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).
[23] 376 U.S. 255 (1964).
[24] § 2.05[C][1], at 2-54.
[25] *Id.* at n.141.
[26] § 2.08[E], at 2-127.

press are not bifurcated interests but rather one and the same, and that what is therefore at stake in the access-to-media controversy are two free speech claims vying with one another. Since I end up with the same Solomon-like solution as Nimmer does, there seems to be no practical difference which analysis one uses.

My next quarrel is not with a point of view but with a failure to pursue a position vigorously to its logical conclusion. In discussing government restraints on the gathering of information, Nimmer asserts that:

> [T]he validity of an anti-speech restriction upon information gathering should turn upon the nature of the communication that would be inhibited by the restriction. If the content of such communication would constitute "speech" within the meaning of the First Amendment, and if its dissemination would fall within "the freedom" guaranteed by the First Amendment, so that the communication per se would be protected, then the gathering of information in order to engage in such communication is likewise protected. . . .[27]

So far so good. But then in a footnote,[28] Nimmer makes reference to the case of *Garrett v. Estelle*,[29] a 1977 Fifth Circuit decision which denied a television reporter the right to film an execution that the print media were free to report. The author leaves his reader simply wondering whether this ruling can be reconciled with the principle he has enunciated for information gathering when logic would seem to compel an unequivocal rejection of the *Garrett* holding.

Finally, I take strong exception to Nimmer's defense—lukewarm though it may be—of the Supreme Court's decision in *Haig v. Agee*,[30] which upheld the revocation of Philip Agee's passport on the ground that his disclosures of the names of United States intelligence agents abroad had caused serious damage to our national security. Although Nimmer disassociates himself from the Court's contention that Agee's behavior constituted "action" rather than "speech" and believes that the first amendment issue cannot be thus skirted, he nonetheless concludes that: "[S]ince the First Amendment does not constitute a license to disclose any and all national security secrets . . . the passport could be revoked without violating the First Amendment."[31] Yet even if one concedes (which I would

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27 § 4.09[B], at 4–50 (footnotes omitted).
28 *Id.* at n.55.
29 556 F.2d 1274 (5th Cir. 1977).
30 453 U.S. 280 (1981). *See* § 4.09[B], at 4–51.
31 § 4.09[B], at 4–51 (footnote omitted).

not so readily do) that Agee's speech was problematic from a first amendment point of view, the revocation of a passport is a sweeping response that is difficult to reconcile with the principle that anti-speech restrictions must be no broader than necessary to serve whatever compelling interests the state may have.

Having thus exhausted the areas in which I disagree with Nimmer, I turn now to a number of points in his treatise about which I experienced some ambivalence. The first and most important, since it pervades so much of his last and longest chapter, is the unique twist he gives to the concept of state action within a first amendment context. Essentially, he argues that when the state is called upon to enforce restrictions against those who seek access to private property for expressive purposes (whether in a company town, a shopping center, on a television station or in a newspaper), and it invokes the law of trespass or any other coercive legal mechanism, this constitutes state action sufficient to trigger the claim of a possible first amendment violation. In other words, the first amendment may be called into service, though not necessarily with ultimate success, whether a restraint upon speech is initiated by the government itself in order to protect some alleged societal interest or is initiated by private parties who seek the aid of the state's police power to protect their own interests. As Nimmer acknowledges in a lengthy footnote consuming four full pages: "It must be said that this view of state action has generally not been invoked . . . by the Supreme Court in its application of the state action requirement under the equal due process and protection clauses [sic] of the Fourteenth Amendment."[32]

Nonetheless, there is a compelling logic to Nimmer's line of argument, and, perhaps because it ultimately drives him to the conclusion, congenial to me, that shopping centers should not be permitted to exclude unwanted speakers and leafleters, I am inclined to climb aboard. Yet one hesitates because there seems to be something a bit esoteric (or maybe just too unfamiliar) about the concept, and it does lead Nimmer to a highly dubious interpretation and prediction regarding the Supreme Court's decision in *PruneYard Shopping Center v. Robins*.[33] Nimmer maintains that the *PruneYard* decision, which recognized a state's right to grant broader protection under its own constitution to the exercise of free speech in private shopping centers than that afforded by the first amendment, must ultimately result in a holding that the federal protection for such

[32] § 4.09[D][2][*a*], at 4–103 n.311.
[33] 447 U.S. 74 (1980). *See* § 4.09[D][2][*b*][*ii*], at 4–117.

rights can be no weaker than that of the states.[34] I would suggest that this is more wishful thinking than hard-nosed prediction and that if Nimmer's state action analysis necessitates such a conclusion, there may be something wrong with that analysis.

Another part of the author's discussion of *PruneYard* and of shopping centers generally, however, struck me as unexceptionable and also immensely helpful in clarifying what the interests of private property owners are in wanting to exclude the speech of others from their premises. Says Nimmer:

> Perhaps the most central of these is the right to exclude the world, which is to say, a right of privacy over that domain in which a property interest resides. It is the right to privacy, derived perhaps from a property interest in the premises, but not the property interest per se, which explains why there is no First Amendment right to speak in or at the threshold of a private residence contrary to the occupant's wishes.[35]

"But," he goes on:

> [I]n the words of *Marsh v. Alabama*, "the more an owner . . . opens up his property for use by the public" the more attenuated becomes the privacy interest. On the streets and sidewalks of a company town, as in *Marsh*, there is no meaningful privacy interest . . . . [M]ust it not likewise be concluded that there is no meaningful privacy interest to be claimed on the streets, sidewalks, and other common areas of a shopping center?[36]

Having been so clear and unequivocal about shopping centers, Nimmer unfortunately vacillates when it comes to the territory around or within a freestanding individual store. First, he seems to express some sympathy with Justice Powell's concurring opinion in *PruneYard* which distinguished the large shopping center at issue in that case from other hypothetical freestanding stores or even smaller shopping centers.[37] Nimmer then turns around to note that:

> It may be argued that when privately owned premises consist of a commercial enterprise which by hypothesis not only permits, but actively invites the public's presence, whatever objection there may be to the intrusive presence of those engaging in speech activities, it cannot be an objection based upon loss

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34 § 4.09[D][2][*b*][*ii*], at 4-117.
35 *Id.* at 4-118 to -119 (footnote omitted).
36 *Id.* at 4-119 (footnote omitted).
37 *Id. See* 447 U.S. 74, 96 (Powell, J., concurring).

of privacy.[38]

Then, apparently uncomfortable with where that leads, Nimmer retreats and suggests that beyond privacy there may be "injury to other interests again derived from the property interest (but not the property interest per se) which could effectively counter a claimed First Amendment right."[39] For example, says Nimmer:

> [I]f the speakers' presence within the store introduces a discordant note that counters what is otherwise a homogeneity in atmosphere cultivated by the store owner . . . this in itself might be found to injure the use or economic value that the owner of the premises is entitled to expect by reason of his property status.[40]

Forgive the pun, but has not Nimmer now given away the store? For not only could, and likely would, any individual store owner consider all speech by outsiders to be a "discordant note" in an otherwise homogeneous atmosphere, but the management of a huge shopping center could make the very same claim. It might be somewhat more difficult to maintain that a large shopping center has, can have, or should have a "homogeneity in atmosphere" comparable to that of a small individual store, but it would certainly not be impossible to persuade a court to that position. And what about a small shopping center or a large individual store?

Returning once again to Nimmer's theory of state action, one can only admire his ingenious use of that concept to probe the Supreme Court's decision in *Columbia Broadcasting System v. Federal Communications Commission*.[41] Although the case ostensibly involved only the construction and application of a federal statute, Nimmer, using this theory, finds support for his contention that there is a limited *first amendment* right of access to the privately owned mass media, whether electronic or print.[42]

What the Court held in *CBS* was that the FCC acted properly in deciding that the network had violated the Federal Communications Act, which requires that "reasonable access" to the airwaves be made available to candidates for federal elective office, by refusing to sell time to the Carter-Mondale Presidential Committee as early as December, 1979 to launch its 1980 campaign.[43] The Court, in

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[38] § 4.09[D][2][*b*][*ii*], at 4–121.
[39] *Id.*
[40] *Id.*
[41] 453 U.S. 367 (1981).
[42] § 4.09[D][2][*c*], at 4–127.
[43] 453 U.S. at 373–74.

finding that the statute did not violate the free speech rights of the broadcasters, said that this: "[S]tatutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters."[44] What Nimmer does with this sentence is to seize upon the phrase "the First Amendment rights of federal candidates" and claim that the Supreme Court had suggested here that even if there had been no statute requiring access, there would still be a cognizable right of access to the airwaves based on the first amendment because of the government's involvement (hence state action) in excluding from use of the airwaves all but those who have been given licenses to broadcast.

Not content to rest there, Nimmer pushes the point even further. He claims that although the state action analysis becomes "admittedly more tenuous when one considers the privately owned print medium, where there is no comparable licensing system,"[45] and although: "[T]he Supreme Court . . . may well agree with the lower court decisions which deny the presence of state action when privately owned newspapers reject access claims from outsiders,"[46] there is a basis for believing that the Court may go the other way, given the phrase about "*First Amendment* rights" of candidates and the public in the *CBS* opinion. Indeed, Nimmer even envisions the possibility of the Supreme Court some day "ruling that the conventional letters-to-the-editor column is constitutionally required."[47] What pipe he has been smoking Nimmer does not tell us! I would like very much to join him in this fantasy but harsh reality compels me to assume that the Supreme Court's reference to "First Amendment rights" in *CBS* was more casual and metaphorical than Nimmer would have it. In fact, he himself acknowledges in a footnote that "[o]f course, it is possible that the Court meant merely to describe speech interests which underlie the First Amendment."[48]

The last point in this treatise which particularly attracted both my enthusiasm and my reservations was the author's critique of the standard used by the Supreme Court to determine when the government has impermissibly intruded on a person's right not to be forced to utter or disseminate views with which he or she is not in sympathy. As Nimmer reports, this issue has arisen in the context of Jehovah's Witnesses objecting to compulsory participation in flag

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[44] 453 U.S. at 397.
[45] § 4.09[D][2][c], at 4–129.
[46] *Id.* (footnotes omitted).
[47] *Id.* at 4–132.
[48] *Id.* at 4–128 n.418.

salute rituals in the public schools, union members objecting to the expenditure of their dues money for political causes they do not support, a shopping center owner objecting to a requirement that he allow others to use his premises to propagate views which he does not hold, and a Jehovah's Witness objecting to the display on his car of a New Hampshire license plate bearing the motto "Live Free or Die." In the license plate case, *Wooley v. Maynard*,[49] the Supreme Court drew a distinction between displaying on one's car a motto one finds objectionable—which the Court decided that a state may not compel a person to do—and the carrying of currency in one's pocket with the motto "In God We Trust"—a message which may also be objectionable to some people but which no one would assume they were espousing by virtue of their possession or use of that currency. The difference, according to the Court, is that in the first instance the message would be "readily associated" with the driver whereas in the second instance it would not be attributed to the user.

Nimmer, quite correctly I think, finds this to be an erroneous distinction. In response to the Court's conclusion that a motto on a license plate would be "readily associated" with the beliefs of the vehicle's operator, whereas the views of a leafleter in a shopping center would not be attributed to the property's owner, Nimmer points out that:

> [I]f anything, the distinction would appear to cut the other way. The public may be assumed to be aware that the placement of license plates on an automobile is not a volitional act, but is required by law . . . . [whereas] many members of the public would very likely assume that those engaging in speech activities on the premises of a privately owned shopping center do so with the consent of the center owner, and hence there may well be an assumption that the owner approves of the message conveyed.[50]

Even a flag salute by public school children, notes Nimmer, if done under state compulsion, "will not be 'readily associated' with the speaker if the compulsion is known."[51] Thus, since he believes, as the Supreme Court and I do, that school children should not be compelled to salute the flag, he rejects this standard as a viable basis for determining when the state may or may not compel a person to utter or disseminate a disagreeable message, and suggests that there

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[49] 430 U.S. 705 (1977).
[50] § 4.10[A], at 4–142 to –143.
[51] *Id.* at 4–144.

must be a better alternative. However, Nimmer does not clearly articulate what that alternative should be.[52]

The Supreme Court could have avoided this problem in *Wooley* if it had followed the lead of the court below which found against the state on the ground that Maynard had engaged in protected symbolic speech when he placed masking tape over the slogan on his license plate. The lower court held that the state had therefore violated his right *to* speak when it punished him for doing so.[53] It apparently never occurred to the three-judge district court to transform this into a right-*not*-to-speak case as the Supreme Court later chose to do.

Disposing of *Wooley*, however, as the lower court did does not solve the problem addressed by Nimmer in this section of his book. If we assume that the Supreme Court reached the correct result in the flag salute case, as well as in the license plate and shopping center cases, we must find a principle that will sustain those results. It cannot be that first amendment rights are sufficiently protected if there is an opportunity to disavow the message; for although that might take care of the needs of the owner of the shopping center, the plaintiff in *Wooley* also could have handled his situation, as Justice Rehnquist suggested in his dissenting opinion, with a bumper sticker that announced his disagreement with the slogan on the license plate.[54] It cannot be that first amendment rights are violated if one is merely compelled to disseminate or facilitate the circulation of objectionable messages of others, for then the shopping center case would have been incorrectly decided and we could also insist that "In God We Trust" be eliminated from our currency. Perhaps the correct principle should be that the following ingredients must be present in order for there to be a violation of the right not to speak:

1. The views which are uttered or the symbols which are displayed are distasteful to the communicator or the owner of the medium of communication, and the communicator or owner is nevertheless compelled by the state to engage in their utterance or dissemination.

2. There is a possibility that persons who see or hear the message may believe that it represents the views of the communicator or of the one who facilitates the communication.

3. There is some public action required by the state to give

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52 *Id.*

53 Maynard v. Wooley, 406 F. Supp. 1381 (D.N.H. 1976), *aff'd*, 430 U.S. 705 (1977).

54 430 U.S. 705, 722 (Rehnquist, J., dissenting).

the utterance visibility, such as participating in a public ritual, signing a public document, or posting a message on one's person or property—in contrast to such passive behaviors as the private possession or transfer of currency, riding on a public transit vehicle which bears distasteful mottos, or sitting quietly in a group where others are engaging in communicative behavior with which one is not in accord.

4. If the disseminator is an institution (such as a shopping center, broadcasting station, or newspaper) rather than an individual, there must be no feasible way to disclaim any endorsement of the message or to have the public understand that the views being circulated are not those of the facilitator of their dissemination. Individuals, on the other hand, cannot ever be expected to disavow, nor be burdened with the necessity of disavowing, their own utterances or their active participation in an utterance.

I must resist the impulse to indulge in any further rewriting of Nimmer's work. Indeed, there is little else that I would want to rewrite. His scholarship is faultless, his judgments well reasoned and well documented, and his commitment to a robust interpretation of the first amendment undeniable. He has enriched the free speech literature with this treatise, and we can eagerly look forward to the pages which are to be added to our loose-leaf binders in the future.