BOOK REVIEWS

The First and the Fifth. By O. JOHN ROGGE. New York: Thomas Nelson & Sons, 1960. Pp. 358. $5.00.

The dust jacket of this book promises discussion of something old and something new. The new is "Some Unenumerated Rights." Among these rights are freedom to travel, freedom of knowledge, and the right to privacy. They get slight attention. The primary conclusion seems to be that the ninth amendment will be of little assistance in furthering their establishment. Mr. Rogge is undoubtedly correct in this conclusion, but his discovery is unlikely to occasion any widespread wonderment. He does suggest that the Supreme Court has some molding power in the formulation of such rights, and that the existence of the ninth amendment, rather than anything it says specifically, may assist ". . . to make the document as timeless as possible."[1] He tritely warns that the molding may go too far; that in the guise of construing the Constitution one may be ". . . engaged in amending it."[2]

I think it not unfair to Mr. Rogge to observe that he says nothing either new or valuable about "unenumerated rights." It would, however, be unfair to suggest that even the author regards his discussion of those matters as important to his basic theme. Only forty pages of over three hundred are devoted to them. He does not even bother to come to any particular conclusions about them. It is my impression that he wrote this book, or perhaps more accurately assembled it,[3] out of high concern about some rights so well enumerated that the numbers have passed into common language—"taking the fifth" is only too well known.

Mr. Rogge has elaborately researched and documented his treatment of what he calls the rights to speech and to silence. Still, it is hard to uncover anything genuinely new in that process. The history has been intensively mined many times by highly qualified men. Mr. Rogge, however, draws different conclusions from that history. In his view, the first amendment restrains the federal government from interference with speech in any form, and with-

[1] P. 304. He neither says why this is good, nor observes that his supporting quotation from Justice Marshall says something different.

[2] P. 304.

[3] All the important parts first appeared as law review articles and have been brought up to date for this publication. The only significant change for the worse is that the article footnotes have been transferred to the back of the book and the numbering removed from the text. As a consequence, they are wholly unusable. Trial and error finally disclosed that the reference "P. 12, l. 21 . . . ." was to the first citation in the 21st line of page 12. Forty-three pages are entirely wasted in this manner.

out any exceptions—"speech is as free as thought" itself.[4] To him, it matters not how vigorously the idea is stated, or how calculated it is to bring about substantive harms; the idea can be shouted from a rostrum or stated philosophically in a seminar. The *Yates*[5] distinction is bad, and should be abandoned. Nor is it permissible to qualify the right by discount formulae or clear-and-present danger tests. The famous *Schenck*[6] reservation about the man who shouts "fire" in a crowded theatre is unfortunate; that conduct is indeed punishable, but because it is conduct, not speech. Neither advocacy nor conspiracy to advocate can be punished except as part of unlawful action; and then it is the action, not the words, that justifies the punishment.

The last proposition suggests that Mr. Rogge adopts the rather conventional notion that speech is protected in order to further the transmittal of ideas. But he is as damning of obscenity controls as he is of restraints on political speech, and makes no qualifications about "redeeming social importance."[7]

In short, there is absolutely no federal control over speech. This conclusion rests less upon the first amendment than upon the proposition that there simply is no federal power over speech at all. He is concerned not with measuring what congressional power was taken away by the first amendment but with demonstrating that no power was ever given Congress in the first place.

I am sure that Mr. Rogge does not like the consequence, implicit in his argument, that the states do—so far as the federal constitution is concerned—have power to restrain advocacy as well as action, and sedition, and prurience. But he is faithful to his history as he finds it, and expresses the hope that the states will learn to restrain themselves.[8]

I would like to think that the free speech clause is "incorporated" in the fourteenth amendment. I reluctantly agree that it is not. Could I ignore history, or remake it, I would choose the very opposite of Mr. Rogge's position. I could endure the loss of the first amendment restraint on Congress if I were assured that at least its rough equivalent were contained in the fourteenth.

Writing about the fifth amendment right to silence, Mr. Rogge expresses satisfaction with the Warren Court's treatment of the problem of coerced confessions. But he does suggest that preoccupation with use of the fifth amendment by the guilty, and undue emphasis upon the merely "incidental" function of protection of the innocent who become circumstantially implicated, have obscured the more important purpose of the amendment. History, as he reads

[4] P. 10.

[5] Yates v. United States, 354 U.S. 298 (1957).

[6] Schenck v. United States, 249 U.S. 47, 52 (1919).

[7] See Roth v. United States, 354 U.S. 476, 481 (1957).

[8] Although far removed from his discussion of state power over speech, this seems his only means of restraining state action. P. 274. He does suggest that this is "within certain limits." But he has denied the only known source of federal limits and suggests no alternative source.

it, compels the conclusion that the right to silence includes the right not to betray one's confederates. He condemns the *Rogers*[9] rule of waiver, not on the usual ground that it prevents us from getting information to which we are entitled, but on the broad ground that we are not entitled to the information.

Some years ago Dean Griswold took up the defense of the privilege against self-incrimination when it was under bitter attack.[10] Much of his argument was based upon the point Mr. Rogge here rejects as incidental—that it protects the innocent as well as the guilty. Almost concurrently with Mr. Rogge's expression of his views, Dean Griswold has agreed that justifying the privilege as protection for the innocent was a "mistake."[11] Yet a vital difference between their views remains. Dean Griswold still thinks, as I understand him, that the constitutional privilege does not extend to protect others. He holds only that the failure of our society to grant to political thought and association the protection which they deserve justifies occasional instances of abuse of the privilege. Not so Mr. Rogge. He would grant the privilege to be silent as a matter of right, compelled by the constitution and supported by history. He does not even limit his position expressly to inquiries into beliefs and associations, although the context makes it apparent that this is where he thinks it most important.

The privilege we know today is a truly remarkable extension of what the constitutional language and history would justify. I doubt that we could accomplish it again if we had to start from scratch. But could I make the system over, I would not want to go as far as Mr. Rogge. In operating the system (as distinguished from re-ordering it), I would be obliged to take into account what seems to me his strongest argument. Do we ever—whether from an embezzling bank teller in a criminal prosecution or a political deviant before a congressional committee—get useful and reliable information as a result of ordering a man to answer? We usually get perjury. We often have gotten the satisfaction of punishing him for not answering. That kind of satisfaction we are ashamed to admit and should be unwilling to take.

Mr. Rogge is very bold. I must conclude, for myself, that on his major thesis—that both speech and silence are beyond the power of government to control—he is baldly wrong. Yet it is a good book to read, and anyone interested in these freedoms (and who cannot be?) will be rewarded by reading it with care. Readers probably will not "buy" his history, but they will admire the way he adheres to it, accepting the bad inferences along with the good. For example, although he protests immunity acts and would have none of them (at least apart from what he calls economic crimes), he finds them to be constitutional because history sustains them. Readers will also be impressed

[9] Rogers v. United States, 340 U.S. 367 (1951).

[10] GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

[11] Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216, 223 (1960).

with some of his lesser arguments, such as that the Immunity Act of 1954 is invalid because it requires a federal judge to exercise nonjudicial functions. I have not discussed those arguments, good as most are, because Mr. Rogge thinks, as do I, that he must stand or fall on the history. For myself, I think he fell. But in the process he does something to restore to respect rights which, if founded in history, speak of something greater still—the inviolability of the individual. Others have observed the paradox of throttling our freedoms under the guise of defending them. In a similar contradiction, Mr. Rogge has written a quite wrong good book.

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Cases and Materials on Torts. By CHARLES O. GREGORY and HARRY KALVEN, JR. Boston: Little Brown & Co., 1959. Pp. 1309. $12.50.

Cases and Materials on Torts, edited by Professors Charles O. Gregory and Harry Kalven, Jr., is an exacting and provocative collection of cases and excerpts from torts literature for use in the classroom. This review is limited to observations that may be of assistance to the torts teacher in search of a more effective teaching vehicle. The book is not for those who, because of time restrictions or suspected deficiencies in student sophistication, feel that class work must be restricted largely to a bare exposition of tort rules and doctrines. *Gregory & Kalven* can be used effectively only by the teacher who has the opportunity to probe deeply and who enjoys a degree of confidence in the capacity and industry of his first-year students. This book promptly goes behind the scenes and stays there.

Before turning to Gregory and Kalven's organization, a word about the types of material and the mechanics of presentation used may be appropriate. The profound line of attack that the editors have developed could not be attempted within available time limits without a diligent eye toward the selection, intermixture and ordering of materials. Teachers accustomed to the usual parade of cases followed by rather spare footnotes may be struck by the editors' extensive resort to excerpts from the periodical literature. So much of this material is compressed within the book that a casual examination could give the impression that the 1300 page volume is somewhat too long for effective use. But further consideration makes it obvious that much of this same material would be assigned as collateral reading by most teachers using a less voluminous casebook. For this reason a net saving in time for the conscientious student is actually effected, because the editors have presented only those passages which bear directly upon the problem being considered at the time. If any criticism is to be made here, it would be that there may be too few cases, and that many of those which are presented have been over-severely edited. This is not a book that stresses case analysis.