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Freedom of Speech

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BOOK REVIEWS.

FREEDOM OF SPEECH. By Zechariah Chafee, Jr., Professor of Law in Harvard University, New York: Harcourt, Brace & Howe 1920. pp. vii, 431.

It is difficult to discuss judicially a subject so highly controversial as "Freedom of Speech," and equally difficult to review, without bias, a treatise on this subject presenting conclusions that vary from those of the reviewer: the review becomes inevitably an exposition of the reviewer's favorite theories.

It has seemed expedient to make this statement at the outset, so that it may be understood that the reviewer of this book is fully conscious of his own bias, and asks indulgence if his review turns out to be more a statement of his own ideas than a fair comment upon the theories of Professor Chafee.

The fundamental liberties enumerated in the early amendments to the Federal Constitution are so generally taken for granted that we easily forget that it has cost "much blood and sweat," as Mr. Justice Holmes reminds us, to give them vitality. We hesitate to believe that their foundations are threatened; and because of this easy going assumption of security, a warning such as that sounded by Professor Chafee is entitled to the most serious consideration.

In the judgment of the reviewer, the book loses none of this primary value from what must nevertheless be reckoned as a fault, *viz.*, its very definite bias. Professor Chafee goes very far in his unwillingness to accept restriction of utterance. He seems to doubt the constitutional test of the Supreme Court as announced by Mr. Justice Holmes in the Schenk Case, *viz.*, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." He would allow no restrictions on the right of free speech and free publication, except such as might be regarded as illegal under the law governing solicitations and attempts. He says (pages 38-39), "Thus our problem of locating the boundary line [that is, the constitutional line] of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts." And yet he concedes (pages 170-171) that, "A man who talks scurrilously about the flag commits a crime,

not because the implications of his ideas tend to weaken the Federal Government, but because the effect resembles that of an injurious fact, such as trampling on the flag, which would be a public nuisance and a breach of the peace."

But it is clear, as Professor Chafee admits, that even the rule which he advocates may be variously interpreted and applied. What is meant by his word "close?" And how are we to determine whether words "will give rise to unlawful acts?" Professor Chafee would seem strongly disposed to disregard the "tendency" of words, and yet tendency must necessarily be considered if we are to punish words "which will give rise to unlawful acts," unless the illegality of such words is only to exist when they are successful. We do not understand that Professor Chafee advocates such a rule any more than a rule which would punish words inciting to crime only in the event crime is committed.

The same indefiniteness inheres in Mr. Justice Holmes' test, since intelligent persons will differ with one another as to whether words create "a clear and present danger" of bringing about the substantive evils that Congress has a right to prevent. The matter, therefore, becomes a question of judgment, a fact that tends to explain the bitterness of the controversy and the inconclusiveness of the discussions, since the application of the rule depends on the relative emphasis given to the right of free speech as opposed to the duty of obedience to law.

Undoubtedly freedom of speech, while a recognized part of individual liberty, is important also because of its social value; but it must be conceded that it involves social danger, since it may give rise to unlawful acts or create a clear and present danger thereof. The question of the restraint that should be applied becomes, therefore, a matter of individual opinion, except so far as the Constitution interposes legal barriers.

But Professor Chafee has intended and accomplished much more than a discussion of the constitutional limitations upon legislation affecting freedom of speech; and while the bias which seems apparent to this reviewer—probably because it differs from his own—leads to an unduly restrictive theory of the *power* of the state to deal with utterance and writing, his advocacy of a liberal policy in respect to freedom of discussion is developed with force and thoroughness.

However, it would have added to the value of the work if the

author had been a little more judicial. Without perhaps any conscious purpose of doing so, he leaves the reader with the impression that, in his judgment, all the persons punished under the Espionage Act and similar laws, were high-minded apostles of liberty, grievously opposed by rigorous laws. There is also a tendency to lay undue emphasis on minor matters, such as the light-hearted comments of Judge Clayton in the Abrams trial. Such an attitude on the part of a judge is not inconsistent with the most careful and considerate administration of justice, as Mr. Justice Darling has shown in England. And it sometimes has the merit of divesting a situation of the theatrical importance which attorneys of a certain type seek to throw around a case of public interest.

The author recognizes that the restrictions which may properly be enforced in war time differ from those which are appropriate in time of peace, not because the constitutional guaranty is in abeyance, but because in such a crisis words may create a clear and present danger, which results from the circumstances under which they are spoken; but he seems to find merit in the rhetorical suggestion of the Supreme Court in the Milligan Case, that a country preserved at the sacrifice of the cardinal principles of liberty, is not worth the cost of preservation. Of course this would be true if the sacrifice were permanent, but since the liberties of the citizen necessarily depend on the preservation of the government, it is obvious that a temporary restriction of some phase of liberty may be well worth while in order that liberty itself may be ultimately and permanently preserved. The advocates of free speech insist that error should be met with truth, and that time will destroy error, but they overlook the fact that, when war is flagrant, issues cannot abide the slow processes of time. Immediate and definite action is essential in order to preserve the state.

Freedom of speech is only one phase of the liberty of the individual. That liberty is made up of many elements all of which are in jeopardy of being irrevocably lost in the event of national defeat. To insist on a relatively unlimited freedom of discussion in war time is to disclose a lack of a sense of proportion—to jeopardize the whole of individual liberty for the sake of a part only. Nor is it fair, to say that this begs the question, that it assumes the point in issue, *viz.*, whether, in the circumstances, speech is dangerous. This is a question of fact, and a liberal should be willing that it be resolved in accordance with those methods which are supposed to ascertain

such facts and to give effect to what is "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." It is too soon to forget the denunciation of the courts for their failure to recognize such considerations where they have had under discussion the liberty of minorities, involving other fundamental rights.

It will not do to refer to the great figures of the past who, having disregarded the law, have led revolutions successfully. No one will deny the indebtedness of the race to these men. But no government can concede the right of revolution. It has been created to accomplish certain ends and by virtue of the fact of its creation, it is endowed with the right of self-preservation. The insistence on a single phase of individual liberty such as freedom of speech, which is so ably developed by Professor Chafee in this book, only serves to throw into relief the attitude of those who, by seeking to maintain the country, were endeavoring to preserve in permanence, not only this heritage but also the heritage of the other liberties safeguarded in the Constitution. It need not alarm us if some punishments were severe. A people that could maintain a calm and judicial attitude in the crisis of a great war would never win it—they would not deserve to. "Some play must be allowed for the joints of the machine."

Professor Chafee has rendered a very real service in his thorough exposition of the tendency to carry over the restrictive legislation of the war into peace conditions. He will find far less disagreement with his views here than with those which relate to the war emergency. There is every indication that these laws are rapidly falling into disuse. Of course, it is of doubtful wisdom to carry on the statute books laws that are not enforced, and clearly many of these should be repealed.

The book includes an interesting chapter on "The Deportations," which are discussed almost wholly from the viewpoint of policy. The suggestion that the complacent attitude of the country toward the deportees was attributable to racial dislike overlooks, we believe, the real reason. To the reviewer's mind, it seems clear that the explanation of this attitude on the part of the community is found in the popular belief that the foreigner who comes to this country and does not like what he finds here should get out. It is difficult to see what just cause he has to complain of a situation into which he has precipitated himself.

The man into whose house a wayfarer has come for shelter from a storm will have difficulty in sympathizing with his uninvited guest if he begins complaining that the house is insufficiently heated and the furniture uncomfortable. And the owner of the house will perhaps be pardoned for suggesting a departure if the stranger intimates the intention of pulling down the house and making it over to suit himself.

Heeding the principles of the book, we have ventured to indulge in a reviewer's freedom of speech, realizing that Professor Chafee is estopped by his own principles from calling us to account for our conclusions. But, in addition, the fine good humor with which he has expounded his very definite views secures us, we know, his full dispensation.

—Henry Wolf Biklé.

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