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FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT. By Alexander Meiklejohn. New York: Harper & Brothers, 1948.

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BOOK REVIEWS

FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT. By Alexander Meiklejohn. New York: Harper & Brothers, 1948. Pp. 107. $2.00.

SPECULATION on the meaning of freedom of speech is as old as tyranny; it is as new as today's editorial on the clash of East and West. A recent addition to the crowded shelf is an analysis of the First Amendment which frequently departs from "what the judges say it is." This is no idle contemplation of the constitutional navel; the reader can expect to find his wits and, more painfully, his favorite truisms, put to serious challenge. Those who respond to an intellectual irritant will find it provocative and rewarding reading.

Professor Meiklejohn's major thesis is that the concept of free speech is meaningless unless considered in its relation to popular government. He shows a lofty disdain for the confusion of free speech with boisterous self-expression, for in the democratic state freedom of speech has an urgency which is of weightier dimensions than individual comfort. The free airing of all evidence before the electorate is a basic postulate of self-government. So vital is it for all contributions, all opinions to be heard when the people are at once "their own subjects and their own masters" that the protection of the First Amendment is unqualified. "Congress shall make no law . . . abridging the freedom of speech." No exception is indicated; therefore, none can be allowed.

This emphatic protection applies only to what Meiklejohn terms the *public* right of free speech—"advocacy of action by the government"—or that self-expression which the citizen engages in as a lawmaker.

In a sense, the citizenry as a great body of lawmakers is entitled to the same legislative immunity enjoyed by representatives. No matter how unpopular his plea, a Congressman is not compelled to limit himself to "mere academic and harmless discussion." Nor is he silenced as "unwise, unfair, un-American." The only check upon his ideas is the ballot which retires him from office, and Meiklejohn argues that free and unlimited debate is as essential in public places as it is in the legislature. All those who govern must be *free to hear*, and only they may decide that a doctrine is foolish or dangerous—not with a decree of silence but through a negative vote. "To be afraid of ideas, any idea, is to be unfit for self-government."

The author is in obvious conflict with the clear and present danger doctrine of Mr. Justice Holmes, and a considerable portion of the book is devoted to a refutation of that famous analysis, not only as a misinterpretation, but as a direct violation of the First Amendment. According to Holmes, speech

can be inhibited if it is the direct cause of results which Congress may prevent. "The question in every case is whether the words 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."

Meiklejohn's attack is three-fold. First, Congress may enforce a law against evil; it may punish transgressors; it may *not* punish those who protest against the law or its enforcement. He who cries "fire" in a crowded theatre may be guilty of manslaughter. He may be deprived of life, liberty, or property, but not freedom of speech. This is the voice of Socrates who defied the citizens of Athens when they bade him be silent, but would not flee from the cup of Hemlock because the citizen court had decreed it.

The second barrage against Holmes can be briefly stated: "Some preventions are more evil than the evils from which they would save us." Any limitation upon speech is a threat to the whole framework of self-government, and a judicial principle which would permit it is therefore more dangerous to the state than the words it would silence. Legislative immunity recognizes no emergency which would restrain the lawmaker; Holmes would have shuddered at the suggestion that judicial dissenters represented a "clear and present" threat to the effectiveness of majority decisions; minorities in the popular assembly must have the same protection.

Finally, the criticism of Holmes accentuates the revisions in the original doctrine wrought by the Brandeis decisions. Customarily, these two justices are treated as common defenders of freedom of speech. Indeed, the dissents referred to were written with Justice Holmes concurring, but Meiklejohn finds in them a laudable correction of the constitutional and intellectual error in the Holmes reasoning of 1919. Brandeis, in 1927, held that "no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for free discussion. If there be time to expose through discussion the falsehood and the fallacies, to avert the evil through the processes of education, the remedy to be applied is more speech, not enforced silence." His stress lies not upon danger, but upon the emergency which in itself interferes with the full and free discussion of ideas. The only quietus sanctioned by the author is one which would command that "public discussion must be, not by one party alone, but by all parties alike, stopped until the order necessary for fruitful discussion has been restored."

Emphasis thus far has been placed upon the right of public free speech. It has not included slander, sedition, treason or words which incite men to individual criminal action. Nor does it include private free speech. The expression of selfish aims by the merchant, unionist and lobbyist Meiklejohn regards as one of the liberties of the Fifth Amendment protected only by the "due process" clause.

The distinction between "freedom of speech" and "liberty of speech," between public and private free speech, flows easily from the pen; but, in the opinion of this reviewer, the weakest point in the Meiklejohn brief is the failure to consider the "twilight zone" of definition. Variance, quickly pointed up by examples, is not so easily distinguished in actual litigation.

The advertiser, merchant and trade unionist offer arguments in which the quality of self-interest is easily discerned by their opposition. Frequently, it can be diagnosed to the satisfaction of most "reasonable men." However, so astute an observer as Meiklejohn should not have failed to consider the sincerity with which individuals can identify their personal comfort with the general welfare. The Holmes dictum that "the best test of truth is the power of thought to get itself accepted in the competition of the market place" was too brusquely dismissed. It is easy to suggest that there is an immoral cast to such wholesale selfishness—more virtuous to demand that the citizen speak, think and vote for the entire commonwealth—but at times there is no surer road to public truth than the free exchange of egotistical proposals. If one hundred and forty million cry out when the shoe pinches, the body politic can at least be relieved of its corns.

Yet Meiklejohn's mournful cry that such a position destroys the basis of our education for "devotion to the general welfare" should not go unheeded. Recognition of sectional, economic and group motivation in public action need not become advocacy of ruthless self-interest. The legislative immunity which this discussion has bestowed upon public speech commands deeper respect than the "natural rights" doctrine of the 18th century. It involves far more than personal license; it is at once a tribute to each man and a command that he be honest, intelligent and worthy of the public ear.

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THE SUCCESSFUL PRACTICE OF LAW. By John Tracy. New York: Prentice Hall, Incorporated, 1948. Pp. 469. $5.75.

THIS work presents a kaleidoscopic survey of the primary problem that confounds the young attorney, namely; how to be successful in his chosen field. Mr. Tracey runs the gamut of innumerable problems which beset the beginner, such as: what type of stationery to buy, where to keep the statutes in one's office, how to close a sale of real estate, where to locate one's office, how to obtain and keep clients, how to fix fees, and so forth.

Under one cover can be found the solution to literally hundreds of questions which confront the youthful practitioner. Its value, however, is not to the beginner alone, for its multitude of suggestions also challenges the present