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CHAFEE ON LAW AND FREEDOM OF SPEECH

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ZECHARIAH CHAFEE has long been one of the country's leading authorities on civil rights. As such, his influence has been, to some extent, impossible to measure. A brief description of his activities, however, might introduce him to those who are not familiar with his work.

Professor Chafee taught at the Harvard Law School from 1916 to 1950. From 1929 to 1931 he served on the Wickersham Commission which reported on the prevalence of "third degree" methods in law enforcement. From 1943 to 1947 he served on the Commission on Freedom of the Press. In March, 1948, he was sent to Geneva as one of five delegates from the United States to the United Nations World Conference on Freedom of Information. In 1952 he received the Stephen A. Wise Award from the American Jewish Congress for his work in civil liberties. Before his death in 1957 he had written the following books, among others: *Blessings of Liberty, Free Speech in the United States, Government and Mass Communications,* and *The Inquiring Mind.*

It is difficult to place the work of Professor Chafee in any particular school of thought. His firm belief in the common law prevents him from being classified as a follower of Holmes, Dewey or Maritain. Yet, his firm belief in the common good as one of the purposes of the state prevents his being classified as a legalist or positivist. If one were to coin a phrase for his type of thinking, he might be called a believer in a "moral-historical progressionism." The two chief elements in this belief are (1) a belief in the wisdom of the past and (2) a belief in some type of moral code.

The belief in the wisdom of the past is a belief that our Anglo-Saxon legal heritage in civil rights is an outgrowth of a long trial-and-error process, in which unsatisfactory solutions to civil rights problems have been discarded. This does not, of course, mean that what we now have is

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the best obtainable, for improvements can always be made. However, the result of centuries of experimentation cannot be ignored. There exists a collective wisdom of mankind that is passed on from generation to generation, which we would do well to heed.

Chafee's belief in a moral code is not as explicit as some would like. There is, he believes, a way in which men should act that transcends mere expediency. The wisdom of the past is simply man's attempt to define in practical, not abstract, language what that code is. As man comes to understand the code's application more thoroughly and as a more thorough application of that code becomes possible, the wisdom of the past will be modified accordingly. What we have then is a continuous interpretation of the moral code which tends to improve as time goes on.

This leads us directly to the nature of law. If what has been said is true, then one cannot hold that the lawmaker concerns himself only with making or discovering the law. If the law is only discovered, then the part that men play in the process is negligible. If the law is created, then it is made from nothing—no natural law or moral code seems to apply. Chafee describes these two conflicting views. Concerning the view that law is only discovered he says:

> The law is like a partially explored continent which is always there and which judges are gradually mapping out by their decisions. A particular judge's personality does play a part but it does not affect the real rules of the law. It merely influences the accuracy with which his written opinion describes this law outside himself, just as one mapmaker may explore farther than another or record what he sees with a greater skill. For example, a judge may confuse two legal doctrines that are really distinct, but the law that exists somewhere stays the same whatever the judges do.[1]

This had been the position of Blackstone and many others. On the other hand, there is the position of such men as Holmes and Austin, described by Chafee in this way: "The law is like a skyscraper under construction and never finished. The judges gradually put up some beams as they wish; the legislators gradually put up other beams as they wish. All law is built by human beings including judges."[2] To hold either one or the other of these beliefs, according to Chafee, is unrealistic. Each position has some truth in it. As he says:

> The skyscraper theory recognizes the personal element in decisions. . . . Judges like to talk as if their decisions were wholly uninfluenced by independent factors. Yet when they discuss the decisions of a great judge whom they admire . . . they recognize an element of creativeness in that man's work. The legal rules which a great judge declares would be different if they were declared by a lesser man or indeed by some other great judge. We cannot get outside of ourselves to do our thinking and each of us inevitably puts something of himself into the general principles by which he shapes his conclusions about a set of facts, even undisputed facts.
>
> On the other hand, law is very much more than the fiat of any single judge or group of judges.... If it were only that, citizens would have little reason for submitting to the rules of the common law except the fear of punishment for disobedience. For the most part, men obey the law without litigation or accept quickly the outcome of litigation because they feel that law is the embodiment of certain generally recognized norms outside of any single individual. It is their rational recognition of the objective truths and values in law which mainly impose the

[1] Chafee, *Do Judges Make or Discover Law?*, 91 AM. PHILOSOPHICAL SOC'Y PROC. 406 (1947).
[2] *Ibid.*

obligation to obey the law.

Therefore it is legitimate to reconcile the two sides of this centuries-old controversy by saying that the judges and legislators make law out of what they discover, and that law is the will of [these men] . . . trying to do what is right.[3]

It might be noted here that we are not discussing such minor governmental regulations as those requiring us to drive on the right side of the street, to register before voting, or to acquire a building permit before constructing a home. No one would question that these are and should be man-made laws. Rather, we are discussing the enunciation of such fundamental laws as those relating to the right to educate and raise children, the prohibition of libel and the guarantee of religious liberty. The two components of this basic law, then, are a natural law and a legalistic structure built upon the natural law so that it may be applied and utilized. Both of these elements must be present.

The accumulated wisdom of the past is handed down to us primarily in our constitutions. Momentary expediency must never usurp the more basic principles of governmental life. For Chafee, "short time aims of the people and their elected representatives must give way before the long time aims of the people as found in the Constitution."[4] The law is more than the present expression of the will of the people. He agrees with Burke that government is "a partnership between those who are living, those who are dead, and those who are to be born."[5]

Professor Chafee is far from propounding a new idea. His is basically a reiteration of our common-law background without the historical limitations of the common law. It does not present a merely philosophical approach to political society, but rather a practical-philosophic approach. It recognizes that the state can never be considered abstractly, that is, apart from its agents, for the agents of the state directly influence all the actions of the state. It could conceivably be argued, for instance, that the state has the power to censor ideas, if one were to proceed by abstract reasoning. But when it is realized that men, not angels, would have to be the censors, and that men are imperfect creatures, it becomes apparent that the best policy is for the state to keep "hands-off" the free flow of ideas. This will be discussed at greater length later, but the point should be made that the range of activity that the state may rightfully engage in is limited not only by the nature of the state, but also by the nature of man who must, of necessity, be the agent of the state.

While the state is limited by its own nature and the nature of its agents, it is also restricted by the nature of the people within its jurisdiction. The purpose of law is to provide for some sort of common good and to maintain a legal order within existing society. "The people," Chafee once observed, "cannot be legislated into saint-hood." Elsewhere he added that "one of the main values of law is that it crystallizes existing standards of conduct and makes more people aware of those standards, so that compliance becomes habitual."[6] As a postscript to these remarks it might be pointed out that the law should

[3] *Id.* at 419-20.

[4] Chafee, *Charles Evans Hughes,* 93 AM. PHILOSOPHICAL SOC'Y PROC. 276 (1949).

[5] CHAFEE, THE BLESSINGS OF LIBERTY 50 (1956).

[6] Chafee, *Possible New Remedies for Errors in the Press,* 60 HARV. L. REV. 1, 27-28 (1946).

be neither arbitrary nor arbitrarily applied. Chafee is opposed to discrimination, whether it is based on race, creed, color, sex or nationality. He is also opposed to guilt by association and discrimination because of non-conformity to political and social beliefs.[7]

The type of government which Zechariah Chafee believes is best suited for mankind, at least in the developed West, is a democracy, since a totalitarian regime is contrary to natural law. Only in a democracy can totalitarian governments be avoided. Only the people themselves are able to determine their own good since they alone have the necessary collective wisdom. However, there exist many forms of democracy. In fact,

> the essentials of democracy are plainly compatible with a wide range of political structures—republics or constitutional monarchies . . . nations with a permanent executive officer like our President or executive officers chosen by the legislature like the British Cabinet, with or without a written constitution, with or without judicial power to invalidate statutes. . . .[8]

The collective wisdom of democratic peoples, however, must not be selfishly used. It is a trust the electorate holds for the entire nation.

> Since the electorate is always smaller than the whole body of persons affected by government, it follows that voters, like legislators, are representatives. They do not act merely for themselves, but for others—the living who cannot or do not vote, the dead, the unborn. The voter, like the legislator and the officeholder, is a trustee for the public. Like them, he has duties as well as rights. . . .[9]

In order to make this political system work, however, the truth must be known, for without truth democracy will collapse. "Experience proves," Chafee says, "the necessity of a *constant process of open debate* if a free and democratic government is to function effectively. Satisfactory public opinion in a crisis is impossible unless both sides can present their contentions. . . ."[10] For Chafee, the worst thing we can do in time of war is what we did during the First World War—gag the people under the guise of national defense. He cites dozens of examples of injustices then perpetrated upon the American people in order to show that the most innocent law dealing with freedom of speech can, and will, be interpreted to stifle free speech.

Only through an abundance of inquiring minds among the people can the baffling problems of democracy be solved. The first amendment is much more than a prohibition of legislation against free speech. It is also "a declaration of national policy in favor of the public discussion of all public questions."[11] It must be seen as both a negative and a positive force on the nation. He reminds us also that free speech "helps us to make up our own minds on issues about which, previously, we did not care one way or the other. Suddenly we realize their importance and the necessity of taking sides."[12] Moreover, every now and then we need to be stimulated by ideas which may have become, through the passage of time, unacceptable to us.

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[7] Chafee condemns guilt by association because an individual is responsible only for those things he does with his own knowledge. He contends that a person cannot always know what an organization or another individual stands for. CHAFEE, FREE SPEECH IN THE UNITED STATES 470 (1941).

[8] CHAFEE, *op. cit. supra* note 5, at 59.

[9] *Id.* at 51.

[10] CHAFEE, *op. cit. supra* note 7, at 415.

[11] *Id.* at 6.

[12] CHAFEE, *op. cit. supra* note 5, at 111.

> Just as Socrates went up and down Athens stinging men's minds into fresh activity about such ideas as "virtue," "knowledge," and "justice," which had become stale like old hay for want of an occasional turning over . . . so a great writer arouses us from our dogmatic slumbers and forces us to reconsider conceptions we and many previous societies have been inclined to take for granted.[13]

Truth, then, is necessary for the proper functioning of a democracy—not only to enlighten the people but also to awaken them. Yet, it is not what certain individuals in the government believe to be the truth that is the truth. The truth can only be known through free and open discussions, and no man should play the censor. Chafee's position, as he sees it, is the same as that of Milton and Mill. The only qualification he places upon free speech is a very restricted sense of public order which is based on Holmes' "clear and present danger" concept. Authoritarian censorship, he believes, is incompatible with free and open discussions:

> It will be enough for me to mention two of the weaknesses in the authoritarian view. First, it is almost impossible to find men with the wisdom and incorruptibility which are essential for the task of controlling the minds of everybody else and killing bad ideas *en masse*. Second, men in authority are tempted to identify their own policies with truth and to make opposing ideas criminal as a means of perpetuating their policies and their control of the government.[14]

Chafee accepts wholeheartedly the six ideas of Milton in the *Areopagitica:* (1) the chief value of freedom of speech is to the community; (2) we all run the risk of condemning good ideas as bad simply because they are new and strange to us; (3) the sources of evil are numerous and many of them cannot be prevented by law from reaching men even if books are censored; (4) most men are not fit to be censors and the few who are fit will not want to take on such a repulsive job; (5) few books are all bad—the censor may ban a book for a few passages he thinks bad, thus depriving readers of all the good parts; and (6) the opportunity of the reader to sift good from bad is a valuable part of his education for life.[15]

Chafee places his chief emphasis on the first of these six points and says that the greatest value of freedom of speech is not to the minority who want to speak, but to the majority who do not want to listen. His remarks about radicals show an extraordinary grasp of human nature.

> Men who use revolutionary language should not be suppressed in the absence of a very serious and pressing danger, because they almost always have a grievance. Very few people want to smash things for the fun of it like small boys breaking windows. Whether the grievance is well founded or not, the defenders of the existing order ought to know about it so that they may correct it or show by counter-argument that it does not exist. The agitator would be much wiser and more effective if he expressed his case calmly without threats, but we ought not to punish him for this mistake. . . . [H]e is not accustomed to weighing his words carefully, and he is only too apt in a heated argument to let himself go. And on the whole, society gains if he is free to do so.[16]

Once the revolutionaries advocate an idea that is unacceptable to society at large, the

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[13] CHAFEE, *op. cit. supra* note 7, at 546.

[14] CHAFEE, *op. cit. supra* note 5, at 103.

[15] CHAFEE, FREEDOM OF SPEECH AND PRESS 33-34 (1955).

[16] CHAFEE, *op. cit. supra* note 7, at 187.

idea itself takes on an unpleasant odor and any who advocate it are likewise branded as revolutionaries. "When you put the hotheads in jail," he writes, "these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation."[17] Hence, you silence not only the not-so-wise but also the wise.

Chafee, of course, recognizes that it is often difficult to abstract truth from argument. But this is due substantially to improper methods. The principle of a market place of ideas is still sound. It has within itself a self-correcting process that permits truth to emerge from the clash of good and bad opinions. "The assumption," he writes, "is that free action in rational minds will result in self-correction. . . ."[18]

The state should facilitate the attainment of truth. One of the most important purposes of government is the discovery and dissemination of truth. But it would be harmful for the state to be a direct participant in the debates, for once the coercive power of the state directly or indirectly is thrown into the argument, "it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest."[19] The state, however, can and should do several things. It can prevent monopolies in mass communication media and it can take steps to insure a fairer treatment of the news. But equally important, if not more so, it should provide meeting places, whether in municipal auditoriums, schoolhouses, parks, etc., where questions of public importance could be freely discussed.[20]

With the best possible knowledge of the truth that we would thereby obtain, we could more adequately make laws out of what we discover, utilizing to the fullest our moral and historical traditions and making continued progress on the road of life.

[17] *Id.* at 561.

[18] 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 23 (1947).

[19] *Id.* at 50.

[20] CHAFEE, *op. cit. supra* note 7, at 559.

OBSCENE LITERATURE
(Continued)

To narrate *(narrant)* obscene things seems to imply some historical sense, rather than one that is theological or scientific, just as it connotes a treatise of some length rather than a mere report in some paper or magazine.[52] Thus any real or fictional description of obscene things, when this would be rather minute or perversely detailed, placing the obscene fact amid its circumstances in so realistic a manner that the reader could scarcely avoid thinking about and picturing mentally the things so narrated, would be considered as forbidden literature.[53]

[52] Augustine, VI, 471.

[53] *Ibid.*, 474; Pernicone, *loc. cit.;* Wernz-Vidal, *loc. cit.*

The final word in the canon, *docent,* is the strongest. "Those books are said to teach obscene things which impart and explain how lustful actions are performed, by what means others may be corrupted and led to satisfy one's wicked desires."[54] This word clearly indicates and delineates the case of a reader who "deduces false conclusions from the description or narrative."[55] Any book would be condemned in virtue of this word if it were to introduce into the narrative some immoral deed or practice and then proceed to explain or justify it.[56]

[54] Pernicone, *loc. cit.*

[55] Augustine, *loc. cit.;* see Cappello, *loc. cit.*

[56] Burke, p. 37. There are other moralists and canon lawyers whose definitions of these three terms agree with what has been presented: Aertnys-Damen, I, 758; Udalricus Beste, *Introductio in Codicem* (Collegeville, 1946), p. 707 [=Beste]; J. Brys, *Juris Canonici Compendium* (10th ed.; Bruges, 1947-59), II, 218 [=Brys]; Ianuario Bucceroni, *Institutiones Theologiae Moralis* (6th ed.; Rome, 1914-15), IV, 315 [=Bucceroni]; Cappello, II, 485; Merkelbach, I, 601; Benedicto Ojetti, *Synopsis Rerum Moralium et Iuris Pontificii* (ed. altera; Prati, 1905), II, 255, who comments on the meaning of these words before the formulation and promulgation of the Code, and thereby shows the continuity in the meaning these words have had in Church law; Wernz-Vidal, *loc. cit.*

FIRST AMENDMENT

(Continued)

obligation was in an "Almighty God" (discovered from the order of the external world, the principle of cause and effect and an analysis of the great inner world of the subjective; not a God who had revealed any specific supernatural truth—the area of great historic conflict and bloodshed which the Constitution's drafters sought to avoid).

There is a striking analogy between the decisions of the Supreme Court in the early thirties, in the field of economic social justice, and those in the early sixties, in the sphere of the promotion of the common good by preservation of the ideal of the sacredness of the individual. In the early thirties the Court interpreted the Constitution so as to deter the state—by interposing the abstract concept of individual liberty—from effectuating economic social justice. Now the Court is preventing the state from fostering, without coercion or compulsion, that underlying ideal upon which economic social justice, as well as civil rights, rests. A massive public opinion, however, in the later thirties after the attempt to "pack the Court" had failed, finally caused the members of the Court to adopt a sociological legal philosophy. The analogy will be complete if and when a correspondingly overwhelming public opinion is exhibited, sufficient to cause the Court to apply the natural law philosophy of the founding fathers in the area of the first amendment.

It is, of course, more difficult for the public to become aware of the long range socially disastrous consequences of the *Engel* case, as compared to those cases which had immediate adverse economic social consequences. It is submitted, however, that the necessary public opinion will be generated when the public perceives the *Engel* case in its true light—a decision

which must eventually result in total secularism and a rejection of human responsibility, not merely toward the God of revealed religion, the God of reason, but also toward preserving the immutable, absolute, intrinsic, and transcendental inviolability of man as distinct in quality from brute creation. The final issue, therefore, is whether a nation which believes that man is no different from a baboon, or a grain of sand, can continue to maintain the free American way of life.

DE JURE INTEGRATION
(Continued)

Professor) Frankfurter: "It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value."[64] Nevertheless it is on this level that issue has been joined and it is on this level that the discussion in this article has been premised. To those who have strong views on the policy of the "balancing" proposals discussed here, I can only commend an observation made by Mr. Justice Holmes in dissent that has now attained the status of a democratic axiom. He read the guarantee of free speech and thought as meaning "not free thought for those who agree with us but freedom for the thought that we hate."[65] In light of the lessons of our national experience one might hope for a similar realization that political democracy means reliance on the representative agencies of government not only for the measures to which we are indifferent, but also for those which we want very badly.

The Supreme Court has thus far declined to review a case that permitted corrective measures[66] and one that refused to constitutionally compel them.[67] We are therefore suspended between the extremes of those who would supplant the responsible political bodies with judicial decree and those who would straightjacket them with judicial bonds. I hopefully second the view of Professor Freund that "there the matter rests and, in my judgment, is likely to rest so far as constitutional law is concerned."[68]

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[64] FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 197 (1962).

[65] United States v. Schwimmer, 279 U.S. 644, 655 (1928) (dissenting opinion).

[66] Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, ____ U.S. ____ (1964).

[67] Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The case is extensively reviewed in Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation*, 59 NW. U.L. REV. 121 (1964).

[68] Freund, *Civil Rights and the Limits of Law*, 14 BUFFALO L. REV. 199, 205 (1964).