



CHICAGO JOURNALS

The Civil Liberties in the American Community

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Source: *Ethics*, Vol. 51, No. 1 (Oct., 1940), pp. 1-21

Published by: [The University of Chicago Press](#)

Stable URL: <http://www.jstor.org/stable/2989207>

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ETHICS AN INTERNATIONAL JOURNAL OF SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY

VOLUME LI

OCTOBER 1940

NUMBER 1

THE CIVIL LIBERTIES IN THE AMERICAN COMMUNITY

DONALD MEIKLEJOHN

IN APRIL, 1939, the American Civil Liberties Union issued a brief pamphlet entitled "Why We Defend Free Speech for Nazis, Fascists, and Communists." The pamphlet proposed an active defense by the Union of speech and other civil rights "for all-comers." It observed that many friends of the Union have urged a departure from such a line of defense and went on to explain why it intends to continue that line.

The conclusion of the Civil Liberties Union is certainly striking; simply stated, it amounts to protecting those who aim ultimately to destroy civil liberties. The reader turns to their explicit argument, then, with considerable curiosity as to its logic. And here he finds a circumstance even more surprising—that the argument is almost entirely negative. The Union must, it says, defend speech by Nazis, as by all others, because "it does not engage in political controversy." "It takes no position on any political or economic issue or system." Even where opposition to the Bill of Rights is expressed, the Union is concerned "at the point of action contrary to the Bill of Rights, not in relation to theories." As far as theories are involved, any and all are entitled to full expression. "The defenders of civil liberty cannot tolerate the suppression of any propaganda." "To those who advocate suppressing propaganda they hate, we reply that they can draw no consistent line." "To those who urge suppress-

sion of meetings that may incite riot or violence, the complete answer is that nobody can tell in advance what meetings may do so."

The sentences here quoted are, of course, only selections from a single pamphlet. But they are, I think, representative of a very heavily negative attitude toward the civil liberties in America. We are to let everyone speak, because we must not discriminate between parties, because one theory should not be privileged over another, because we cannot find a consistent principle of censorship. Defense of the civil liberties appears to be founded mainly on the absence of a desirable alternative rather than on any positive merits of its own. And, accordingly, it is not surprising that Nazi and fascist writers point with pride to the aggressively positive character of their own way of thought.

The conclusion reached by the Civil Liberties Union pamphlet is, I think, sound. Nazis, communists, and democrats alike must have their say. But this conclusion must surely be given a clear and positive basis. We can hardly defend the right of Nazis to hold meetings simply on the ground that no theory should be repressed. What the Civil Liberties Union needs to show, in its arduous tolerance of its intellectual enemies, is that such tolerance positively fulfils a social philosophy. In writing about free speech for Nazis, it is surely engaged in "political controversy," is surely "taking a position" "on a political issue." At least, when the Nazi groups deny free speech and we affirm it, I suppose that the speech issue is "political." The question to which this paper is directed is, accordingly, what positive statement—what political theory—can afford a convincing justification for the apparently paradoxical stand of the Civil Liberties Union? Two such theories have been proposed with considerable success in our history; I shall pass these in review and try, in terms of their merits and defects, to state a third, which seems to me more satisfactory than either.

The first important American conception of the civil liberties

was phrased in terms of the theory of natural rights. Jefferson presented that theory very simply in his sketch of a Utopian community of twenty men in which, Plato-like, he assigned to each man individually what he could do for himself and to the whole group what required joint activity.¹ The capacity to think and to speak was, Jefferson claimed, clearly an individual capacity. And as this was designed and bestowed on man by God, it followed that thought and speech were to be left strictly to their possessors, to be fostered and expressed as they wished. In this theory we have the ringing and defiant note of the revolutionary declarations and the appeal beyond any human authority to establish the sacredness of individual rights. And in such positive and burning writings as the Declaration of Independence and the Rights of Man we can best find, it may be thought, our ground for asserting freedom of expression for all.

The natural-rights theory will not, however, serve our purpose—among the many objections to it are two which are conclusive. The first is that Jefferson placed speech—and thought—in the wrong group of man's activities. Whether God-given or not, it is so clearly a social activity in both its origin and its exercise that its inclusion among the essentially private concerns of man cannot be maintained. Whatever the basis of freedom of speech may be, we cannot, I think, explain that freedom as a right springing from the *nature* of *individual* man.

Furthermore, the natural-rights theory is in its Jeffersonian form too sharp, too uncompromising, too "absolute." It stands committed on its face to the protection of all utterances—anywhere, any time, on any subject. And for this reason the rights it asserts have very properly been charged with arbitrariness. Taken as grounded simply in one part of men's "nature," without reference to social interaction, they fail—as many American jurists have argued—to admit of the sensitivity required in social judgment. The dilemma they generate is effectively pre-

¹ Cf. Gilbert Chinard, *Thomas Jefferson, Apostle of Americanism* (Boston, 1929), pp. 80 ff.

sented by Zechariah Chafee in his *Freedom of Speech*.² In time of war, he says, "the agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock."³ And with such a deadlock the natural-rights theory cannot deal, save by the heroic expedient of declaring all social purposes secondary. Its moral fervor is admirable—its moral sense seriously open to question.

These two objections are, I think, conclusive against the natural-rights theory of civil liberties. It cannot furnish the positive statement for which we are looking; and so I turn to the second theory, which has had much weight in America—to what may be called the "public-utility theory." According to this, speech and the other civil liberties are to be protected primarily as means to the public well-being. This is the view held by Mr. Justice Holmes and Mr. Justice Brandeis and expounded at great length by Professor Chafee in his *Freedom of Speech*.

I am going to consider *Freedom of Speech* at some length and to criticize, as well as to applaud, its argument. It is, certainly, one of the great American achievements in social theory—in terms equally of the courage and the thoughtfulness and care of its author. Written in 1920, at the height of the repressive activities following the last war, it is a stunning rebuke to the hysterical and jingoistic, as well as to the sober and judicial, agencies that rushed to discard American practices of civil freedom. In the present situation its lessons are of paramount importance.

The first concern of the book is with freedom of speech in wartime. Chapter i develops the theory of free speech which Professor Chafee thinks appropriate to war conditions; the second and third chapters develop that theory in relation to court decisions on cases arising under the Espionage Act of 1917 and its amendments in the Sedition Act of the following year. The succeeding chapters deal successively with post-war legislation on sedition and anarchy, with deportations under the alien

² New York, 1920.

³ *Freedom of Speech*, p. 34.

radical law of 1918, with the expulsion of five Socialist members from the New York State legislature, and, briefly, with post-war restrictions on teaching.⁴

The central thesis of the book is that under the pressure of wartime and anti-Red excitement many individuals were unjustly punished for criticism, spoken or written, of American policies and American institutions. This injustice occurred, as Chafee sees it, because judges and juries and public officials generally failed to hew closely to a well-defined criterion for the restriction of political criticism. And this was, again, the result of a general confusion about the importance of free speech and its relation to other social procedures. The argument divides, accordingly, into consideration of the practical criterion of restraint and exposition of the theory which constitutes the basis for that criterion.

The *Masses* case in the Southern District of New York in the summer of 1917 set the stage for the many hundreds of prosecutions which followed.⁵ The August number of *The Masses*, a revolutionary journal, was excluded from the mails on the ground that it contained articles which imperiled America's conduct of the war; these articles included a poem in praise of Emma Goldman and Alexander Berkman, who were then in jail for conspiracy to obstruct the draft. The journal appealed to Judge Learned Hand for an injunction against this exclusion, and the injunction was granted. The Circuit Court of Appeals, however, reversed Judge Hand's decision and sustained the postmaster.⁶ And in the opinion of Judge Hand, on the one side, and Judge Charles M. Hough and the Circuit Court, on

⁴ A note is in order in regard to the relation between wartime and peacetime freedom of speech. Mr. Chafee holds—rightly, I think—that one basic criterion of restraint must be applied to expressions in war as in peace. It is, accordingly, to his discussion of that criterion that I shall address myself; the special circumstances that may vary its application can be taken up individually. In general, it is clear that wartime conditions do supply special circumstances for applying, though not for defining, such a criterion.

⁵ *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D. N.Y., 1917). See *Freedom of Speech*, pp. 46 ff.

⁶ *Masses Publishing Co. v. Patten*, 245 Fed. 102 (C.C.A. 2d, 1917).

the other, Mr. Chafee finds the two criteria which competed for determination of American policy in matters of expression during and after the war.

Judge Hand, in condemning the restriction on *The Masses*, distinguished sharply between the sorts of expressions which may and may not be restrained. Granted that a poem in praise of a pacifist was a form of agitation, he said: "To assimilate agitation, legitimate as such, with direct incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."⁷ Such a statement affords, Chafee claims, a clear and dependable criterion for determining when government may interfere. "The tests of criminal attempt and incitement are well settled."⁸ In the first place, there must be "intention to bring about the overt criminal act."⁹ Second:

Attempts and incitement, to be punishable, must come dangerously near success, and bad intention is merely one modifying factor in determining whether the actual conduct is thus dangerous. A speaker is guilty of solicitation or incitement to crime only if he would have been indictable for the crime itself, had it been committed, either as accessory or principal.¹⁰

In the declaration of Judge Hand, accordingly, Chafee finds the criterion which prevailed before the war "under the ordinary standards of statutory construction and the ordinary policy of free speech."¹¹

The view of Judge Hand was, however, explicitly overruled by Judge Hough and the Circuit Court of Appeals. The opinion of Judge Hough rejected the view that incitement to violence is the prerequisite of restraint, and substituted the precept that restraint is admissible "if the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used in an endeavor to persuade to resistance."¹² Those who wrote in praise of Goldman and Berkman encouraged, deliber-

⁷ In *Masses v. Patten*; cited in *Freedom of Speech*, p. 51.

¹⁰ *Ibid.*, p. 52.

⁸ *Freedom of Speech*, p. 51.

¹¹ *Ibid.*

⁹ *Ibid.*

¹² *Ibid.*, p. 54.

ately, resistance to American pursuit of the war and should accordingly be silenced. Thus the stage was set for the Supreme Court cleavage between Mr. Justice Holmes and Mr. Justice Brandeis on one side and the rest of the Court on the other, the former taking the position of Judge Hand, the latter developing and reformulating the criterion of Judge Hough.

The Holmes-Brandeis view is found in both majority and dissenting opinions. Speaking for a unanimous court, Mr. Justice Holmes held in the *Schenck* case¹³ that restriction was clearly legitimate in the case of antidraft circulars mailed to men eligible for the draft, and a similar opinion was rendered by Mr. Justice Brandeis in the *Sugarman* case,¹⁴ which involved a speech urging a number of registrants not to report for military service when called. In both cases the justices held that the expressions of opinion involved "a clear and present danger" of bringing about "the substantive evils that Congress has a right to prevent,"¹⁵ that is, they clearly and immediately threatened to weaken the government's effort to drive its conduct of the war to a successful conclusion. On the other hand, in dissenting from the rest of the court in the *Abrams* case,¹⁶ Mr. Justice Holmes held that a clear and present danger could not be found in the distribution in New York of pamphlets urging a general strike to hamper the American expedition to Russia. The likelihood that such advocacy would lead to real impediment of the war with Germany was too slight to justify restraint.

The criterion of "clear and present danger" is, Chafee claims, practically the same as that of Judge Hand. For, "in order to give force to the First Amendment, Justice Holmes draws the boundary line very close to the test of incitement at common law."¹⁷ In the Holmes view, "words are criminal under" the Espionage Act "only because of their relation to the armed forces, and that relation must be so close that the words con-

¹³ *Schenck v. U.S.*, 249 U.S. 47.

¹⁴ *Sugarman v. U.S.*, 249 U.S. 130.

¹⁵ Mr. Justice Holmes in *Schenck v. U.S.*

¹⁶ *Abrams v. U.S.*, 250 U.S. 616.

¹⁷ *Freedom of Speech*, p. 189.

stitute 'a clear and present danger' of injury to the raising of those forces or of mutiny and similar breaches of discipline."¹⁸ Speech cannot be punished merely for its tendency to discourage citizens at war. Thus Judge Hand and Mr. Justice Holmes were essentially at one, as Chafee sees it, in defending from interference all speech which does not directly threaten a serious injury. In the statement of the latter in the Schenck case we have "for the first time an authoritative judicial interpretation in accord with the purposes of the framers of the Constitution."¹⁹

In contrast with the clear-and-present-danger criterion, to which I shall refer more briefly as the "danger test," is the criterion of "remote bad tendency," which, subsequent to Judge Hough's opinion in the Masses case, prevailed in most lower courts and in large measure in the Supreme Court as well. Under this notion, Chafee contends, judges

repudiated the test of guilt, . . . that the words must in themselves urge upon their readers or hearers a duty or an interest to resist the law or the appeal for volunteers, and substituted the test that the words need have only a tendency to cause unrest among soldiers or to make recruiting more difficult.²⁰

Hence, the barest tendency to obstruct the war activity of the government in any way could be construed as evidence of bad intention and could be employed under the harsh terms of the 1918 Sedition Act to imprison men for terms longer than any for similar offenses in American history. In particular, in the Abrams case this criterion was made the basis for prison sentences ranging from three to twenty years for distributing pamphlets that were not shown to have had the slightest effect on the national morale. "There was no evidence," Chafee writes, "that one person was led to stop any kind of war-work, or even that pamphlets reached a single munition worker."²¹ The argument that the advocates of bad tendency thus, in fact, employed was that, where a bad tendency was conceivable, a mo-

¹⁸ *Ibid.*

²⁰ *Ibid.*, p. 55.

¹⁹ *Ibid.*

²¹ *Ibid.*, p. 127.

tive of like character might be imputed—and bad motives were in themselves adequate ground for punishment. On this reasoning Abrams and his friends could be punished for advocating resistance to the Russian expedition by a general strike, since the latter involved a weakening of the United States' efforts against Germany.

These were, then, the two main criteria of restraint governing American policy on civil liberties during and after the war. And as between them, Chafee speaks out very strongly for the danger test. The bad-tendency view is inevitably too sweeping, he argues—even if officials and judges have the best of intentions, they will still be led by that criterion to stifle all controversial discussion. Only as practice is determined by a rule as definite as the danger test do thought and speech secure a real area of effectiveness. Defenders of bad tendency may, indeed, reply that at least during wartime freedom of discussion is of very secondary importance. And in meeting this contention Chafee sets forth in general the theoretical basis on which, as he conceives it, the civil liberties of the First Amendment are founded.

The first of these arguments against the bad-tendency criterion may be instanced by Chafee's observation that "under the Minnesota Espionage Act," interpreted in terms of bad tendency, "it has been held a crime to discourage women from knitting by the remark 'No soldier ever sees these socks.'"²² Any and all words or writings which might be thought to embody a disloyal motive could, under the bad-tendency view, be regarded as intended to weaken the pursuit of the war—and the upshot of the two thousand Espionage Act prosecutions was, Chafee holds, to put "an end to genuine discussion of public matters."²³ Thus, instead of balancing carefully the war and the speech clauses of the Constitution and granting real consideration to each, the supporters of bad tendency in effect so emphasized the war clause as to brush aside entirely the claims of free speech.

²² *Ibid.*, p. 57; cited from *State v. Freerks*, 140 Minn. 349.

²³ *Freedom of Speech*, p. 56.

Ultimately, then, the core of Chafee's argument is in his theoretical statement of these claims. Why is free speech important? He answers, first, for its satisfaction of individual needs for self-expression; secondly, and much more, for its utility to society. For, "one of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern."²⁴ And to the discovery and spread of truth, absolutely unlimited discussion is essential, for, he argues, "once force 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."²⁵ This does not mean that free speech is the only important procedure in society—government has obviously "other purposes, such as order, the training of the young, protection against external aggression." Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale."²⁶ The main point—common to John Stuart Mill and Mr. Justice Holmes and Mr. Chafee—is that truth is very important for success in public policy and that freedom of discussion is the only effective means of securing that truth.

This public-utility theory in the form developed by Mr. Justice Holmes is, at present, dominant in the Supreme Court.²⁷ To its support can be rallied the reflections of the utilitarian philosophers and the practical usages of American law. First and foremost in it is that emphasis on general well-being which has recently stood out more and more clearly as the primary consideration in public policy. Yet it is, like the natural-rights theory, open to serious objection, in regard both to its fundamental principle and to its practical criterion.

²⁴ *Ibid.*, p. 34.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ This may be challenged in virtue of an eight-to-one decision handed down on June 3 of this year refusing to invalidate a local school-board ruling requiring a flag-salute of all students. Other recent decisions, however, generally follow the line of reasoning of Mr. Justice Holmes.

The philosophical thesis of the public-utility theory is that only by unlimited discussion can truth secure its fair chance in the competition of ideas. To this effect Chafee quotes from Milton at the beginning of his book: "Who ever knew Truth put to the worse, in a free and open encounter?" But I must say that I find this proposition very unconvincing. Is there such a natural Ricardian balance of competing opinions in the market place of public debate that by a totally unregulated bargaining of ideas a progressive attainment of truth can be achieved? Is this any less transparent a fallacy than its economic analogue? Are not large combinations and honeyed inducements at work incessantly on the public mind? Is the encounter ever "free and open"? I do not mean to propose that intellectual regimentation is an immediate public necessity. But I find it very hard to accept unlimited discussion simply on the ground that it is the only way to all the truth.

Furthermore, it is not, in the cases which Chafee cites, a matter of abstract truth or falsity which is at issue. Those who opposed the draft or the Russian expedition or the capitalistic system were not asserting a matter of fact of the sort for which Galileo is supposed to have been forced into hypocrisy. They were, as Mr. Justice Brandeis had occasion to point out in the *Schaefer* case,²⁸ offering their opinions on matters of public policy which did not permit exact factual verification. The real issue in such political trials is not, as a rule, the suppression of the search for a merely theoretical truth but the checking of efforts to swing public opinion in one direction or another. The common standard for such discussion is—if we wish to use the term "truth"—a practical truth and one related internally to the process of discussion. It stands to free discussion not in the relation of end to means but rather of whole to participating member. Such truth is not independent of the efforts of the contending parties and calmly awaiting its appropriate seeker; it hangs on the balance of the conflict in that, as the conflict is a

²⁸ *Schaefer v. U.S.*, 251 U.S. 468.

practical one, either side can, in a very real sense, make itself true. The real issue is thus whether one side or the other or both are to be granted that opportunity.

For these two reasons I am disposed to reject the public-utility theory of free speech. And if such a rejection is sound, it follows that the criterion of clear-and-present danger must also be passed in review. It might be that the eminent applicability of that criterion would justify its retention whatever theoretical basis is accepted—but I think that this applicability can itself be called into question.

The danger test seemed to Mr. Justice Holmes and to its other supporters to justify suppression of the mailing of circulars against the draft to men eligible for the draft and similar suppression of an antidraft speech addressed to a number of registrants. It was invoked by Mr. Justice Holmes, somewhat less to Chafee's satisfaction, to suppress articles in a Missouri paper discussing the constitutionality of the draft.²⁹ And again, it was tacitly applied in the Debs case,³⁰ provoked by a speech in which Debs—in general terms—attacked the war; here Chafee remarks of Mr. Justice Holmes, rather ruefully, that “his liberalism seems . . . to be held in abeyance by his belief in the relativity of values.”³¹ We do not, accordingly, find Chafee wholly in accord with the author of the doctrine of clear and present danger. What is equally disturbing is to find Mr. Justice Holmes using words amazingly reminiscent of the language of the bad-tendency view, when he affirmed of the Missouri *Staats-Zeitung*:

But we must take the case on record as it is, and of that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would have been enough to kindle a flame, and that the fact was known and relied upon by those who sent the paper out.³²

²⁹ *Frohwerk v. U.S.*, 249 U.S. 204.

³⁰ *Debs v. U.S.*, 249 U.S. 211.

³¹ *Freedom of Speech*, p. 93.

³² *Ibid.*, p. 90, quoted from *Frohwerk v. U.S.*

If clear-and-present danger is to be discovered in the problematic situation described in this sentence, it is hard to see why it could not be affirmed, for example, of the possible effects of the general-strike pamphlets of Abrams and his associates.

The danger test is, however one sets it off from that of bad tendency, still concerned with a tendency which is not clearly defined as to either its duration or its intrinsic character. Its basis is the assertion that discussion is so valuable that it must be permitted unless it threatens—seriously and immediately—other social pursuits. But the judgment of this seriousness and immediacy is itself open to significant variation. And again, the relative importance of discussion and such other values as national security and internal order is not clearly developed. Is not freedom of discussion so important that we should be willing to risk some weakening of military effectiveness or some disturbance of the peace? Is it not the case that free discussion is in very large measure an essential condition of national strength? I think such a view is consistent with Mr. Chafee's general theory, but I should find it hard to derive from any statement in his book. For this reason the book does seem to me in the end as negative as was the pamphlet of the American Civil Liberties Union. The main line of argument is that, wherever possible, we should refrain from suppression because we can never be sure that the view expressed is not the nearest to the truth. And this is again dangerously close to the early remark of Mr. Justice Holmes that "truth was the majority vote of that nation that could lick all the others."³³

Fundamentally, the public-utility view is as negative as was the theory of natural rights—and I think, for the same reason. Both fail to establish real continuity between the process of discussion and the national well-being. Both propose a sharp and decisive defense of free discussion—but neither succeeds in fusing that freedom into the demands of society. The natural-

³³ Cf. *Freedom of Speech*, p. 93.

rights theory stops short with defiant individualism; the public-utility theory, while resting its final appeal on social welfare, falls into tentativeness and uncertainty. The problem accordingly becomes that of formulating a theory which retains the hardness and exactness of the former and which also answers the utilitarian demand for inclusiveness and flexibility.

The natural-rights theory offends in that it sets up an artificial conception of an individual man and proceeds to derive the right of free expression from that conception. Against this, it seems clear that the objection on behalf of society is valid. On the other side, the mistake of the public-utility theorists is in the external relation they assert between social activity and the civil liberties. For such liberties are, rather than ways to a useful truth, forms of participation in a social order—they are elements in the forming of the public mind. Freedom of speech and of assembly are, as such, intrinsically valuable. In them we become aware of common interests and formulate common policy. In defining and protecting them, we set up the rules by which our society comes to decision. By the same token, such rules do not apply, except secondarily, to the carrying-out of such decision: freedom of speech is concerned with advocacy and not with actions. The theoretical basis of such freedom is thus found in its civil function as an element in the forming of social policy.

Thus the ground of reference is shifted from individual to society; yet at the same time it does not lose its peremptory, its absolute, character. The civil rights, when thus conceived, are such as admit of no qualification. For they are the essential conditions of the one kind of society we think worth having. Briefly, our demand on such a society is that it be self-determining, self-ruling in all of its actions. It must have a mind that fully represents all of its members. To assure that, it must see to it that every individual is permitted to contribute his full share to the forming of that public mind. On the one side, the condition of citizenship is that one be able so to contribute; on the other,

that any and all genuine contributions shall be protected and encouraged.

There are, of course, many assertions implicit here which invite controversy, and among them I single out two for further elaboration. The first is that it makes sense to speak of society having a "common will" or a "common mind." In *It Is Later than You Think* Max Lerner devotes one or two very pointed paragraphs to attacking that conception. He points out how often members of American society conflict with one another. The facts of conflict are, of course, clearly before us. But equally clear are the facts of our settlement of differences in terms of a common procedure and of our capacity to act in unity once a decision has been reached. And in the reaching of a single decision and acting on it we have all that is required for the notion of a common mind. There is a single program and a single activity, though any number of individuals may participate. In that sense it seems to me that the American community has—or is—a common will. As an actor in its own right, it does have a faculty of decision analogous with that of an individual. And in further analogy with an individual, it has a certain procedure to follow if its mind is to be adequate to its world.

The second assumption which is bound to be challenged is that of the ability of people in general to participate in anything as intellectual as the forming of a common mind. Current pessimism over the "masses' irrationalism" runs very deep. But it rests, I am sure, on an amazingly abstract conception of what a rational mind is. The intellectual process is no antiseptic articulation of self-evident propositions. It is the advancing of assertions, founded naturally in feeling, for subjection to limitation and criticism by other assertions. Mental activity goes on wherever there is possibility of such criticism or even of bare resistance of one affirmation by another. This is why the social character of thinking is in the main its primary feature. In the presence of other persons we become aware of alternatives and of limitations. In social exchange par excellence, though not ex-

clusively, there arises the resourcefulness that depends on variety and the toughness that issues from resolution of differences. And such a process can and in America does admit of the participation of the ordinary citizen. This is why denial of liberty is “uncivil”—it deprives the whole society, quite as much as the individual whose contribution is denied.

This bears out, as against the utilitarians, the contention that our real concern in speech issues is over determination of policy rather than over theoretical assertions of fact. Such issues have to do with the kind of national quality we propose to cherish, the type of procedure we think appropriate to settling our deepest disputes. It is on that matter that we demand a sharp and decisive settlement—not on whether the contending parties are, in their disagreement, pushing us closer to an ultimate truth.

And now, it will be said, what of the need for balancing and weighing, for avoiding that arbitrariness which was the bane of the natural-rights view? Does this account of free expression adequately recognize the other needs of society? In principle this is, I think, no compelling objection, though practically its incidence may occasion difficulty. The civil liberties are what constitute a society—the proposition here advanced is that in the degree in which we treasure social order we must treasure the civil liberties. The most obvious difficulty appears in the matter of national security in time of war. But this is itself in no sense a value set off from the values of the civil liberties. National security is not significant except as the nation maintains its own character. When we go to war we fight, as much as anything else, to preserve that character and to avoid taking on another. Granting all “materialist” economic interpretations of war, that “idealistic” thesis is in large measure valid. We do not propose, in repressing violence, to act with merely countervailing violence. Rather, we insist on relating our agencies of force to public demand and subjecting them to public criticism. We may concede that utterances may be more sharply checked in wartime than in peace, since the pressure of the situation

short-cuts the normal processes of reflection and rebuttal. Speech is true communication only when the listener has a real chance to talk back. On the same reasoning we may, on occasion, call for a complete shutdown on press and radio and public meetings—as, for example, in areas threatened with immediate invasion. The central point is, always, that discussion of policy must occur where it is genuinely possible. Crisis situations may require that—as speech and discussion must, of course, issue in action—a given course of action be pursued without immediate recourse to the reflective process. But the significant consideration remains the process of thoughtful activity by the society as a whole.

The theory here presented does, moreover, afford a precise criterion for the restriction of utterances by government. The point is to be located at the limits of the procedure involved in the formation of a thoughtful public opinion. It will be recalled that Judge Hand in the *Masses* case distinguished between “agitation, legitimate as such,” and “direct incitement to violent resistance.” The distinction is not, indeed, between speech that incites and speech that is merely descriptive or predictive or “academic”—Justice Holmes had the last word on that point when he remarked that “every idea is an incitement” to some action or other.³⁴ The essence of the distinction is, rather, between the communicating of an idea or point of view to another mind and the direct stimulating of the other person to action; to use an expression of Mr. Justice Holmes which is not, unfortunately, as often cited as the danger test, it is between words used as vehicles of communication, on the one hand, and words used “with the effect of force,” on the other.³⁵ If the listener acts on his own decision, the speaker is not responsible, even though he supplied information which played a part in that decision; as Chafee says, “A speaker is guilty of solicitation or incitement to crime only if he would have been indictable for the crime itself, had it been committed, either as accessory or prin-

³⁴ In *Gillow v. N.Y.*, 268 U.S. 652, dissenting opinion. ³⁵ In *Schenck v. U.S.*

cipal.”³⁶ And that this would presumably meet the demands for definiteness is affirmed in Chafee’s assertion that “the tests of criminal attempt and incitement are well settled.”³⁷

In other words, the mistake, as I see it, in Mr. Chafee’s argument is to identify Judge Hand’s criterion with the danger test. Judge Hand’s criterion is, on the face of it, a purely procedural one: Does the speaker or writer address his audience or readers in a way which permits a genuine meeting of minds? Is there opportunity for reflection by the audience, for reply, or question, as well as downright rejection? Does the exchange really admit the formation of a common point of view? The difficulty with the danger test is that, by pointing to the consequences of the discussion, it introduces inevitably the same questionable arguments which flower into the noxious bloom of the bad-tendency judgments.

The concrete meaning of the procedural criterion may be indicated in the following examples. The classic instance from American writing is that of Mr. Justice Holmes; no one can be permitted, he observed, to shout “Fire!” falsely in a crowded theater.³⁸ Mr. Justice Holmes invoked this analogy to suggest the test of clear-and-present danger. But the cry would be quite as reprehensible if it were true. This is, indeed, what Mr. Chafee himself implies when he remarks that anyone should be allowed to stand up and suggest, quietly and reasonably, that there are not enough fire exits in the theater.³⁹ The point is that the cry of “Fire!” is no element in the forming of a common judgment and does not contribute to a sane and thoughtful response to the situation.

Again, John Stuart Mill’s injunction against stirring up a hungry mob outside a grain-dealer’s house⁴⁰ falls clearly in the class of prohibitions of irrational procedure, of incitement to

³⁶ *Freedom of Speech*, p. 51.

³⁷ *Ibid.*

³⁸ In *Schenck v. U.S.*

³⁹ *Freedom of Speech*, p. 16.

⁴⁰ *Liberty*, chap. iii.

violence. The leader of the mob cannot be protected as a speaker or advocate. In the troubled situation involved he *acts* just as surely as the members of the crowd which he touches off to violent activity—whether or not he takes any further part. The essential notion of real speech is that at least two minds, each possessed in some measure of independence of decision, come together to achieve a common judgment. And in a lynching situation there is generally only one mind at work—that of the speaker, or, it may be, no mind at all.

Further examples may be found in the wartime cases which Mr. Chafee discusses so thoroughly. That on which he finds himself most clearly in agreement with Mr. Justice Holmes is the Schenck case. And under the notion of the rational meeting of minds there is, I should agree, no protection for the sending of anticonscription circulars to men who had already registered and had passed examinations for physical eligibility. Once a man is in the army, he has, on matters of military policy—particularly on the matter of his membership in the army—given over his power of independent decision to his commanding officer. Discussion addressed to him on the merits of conscription cannot be protected by the First Amendment as here interpreted. It is not possible to talk policy with someone who is committed to one and only one directive agency—that is, indeed, the serious feature of war. Nevertheless, I should, by the same token, defend men's discussing and advising with one another about the merits of the war and the constitutionality of the draft before they were actually drafted. At such a time they have not yet, either actively by enlistment or passively in the draft, submitted to the eclipse of their independent judgment—theirs still to question and examine why, all the more eagerly as the decision is so momentous. It follows that a speech such as that of Debs, to a public meeting or to one not specifically designed to include active or registered soldiers, must be protected. Only in such a procedure can the public opinion of the

country maintain the directive influence which is as essential in war as in peace.

And finally, to recur to the topic with which this discussion began, the criterion of rational discussion clearly protects speech by Fascists or communists. It does not shield violent activity. It does not protect the marshaling of youth into armed or semi-armed or uniformed marching groups. It does not protect the characteristic Nazi meeting in which a leader harangues and in which any expression of dissent is greeted by physical abuse from an organized battalion of storm troopers. But it does assure open discussion of all grievances, even to the point of suggestions of violent resistance to government. There are two reasons why such advocacy must secure a hearing. One is, that in this process we increase, rather than lessen, the prevalence of the orderly consideration of social questions. We bring such thinking to the public view and expose it to criticism—or ridicule—rather than forcing it underground. Second, in so far as there is advocacy of violence, there are also, we may be sure, real elements of disease in the body politic. The herald of bloody violence is seldom, if ever, pure nihilist. He has something on his mind—and the community needs to know what that is. The more insistently he speaks, the more likely it is that serious evils prevail. And the more urgent, accordingly, is the need for full social attention to his complaint.

In the theory of the civil liberties as functions in the forming of community judgment we do find a positive theory which is continuous with the general demand for social effectiveness and which is, within its own terms, as definite and peremptory as the theory of natural rights. It puts before us, in a manner foreign to the other theories, the way in which government must positively foster civil liberty. In general, Americans think of government as obliged mainly to refrain from checking that liberty or to hinder other hindrances to it. These are, of course, very important obligations, and under them we need to be eternally vigilant against overhasty wartime legislation or (to cite a re-

cent instance) mob compulsion of official tokens of patriotism. What we need further is positive promotion by government of full and free participation by all in open discussion. With this go immense responsibilities in the field of social and economic policy. "Men don't talk much, standing by the roadside"⁴¹ after being driven off their land; they don't talk well if they are pursued by economic insecurity or by the sense of social oppression. To promote the civil liberties means so to reduce the strains and pressures in the economic system that deliberation upon it can really take place. This is why we must bring to the open forum all opinions, and especially those which dissent from the accepted national line. There are, it is true, times and topics which may occasion an abbreviation of discussion as the need for immediate action requires it. As a community we cannot insist upon the indefinite extension of the reflective process when the time for discussion is past. But if the matter is put this way, it is still the process of thoughtful activity that constitutes the community and makes it significant. A positive philosophy of the civil liberties finds them as indispensable elements in that process.

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⁴¹ Archibald MacLeish, *Land of the Free* (New York, 1938), p. 75.