

## BOOK REVIEWS

**JUSTICE.** By Giorgio Del Vecchio. Translated into English by Lady Guthrie. Edited with additional notes by A. H. Campbell. New York: Philosophical Library, 1953. Pp. xxi, 236. \$6.00.

When an earlier work by Del Vecchio was translated into English more than forty years ago<sup>1</sup> it provoked from Holmes one of his frequent snorts at the Kantian precept, "treat every man always as an end in himself, never as a means only." Holmes trotted out, as he generally did on such occasions, what he considered a crushing refutation: "If we want conscripts, we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe,"<sup>2</sup> without bothering to explain exactly how this ugly fact invalidated Kant's beautiful rule. Del Vecchio, right or wrong, is surely entitled to a better hearing, especially from those of us who can't plead Holmes' Olympian excuses for refusing it. It should be much fuller and longer than the one he will get from me in this brief review of a recent translation of his *Justice*—the most compact of the three of his works which are now available in English. In a foreword to the translation of the third of these an American jurist said that it "may well be hailed as one of the greatest books of all time in its field."<sup>3</sup> I admire the charity of this remark, but cannot concur with its judgment, for in my opinion Del Vecchio's work has neither the originality, nor the lucidity, nor the constructive power, nor any other quality which would bring it within a stone's throw of greatness. Still, that is no reason for not discussing it. Obviously his work has some merit, else it would not have been handed the above bouquet, nor would it have been translated into nine languages, including Bulgarian, Turkish and Japanese. What will put off the English-speaking reader, lawyer or philosopher, is its idiom, excessively high-flown even for a Kantian idealist and lacking that rigor which makes Kant's own work such a delight to anyone willing to master its idiosyncracies. But I think it is well for us to take an occasional jaunt into areas of contemporary thought quite different from our own, and we should be willing to put up with a few hardships for the sake of it.

To a time like ours, uneasy with the "give-it-up philosophies,"<sup>4</sup> Del Vecchio's claim that "the absolute criterion of justice . . . can be de-

1. DEL VECCHIO, *THE FORMAL BASES OF LAW* (Lisle transl. 1914).

2. Holmes, *Ideals and Doubts*, 10 ILL. L. REV. (1915), reprinted in HOLMES, *COLLECTED LEGAL PAPERS* 304 (1920).

3. DEL VECCHIO, *PHILOSOPHY OF LAW* (8th ed., Martin transl. 1952). Foreword by Dr. Brendan Francis Brown, Dean of the School of Law, Catholic University of America, Washington.

4. POUND, *CONTEMPORARY JURISTIC THEORY* 29-57 (1940).

duced from the transcendental consideration of human nature" (p. 142) is a matter of importance. Can the claim be made good? "Transcendental deduction" is used more or less in the Kantian sense; it is a process which purports to show that this or that kind of experience (or "consciousness") "presupposes" such and such concepts or propositions. This is what Del Vecchio tries to do for the concept of justice in chapter VII of this book,<sup>5</sup> in an argument whose bare bones would be:

1. Self-awareness presupposes the "inter-subjective relation."
2. The "inter-subjective relation" presupposes the idea of justice.  
*Therefore,*
3. Self-awareness presupposes the idea of justice.

I see nothing to stick at in the first of these propositions. Though the Fichtean dialectic by which it is reached can hardly be taken seriously nowadays, practically everyone would accept the conclusion that we would not have the concept "I" if we did not have the notion of a plurality of selves, the "I" acquiring meaning for each of us only in contradistinction to the "you" or "he" of other selves for whom our own "I" is a "you" or a "he." So we can agree with Del Vecchio that where we find self-consciousness, there we shall also find what he is pleased to call "the objective positing of subjectivity" (p. 83), *i.e.*, the recognition of other selves existing "objectively," without being *mere* objects, like rocks and tables, but "subjects," endowed with the capacity to think their own thoughts and make their own decisions. And when we have arrived at this point, have we then reached the idea of justice? This is what Del Vecchio assumes in proposition 2 above, and this is where I fail to follow. The mere fact that I recognize another man as a *subject* does not imply in the least that I have "the idea and the sentiment of justice" (p. 80) towards him. Certainly there is no such psychological implication; there must have been millions of slave-owners who were perfectly aware that a slave was an "I" to himself, yet did not feel the least inclination to recognize his rights. Nor does it follow logically: from "he can make such and such decisions for himself" it does not follow "he has the right to make these decisions for himself." It *would* follow if we added the further premise, "and every subject has the right to make these decisions for himself." But the great thing we are being promised in the "transcendental deduction" is that the latter would *not* be taken as a sheer premise, but would be exhibited as a conclusion from something else—ostensibly from the "inter-subjective relation," *i.e.*, from one's awareness that other individuals are subjects of thought, feeling, decision, like oneself.

I suspect that one of the sources of Del Vecchio's mistake is the looseness with which he uses expressions like "inter-subjective relation" and,

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5. Where the constructive part of the essay really begins. What has gone before is historical retrospect, mainly of Greek concepts of justice.

shortly after, "inter-subjective coordination" to mean either (i) a cognitive or perceptual relation, *i.e.*, awareness of the fact that other selves exist, think, feel, choose, etc., or (ii) a moral (or, as he would say, "juridical," using this term in a distended sense which does not imply "legal")<sup>6</sup> relation, *i.e.*, one in which there is awareness of rights and duties. In the hopeful syllogism above the first proposition clearly used the expression in sense (i), for it was not said in that context that self-awareness as such implies the sense of rights and duties. But sense (ii) is the one needed to make the second proposition true—thereby ruining our middle term. What happens here seems to me only one instance of an equivocation that haunts many other expressions not only in this essay but in common speech. In "recognize as a person," "recognize" may designate intellectual awareness or moral respect. "Person" or even "human" are similarly equivocal (and, in Del Vecchio's idiom, "subject"); each of them may designate a certain genus of being and/or a center of moral or juristic imputation. This is what makes it plausible to think that the requirement of respect for every man needs nothing more to recommend it than the tautology that every man is a man, while it in fact involves the enormously exacting demand that we should accord to all men such consideration as we are normally willing to give only to our kith and kin and, as the gospel parable enjoins, behave towards a perfect stranger as if he were a neighbor.

But though, as I have argued, Del Vecchio's deduction of justice does not come off, some of the reflections in which it involves him are very suggestive. The "inter-subjective relation" serves him as a vehicle for still another idea which he later describes as "the recognition of the identity of the spirit in a plurality of subjects." (p. 92).<sup>7</sup> This strange phrase reverberates in one's mind, long after one has dismissed it as unintelligible. It is more than metaphor, though less than the literal truth Del Vecchio thinks it. It is an oblique reference to a kind of experience which is more profound and elusive than either cognition or morality, and to which we refer rather tritely as "the sense of our common humanity." This may well be the link between senses (i) and (ii) of "inter-subjective relation," and something we should think about far more than we do, and explore it so far as we can. Though Del Vecchio has done little to clarify it, the fact that he has touched on it at the edges of his argument at least brings it to our attention, and that in itself is a great deal.

But what, precisely, *is* that "absolute criterion of justice" which Del Vecchio has been attempting to deduce? To find the answer is not easy for, as I have already implied, precision of statement is not our author's

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6. A "juridical" relationship, as he uses the term, see, *e.g.*, his first use of it (p. 5), is any relation which involves rights and obligations of any kind.

7. This should be read in its context, and compared with the immediately preceding reference to "the original aptitude of the subject for conceiving the subjectivity of others as well as his own, thus transcending the sphere of immediate experience (which presents to him *objects* only) to unite himself again in an intelligible order to another absolute substance, to another spiritual being, identical with himself and yet different . . ." Cf. such an expression as "the projection of the self in the semblance of the alter" (p. 114) and the citation from Rousseau (p. 96).

strongest point. His first relevant statement seems to be that justice consists of "bilateralism," which he explains as "the simultaneous consideration of several subjects placed ideally on the same plane and represented, as it were, the one as a function of the other." (p. 83). But what would it mean to give this kind of consideration to several subjects? The simplest answer I can suggest would be, "to treat them impartially; to apply to none a rule one would not apply to any of the rest." That this is the sort of thing our author has in mind is confirmed by his use of "reciprocity" as equivalent to "bilateralism"; and "reciprocity" he explains by saying that: "[E]very act performed by anyone with regard to others implies the *virtual authorization* of a similar act between the same subjects, supposing their parts to be reversed." (p. 84). Now this is a well-known notion, and it is, or should be, equally well-known that it constitutes at most, a necessary, not a sufficient, condition of justice; for, *e.g.*, the strongest member of a community might be only too glad to "virtually authorize" towards himself ways of action which favor the strong at the expense of the weak. Our author has an inkling of this difficulty, though he buries it in a footnote, where he remarks that "an injustice repeated with perfect equality in every possible case does not on that account become justice." (p. 86 n.3).<sup>8</sup> This leads him to say that: "Only by beginning with the value of the person, and considering in some way its identity in different individuals, can one arrive at the basis of the concept of justice. . . ." (p. 87 n.3). This would put a very different face on his initial explanation of "bilateralism": the "same plane" on which subjects must be placed, it would now seem, is a plane of *value*, and the "absolute criterion" of justice would turn out to be whether or not rules which recognize and protect the equal value of all persons are applied in the treatment of any given persons.

This is pretty much what we might guess would be the view of one who believes that the "criterion . . . and ideal pattern . . . of justice can consist only in the complete recognition of the personality of each individual . . . as an absolute and autonomous entity." (p. 115). Such a statement would *imply* the concept of the equal dignity or equal value of all persons. The question then is why Del Vecchio should begin his discussion of justice by elucidating it (as in the citation from page 83) in a form which does *not* imply this. The answer is perhaps the distinction between two concepts of justice which our author is anxious to make: the first must "be able to include and equate [*sic*] all possible cases of juridical experience," and thus cover any application of the term "just" even within

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8. What is perplexing is why, having seen this, he should not have gone back to his text to expunge that patently false statement, "... that a subject cannot act in a given way towards others without rendering lawful or 'just' . . . a like acting, in the same circumstances, of others with regard to himself." (p. 84). This seems to have been inspired (see p. 88 n.5 and p. 193 n.6) by one of Kant's unhappiest analogies—that between the law of equality of action and re-action in mechanics and the proposition that "I never can do anything to another man without giving him a right to do the same to me on the same conditions" (KANT, PROLEGOMENA TO EVERY FUTURE METAPHYSICS ¶ 58 n.1 (1902)), a proposition which is surely not true either in morals or in law.

a relationship which we consider *unjust* (as, *e.g.*, when we might speak of a slave-owner treating his slaves justly); the second must serve as an "absolute (*i.e.*, ideal) requirement" (p. 115) in terms of which we can grade various experiences as more or less just. There is a good deal to be said for taking the impartial application of rules as the *minimum* sense of justice, answering to the first of these concepts, and the impartial application of rules fostering equal dignity as the *maximum* sense, answering to the latter concept. If this is the author's intention, it is a pity he did not trouble to say so, for this would have clarified many of his statements, particularly in chapter VIII.

At this point one can't help inquiring how Del Vecchio squared his concept of justice with the Fascist state which he supported from the start and under which he held positions of great academic eminence: Dean of the Faculty of Political Science of the University of Rome during 1924-1925; Rector of the University, 1925-1927; Dean of its Faculty of Law from 1927 until 1938, when the importation of anti-semitism to the southern end of the Axis deprived him of his post. In a footnote (written in 1946) he seems to be telling us that the squaring of the two was not complete, and that he was critical even then of some ideas popular in that regime. Denouncing "uncritical Statolatry," he tells us in this footnote (p. 131) that ". . . he has long taken his stand against that error, and the systems which are derived from it, in a long series of writings among which need be mentioned only, *e.g.*, *Etica, diritto e Stato* (in *Saggi intorno allo Stato*, 1935), esp. p. 168 *et seq.*"<sup>9</sup> He might have also referred to another essay in this volume<sup>10</sup> where he makes a vigorous denunciation of the Hegelian formulae, *e.g.*, "The State is the reality of the ethical ideal," which were used (or misused)<sup>11</sup> by Giovanni Gentile and others to justify the absolutism epitomized in the Fascist motto, "Everything for the state; nothing against the state; nothing outside the state." Del Vecchio's protest rises here to an eloquence unequalled in its dignity in any of his writings:

"Those who know (and who does not?) what horrible and atrocious injustices have been done throughout the centuries by the State, and in the name of the State, cannot but feel in the depths of their consciences a profound repugnance for such formulae, which under a veneer of idealism hide abject materialism and a real denial of those ideal values which alone can make life precious. We have characterized as foolish or mad the systematic contempt of the State; but not less illogical and immoral is the supine and fawning exaltation of every existing social power merely because, being relatively the strongest, in a certain place and time, it constitutes a State."<sup>12</sup>

9. The essay to which he refers was printed in English translation. Del Vecchio, *Ethics, Law, and the State*, 46 *INT'L J. ETHICS* 34, 37 (1935).

10. Translated into English under the title, Del Vecchio, *Individual, State and Corporation*, 50 *POL. SCI. Q.* 525 (1935).

11. Cf. SABINE, *HISTORY OF POLITICAL THEORY* viii, 874 (2d ed. 1950).

12. Del Vecchio, *Individual, State and Corporation*, 50 *POL. SCI. Q.* 525, 538 (1935).

Professor Friedmann, in his excellent text, *Legal Theory*,<sup>13</sup> would have done well to take account of such statements and of the courage it took to make them at the time; his remark that "Del Vecchio's more recent work [*i.e.*, in the thirties] shows a definite move from the Kantian to the Hegelian way of thinking, and consequently to Fascist ideals" (p. 110), ignores such vigorously anti-Hegelian utterances as the ones I have just cited.<sup>14</sup>

But Del Vecchio made also a good many other statements at the time which it is not so pleasant to recall. In these same essays one finds him hailing the advent of Fascism as "the re-birth of the Nation, . . . the sudden inflow of fresh vivifying blood to the organs of the State . . .,"<sup>15</sup> maintaining that:

"[T]he new Italian State . . . has not abolished the great principles . . . of the equality of all citizens before the law . . . of the exclusive primacy of law . . . which is above all arbitrary action, even of the organs of government."<sup>16</sup>

Of freedom of speech he says nothing, and one wonders what he makes of the individual's right to criticize his government on moral and other grounds when, having quoted Mussolini to the effect that the State "represents the immanent conscience of the nation,"<sup>17</sup> he later declares that:

"[I]t is necessary for individuals and social groups while keeping their natural autonomy, to acquire a State conscience, so that all their actions and decisions harmonize with the more general ruling principles which emanate from the central power."<sup>18</sup>

Of freedom of association he says that it is "a judicial institution which has also its importance but nevertheless requires to be limited, because here too juridicity must not become synonomous with anarchy."<sup>19</sup> His remarks about the corporative system are guarded; but he does say he has no doubt that it "responds to the surest dictates of juridical philosophy,"<sup>20</sup>

13. FRIEDMANN, *LEGAL THEORY* (3d ed. 1953).

14. Professor Friedmann might also have noted that as late as *Individual, State and Corporation* (delivered as a lecture in 1934) Del Vecchio makes a strong defense of the "society of States" and says that "The law of the social nature of States is, in its substance, identical with that of the social nature of individuals" (Del Vecchio, *Individual, State and Corporation*, 50 *Pol. Sci. Q.* 525, 546-47 (1935); *cf. id.* at 559-60)—very unHegelian ideas, and completely opposed to Mussolini's views on this subject (" . . . and likewise extraneous to the spirit of Fascism are all internationalistic and societary structures," quoted from Mussolini's *Enciclopedia Italiana* article, "Fascismo" in BORGHESE, *GOLIATH* 337 (1938)).

15. Del Vecchio, *La Crisi dello Stato*, in *SAGGI INTORNO ALLO STATO* (1935), translated in Del Vecchio, *The Crisis of the State*, 51 *L.Q. REV.* 615, 629 (1935).

16. Del Vecchio, *Individual, State and Corporation*, 50 *POL. SCI. Q.* 525, 555 (1935).

17. *Id.* at 545.

18. *Id.* at 552-53.

19. Del Vecchio, *The Crisis of the State*, 51 *L.Q. REV.* 632 (1935).

20. Del Vecchio, *Individual, State and Corporation*, 50 *POL. SCI. Q.* 525, 557 (1935).

and one would never guess from his remarks that under it Mussolini "succeeded in reducing the level of social legislation in Italy to a point where in many ways it is [as of 1939] without parallel in the civilized world."<sup>21</sup>

I am not going into this record to read him a sermon on what he should have said and done. Prescribing martyrdom to others from a safe distance is a little too easy. What interests me rather is to determine what it was about his own concept of justice which made it possible for him to underwrite in good conscience Mussolini's regime at the time. His concept was quite explicit on the "natural rights" of the individual, and on the duty of the state to protect them. This is affirmed more vigorously, as one might expect, in passages added to the second edition of *Justizia* (1946), of which the present volume is a translation,<sup>22</sup> than it was in the first edition, published in book-form in 1924 and delivered in substance as an academic address less than a month after the march on Rome.<sup>23</sup> But even in that first edition Del Vecchio had spoken quite clearly of "the 'natural right' to liberty" in respect of which there is "a perfect equality" in all men.<sup>24</sup> What was lacking in that edition is any statement expressing a recognition of the political import of his grand Kantian formula that everyone must be treated "as an absolute and autonomous entity." If "autonomy" (which he uses in the Greek and Kantian sense of "self-determination") constitutes the very essence of personality, and if all citizens have an equal right to it, it would seem that they have thereby the right to a share, and an equal share, in political power—at the very least, in the power to choose through free elections the personnel of their government and thereby to influence its policies. I have looked in vain for an unambiguous expression of this right in the 1924 edition. All I found was the vague statement that the social bond "supposes as its basis an initial consent," to which, however, the 1946 revision made the following significant addition:

"[T]his consent must continue to be present in the exercise of the legislative function, which is the only direct expression of sovereignty, so as to maintain unimpaired the other fundamental rights and keep them from being abolished under the outward forms of the law."<sup>25</sup>

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21. EBENSTEIN, *FASCIST ITALY* 166 (1939).

22. Aside from the sentence I shall quote directly, the most interesting additions are those which appear at pp. 118-21 and the middle paragraph on p. 143 of the English translation. The bulk of the notes is also new.

23. To those who heard this address the second and third paragraphs of the conclusion (pp. 176-77 of the English translation), with their subordination of "respect for legality" to the task of the "regeneration" of the established order, must have meant a defense of the Fascist coup. Cf. the context in which parts of this material is cited by SCHNEIDER, *MAKING THE FASCIST STATE* 108 (1928).

24. DEL VECCHIO, *JUSTIZIA* 163-64 (1924). In the English translation of the second edition (p. 117) one notices in this context an inconspicuous, but far from trivial, specification of the "forms" of this right: "liberty of thought, word, work, meeting, association, etc." This was missing in the 1924 edition.

25. The second insert in the same paragraph (to which I referred previously, see note 23 *supra*), the rest of which is a hold-over from the 1924 edition.

Here at last is an appreciation of the fact that only through some effective participation in the functions of government (here limited to "the legislative function," presumably through elections to parliament) is there a guarantee that "the other fundamental rights" (*e.g.*, "liberty of thought, word, work, meeting, association") will not be "abolished under the outward forms of the law"—which is precisely what happened in Italy, where "the outward forms of the law" were preserved and solemn talk of the "personal liberty and the rights of the citizen" continued in great style, long after the procedural supports of these rights had been smashed by the dictatorship.<sup>26</sup> Had Del Vecchio found before 1922 a clear and explicit political application for the noble concept of the moral autonomy and equal value of all persons, he would have been far less likely to give subsequently his blessing to Fascism. There is moral, no less than intellectual, danger in vagueness.

This review, already too long, must close, and I cannot go on to discuss the two appendices which put forward the valuable, though confused, thesis that reparation is the "only rationally legitimate end" of penal justice. (p. 218). But I must not forget to say that the translation by Lady Guthrie is excellent, and that the supplementary notes by Professor A. H. Campbell are so good that one wishes there had been more of them.

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**THE BLESSINGS OF LIBERTY.** By Zechariah Chafee, Jr. Philadelphia: J. B. Lippincott Company, 1956. Pp. 350. \$5.00.

Professor Chafee, who recently retired after forty years at Harvard Law School, is a thoroughgoing liberal, the author of twelve books on various aspects of liberty. This present volume is based upon speeches and articles delivered and published by him during the past eight years. His position has varied little over four decades; sometimes, indeed, his stand approaches a rigidity that Professor Sidney Hook calls "ritualistic liberalism"—although by no means always. He is devoted to the English and American legacy of prescriptive liberties, and quotes Burke even more often than he quotes Harry Truman. (It must be said that in this volume Mr. Chafee is frankly partisan in practical politics, applauding nearly all Democrats and frowning upon nearly all Republicans—except for Lincoln, Charles Evans Hughes, President Eisenhower and, on one occasion, Robert Taft.)

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26. See, *e.g.*, 3 SIMPSON & STONE, *LAW AND SOCIETY* 2028-30 (1949), translating in part, MUSSOLINI, *NORMS FOR THE APPLICATION OF THE LAW CONCERNING THE POWER OF THE EXECUTIVE AUTHORITY TO ISSUE LEGAL RULES* (1926), with its repeated references to the rights and the liberty of the subject and their "fundamental safeguard" in the continuing powers of the legislature.

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It is Mr. Chafee's general thesis that since 1945 we have been suffering from a subtle suppression of freedom in America. His chapters range widely: a general survey of freedom of speech and the press since 1917, an analysis of the link between freedom of speech and truth, a denunciation of a portion of the McCarran Act of 1950, a hostile criticism of the proposal for loyalty oaths for lawyers, a chapter on Fifth Amendment problems, one on academic freedom, one on religious freedom, and two very interesting sections on the Universal Declaration of Human Rights and free speech in the United Nations. With some very shrewd and valuable observations, it seems to this reviewer, Professor Chafee has mingled a certain amount of exaggeration and even sophistry.

He is a sincere and consistent opponent of all forms of arbitrary and concentrated power. Of our trend toward gigantism in business, labor and government he remarks, "The Socialists tell us that these gigantic groups are the last step to an all-absorbing state. That would not relieve us from the curse of bigness. We should merely get something still bigger." (p. 43). There can be no doubt of his opposition on principle to the Communists. If he defends the rights of Communists, it is only because he feels that the rights of Communists often are inextricably bound up with the rights of all of us. It is his conviction that the menace of Communism in our midst has been mightily exaggerated, and that we are endangering the whole body of our liberties by a suppression of Communists that is both unnecessary and ineffectual.

Yet in endeavoring to expose the exaggerations of overzealous anti-Communists, Professor Chafee sometimes falls into exaggerations of his own. For instance, "Communists form less than one-twentieth of one per cent of all the people in the country. The odds are over 1,999 to 1 in favor of free institutions. . . . Shades of Valley Forge and Iwo Jima! If we no longer want to be the land of the free, at least let us be the home of the brave." (pp. 126-27). This form of argument, it need scarcely be suggested, is a sophistry: the number of active Communist Party members was scarcely greater in Russia on the eve of the Russian Revolution, and the potential strength of a revolutionary faction is not to be calculated by the number of its professed adherents.

This is not the most imprudent observation in the book. Having remarked that "'subversive' is rapidly coming to mean anything which the powers that be don't like," Mr. Chafee comments, "The prevailing current belief that this is the way to defend American freedoms against totalitarianism recalls nothing I know of in history since the hysteria over the Popish Plot in England around 1680." (p. 87). Really? Surely Professor Chafee is aware that the Terror in France in 1793 was intended to put down subversives, and that the Soviet purges and Nazi measures of repression were, to say the least, somewhat more forceful than our own excesses of zeal for loyalty. And the Jacobin Terror, at least, was undertaken out of a genuine concern for liberty and national safety. To pretend that our recent debates over security measures amount to an hysteria un-

equalled since the seventeenth century is to endanger the credit serious readers should give to Professor Chafee's particular criticisms of certain blunders and bigotries in recent American policies. His remarks on some shortsighted official harshness in refusing visas to scholars intending to visit the United States, for instance, are temperate and worthwhile. Apropos of foreign scholars, one perceptive critic of our nation, Dr. Erik von Kuehnelt-Leddihn, says that American liberals nowadays are timid and irascible folk, starting at every shadow. Sometimes Professor Chafee's liberalism justifies this observation.

The chapter called "The Right Not To Speak," concerned with self-incrimination and the fifth amendment to the Constitution, is curiously muddled to have come from a keen-minded scholar like Professor Chafee. He points out, accurately of course, that to decline to testify on the plea of a risk of self-incrimination is not tantamount to a confession of guilt. Yet he may encourage some people to govern themselves by what Professor Robert E. Cushman has called "homemade constitutional law" when he slips rather vaguely and uneasily over the point that, nevertheless, a plea of immunity from self-incrimination is justified only when the person concerned stands in genuine danger of prosecution for some criminal action. It is no sufficient ground for refusing to testify that the witness may lose money, or reputation, or popularity by his testimony; nor that he may involve persons who would prefer not to be involved. Professor Chafee deals with such disconcerting matters by a long aside on the case of Lilburn and the Star Chamber, 1638-1641. "The point is," he concludes, "that the suspects I have been describing used the privilege as a way of protecting themselves and their friends from being punished for what (they believed) ought not to be punishable." (p 207). In substance, Mr. Chafee approves of this attitude, though not where theft or murder is concerned. "The situation is different, however, when the men who refuse to testify are valuable artisans like Bradford or outspoken lovers of liberty like Lilburn or scholars like Udall." (p. 208).

Well! This surely is begging the question. If every witness is to be the judge of the righteousness of his cause, and is to feel at liberty to plead a danger of self-incrimination when he likes, because he thinks his associates are well-intentioned men, then it will be scarcely possible to obtain testimony in any case from anyone but a volunteer witness. And, despite his often-expressed detestation of Communism, Mr. Chafee here implies that somehow the persons at present involved in the inquiry into Communist activities are in the situation of Lilburn, Bradford, Udall and other Puritan devotees to religious principle. Sincerity and loyalty to a faction seem to be sufficient grounds for claiming immunity. Now many of the Nazis were sincerely and loyally attached to their particular program of social alteration; but it does not follow that the Weimar government would have been tyrannical if it had inquired into their activities. "What sort of law is this," Mr. Chafee inquires, after his reference to Bradford, Lilburn and Udall, "which turns into criminals a large number of persons who

respect the lives, property, and welfare of others?" (p. 208). At best, this is careless writing. Can he mean that Communists and fellow-travellers often respect the lives, property and welfare of others? Especially the property? I submit, in short, that it is highly misleading to conjure up the ghost of a seventeenth-century dissenter and then let it be implied that a twentieth-century totalitarian suffers the same agonies of a tender conscience.

But if Mr. Chafee is illogical and sometimes evasive where doctrines of self-incrimination are concerned, he is at his best in the discussion of the United Nations Declaration of Human Rights and related matters. He might have done well to have suggested that *all* rights, from either a natural-law or Utilitarian point of view, are "human" rights; and he might also have reminded his readers that every right implies an obligation on someone's part. Rights are not merely aspirations. But in general his remarks here are penetrating and good-natured and prudent. He distinguishes between what he calls "Bright Rights" and "Blurry Rights," and urges the advocates of an international covenant to concentrate on securing the Bright Rights, lest they lose everything in a Utopian endeavor to secure immediate and absolute liberty through the world. "For years the [Human Rights] Commission was doing a practical sensible job which had real possibilities of success. Of late, however, its members have lost the sense of what things are possible. By attempting to do almost everything at once, they are likely to get nearly nothing. Men who spend their working hours in glowing fantasies, had better knock off and take a rest-cure." (p. 274).

Here Professor Chafee settles for the possible. He might do the country a greater service if he would settle for the possible in domestic liberties. "To preserve the integrity and dignity of the individual being through ever-increasing complexities is a baffling task," he says in his last paragraph. (p. 321). Well, not wholly baffling, I trust; but we may fail in this conservative labor if we pretend that the problems of the twentieth century are identical with those of the seventeenth century, or if we indulge what Burke called a "licentious toleration" of fanatic cabals that never would tolerate us in turn. Justice Holmes was not half liberal enough for Professor Chafee's taste; but the re-reading of some of Holmes' decisions might be a prudent counterbalance to Mr. Chafee's 'honest and vigorous opinions.

*Russell Kirk* †

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† Editor, *The Conservative Review*.

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