

## BOOK REVIEWS

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**Primer of Intellectual Freedom.** Edited by Howard Mumford Jones. Cambridge: Harvard University Press, 1949. Pp. xv, 191. \$2.75.

In one sense it would be difficult not to be enthusiastic about this book. It is an anthology<sup>1</sup> of important writings on free speech and intellectual freedom in the Anglo-American tradition, and thus poses for review purposes something of the problems that, I imagine, would be raised by a new edition of *Hamlet*. Would one comment once again on *Hamlet* or merely on the advances made in the new edition over prior editions?

The editing achievements can, I think, be disposed of quickly. It is perhaps unfortunate that the small but useful function of gathering well-known and fairly accessible items and putting them conveniently and inexpensively under a single cover has to appear, because of modern publishing habits, in the format of a name book. In any event Professor Jones has kept his role to a minimum. He has selected fifteen items, edited them slightly, added one paragraph introductions that are largely a statement of the factual occasion calling forth the particular item, and has introduced the book with a short popularized statement of the issues today, which is dated happily July 4, 1949. The items are arranged in reverse chronological order starting with five very current items and going back through time to Bacon. I can offhand think of no persuasive reason for this sequence since one of the fascinations of such a compilation is to listen for the echoes of the early writers in the contemporary rhetoric. Perhaps it was the desire to catch the reader's attention with the immediacy of the issues. Finally Professor Jones has added the title and thus leaves as a challenge the label, *Primer*; if these are the materials for a primer on intellectual freedom we can only hope that some day Professor Jones will indicate what would be the content of the advanced courses.

The selection of the materials is good. There are the inevitable Milton, Jefferson, Mill, Holmes, and Chafee and these occupy close to half of the total pages. There is the interesting essay of Walter Bagehot, *The Metaphysical Basis of Toleration*. There are the five current statements; that of Chancellor Hutchins before the Broyles Commission needs no recommendation in these quarters, and that of Grenville Clark in answering an irate Harvard alumnus is also good to have preserved in book form.

Finally there are three essays somewhat tangential to the political theme of

<sup>1</sup> Professor Jones, who is a member of the English faculty at Harvard, calls his volume a casebook. This may suggest something about the pervasive influence of Langdell at Harvard in 1949.

free speech, but within Professor Jones' title. John Morley's *Intellectual Responsibility and Political Spirit* centers on the responsibility of the individual to himself to think matters through regardless of the advisability of voicing them or of the impracticality of realizing them in action. A chapter from Karl Pearson's *Grammar of Science* is exuberant about the potentialities of free scientific inquiry and defends it vigorously against its chief enemy, which turns out not to be the state or society, but metaphysics and philosophy. And the first piece in the sequence is an excerpt from Bacon's *Advancement of Learning* in praise of the dignity of learning, a refrain which Milton picks up in defending, as part of his argument, the utility of promiscuous and wide reading. Thus, the reader is likely to find along with several old friends some items he has not hitherto read and will be grateful for.

Any such collection necessarily leaves out items others would have included. My own chief regrets are the absence of Socrates, Thoreau, Brandeis, and, assuming publishing amenities would have permitted use of so recent a book, Meikeljohn. And it might have been well if Professor Jones had seen fit to include a few men less enthusiastic about the merits of free speech.

While the content of the book is thus not quite limited to the political aspects of free speech, Professor Jones makes clear that he intends the book as a touchstone on issues of the day such as the Un-American Activities Committee, the Communist teacher, and legislation against subversives. Although there appears to have been too much effort to give the book a contemporary and topical look, it will serve well its avowed purpose. And it will do more, since the abiding value of any such collection is in its invitation to think through again its problem.

It is here that the book has special relevance to the lawyer and the student of law. It can stand being said again that the one specialty all lawyers should have is that in the basic civil liberties, and of these free speech is perhaps the first. It is questionable whether any law school has as yet given the matters a sufficiently central place in its curriculum. In fact the free speech issue is in many ways a touchstone too for issues of legal education. It compels the conclusion that matters other than those judged by the incidence of litigation or the current interests of the bar, important as these are, must be prominently included. It affords an easily accessible instance of how a legal problem integrates with other disciplines, such as those of Mill, Milton, Bagehot. It affords an equally good instance of how the legal problem almost imperceptibly slides into questions of society pressures and of sanctions other than those of the state. And at a time when we are jittery about explicit value judgments, it suggests that we can, however mysterious or unsatisfactory the value making process may appear to be when viewed abstractly, find on particular issues such as this rational, or at least deeply satisfying, preferences.

The lawyer and the law are also in a position to make an essential contribution to free speech, one suggested by the limitations both of this treatment and Mr. Meikeljohn's. I do not mean the great practical contribution of being the

spokesman at critical times as was Mr. Hughes or Mr. Willkie. I mean simply that the legal experience adds something to the theoretical problem itself. First, it adds a note of conservatism because to the lawyer the line between speech and action does not appear so firm; it is no accident that the clear and present danger formula has its roots in notions of attempt in criminal law. But, second, it adds a compensating caution about the wisdom of regulation through law since it is the lawyers' special province to realize that there are special difficulties in framing laws with precision in this area, that speech is more ambiguous than action, that a "penumbra" theory of legislation should not apply to basic liberties, and that not only are laws regulating speech too likely to catch persons other than those intended, but also they are too likely to deter persons other than those intended. Finally it is only in the day to day experience of the law that the complexities of application of the principle are felt whether it be an issue of obstructing the draft, obscenity, teaching the overthrow of government by force, postal subsidies, sound trucks, group defamation, contempt, picketing, regulation of radio, fighting words, the Taft-Hartley affidavit, or immigration.

It is the lawyer too who should report to the community on the current scope of constitutional protection. The fact that the basic free speech precedents are not scrutinized often enough by the hard headed technicians has perhaps occasioned undue applause as to the probable meaning of the judicial tradition. In this connection Mr. Meikeljohn's challenge to "clear and present danger" was most salutary.<sup>2</sup> I do not think that a dispassionate reading of the Supreme Court precedents, read as other cases are read, affords any grounds for great congratulation on the way the First Amendment has withstood fire.<sup>3</sup>

This is not the place for an analysis of the complexities of free speech today, but the materials in the book, of course, raise a host of considerations that press for attention. Is the issue of the wisdom of regulating speech simply the issue of regulating any conduct or does speech demand an immunity from regulation not claimed for other conduct? And if so, what is the distinctive characteristic of speech? The best answer, I think, is found in Mill's refutation of the argument that regulation of speech carries no greater assumption of infallibility than does the regulation of anything else. Do we believe that truth wins out in a fair fight; and if we do not claim to know whether it does or not, can we still defend free speech? Is Bagehot right that once force is brought in we substitute a game of chance for a game of logic? Can free speech be analyzed apart from a political theory, in particular a theory of democracy?<sup>4</sup> Must we be making some

<sup>2</sup> Mr. Chafee makes an effective defense of the test and Justice Holmes and Mr. Chafee. Review of Meikeljohn, *Free Speech: And its Relationship to Self Government*, 62 *Harv. L. Rev.* 891 (1949).

<sup>3</sup> I doubt whether even Mr. Chafee's superb book corrects this, although it is a first rate legal analysis. Mr. Chafee's enthusiasm for Holmes is so contagious, his sense of how much worse things could be and have been is so perceptive, and his style is so delightful, that we end up feeling very good about the whole thing.

<sup>4</sup> It is a strength of Mr. Meikeljohn's analysis that the case for free speech is directly tied to a theory of self-government. And Mill and Bagehot seem to have had a similar dependence

assumptions about the minimum intelligence and good will of the audience which is to be allowed to hear; and if so, do not all positions on free speech turn on the size of the elite that is permitted to hear everything? Does not a totalitarian government also use a clear and present danger test? Is the case for free speech ultimately that it is a necessary evil, or is error itself of affirmative value? Is not the controversy in a particular instance more about the degree of danger in that instance than about the degree of danger demanded by the principle?

The last question suggests one final and disturbing point. Why are the defenses of free speech, even the coolest of them, so rhetorical?<sup>5</sup> The point is disturbing because it suggests that this apparently secure value judgment may be hard pressed after all. It arises perhaps from the familiar dilemma that no one seeks to protect all speech, and yet we wish to give it a significantly distinctive degree of protection. In the attempt to protect our position from those felt to be less tolerant, there is the disposition to retreat into epigram and exhortation in stating the principle and the tendency to win handily all cases except those which in fact arise.

This book, however modest the editorial task it performs, is welcome and useful because it makes more accessible important materials on what will always be one of the best of issues.

HARRY KALVEN, JR.\*

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**Courts on Trial.** By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. xii, 441. \$5.00.

A few years ago, a learned layman asked a serious-minded lawyer friend if he could give him a quick definition of the "judicial process." The lawyer obliged by defining it as "the ascertainment of the *facts* in a legal dispute, and finding and applying to them the appropriate *rule of law*." "That," countered the layman, with a facetious twinkle, "is 50% more than one of your distinguished colleagues would care to admit. For I have just finished reading Jerome Frank's *Law and the Modern Mind* in which he contends that the 'rule of law' is *always* so uncertain that it can never be found. Therefore, I take it, the 'judicial process' is just the ascertainment of 'facts'!"

I wonder what the layman would say if he read Jerome Frank's latest book, *Courts on Trial*, in which it is now contended that *facts* in a legal dispute are so uncertain that they can never really be found. "My goodness," he might be

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in mind. On the other hand Milton is able to make a brilliant defense without recourse to the role of speech in the democratic process, despite the fact that he appears to regard the mass of mankind unflatteringly. Chafee questions whether Meikeljohn does not push this so far as to undermine the protection of scientific and artistic speech, which is without political significance.

<sup>5</sup> The *Areopagitica* remains the arsenal for rhetorical arguments. We find repeated today such refrains as that we are copying our enemies; the regulation is an insult to the country, the youth, the teaching profession; the regulation is impractical; that a first step here will lead at once to a hundred others, etc.

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