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The Story of Civil Liberty in the United States, by Leon Whipple

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THE STORY OF CIVIL LIBERTY IN THE UNITED STATES*

Many Americans like to jump to their feet on every possible occasion and sing "My country—sweet land of liberty" while other Americans—more thoughtful and perhaps more patriotic—will prefer to sit down and read Professor Whipples' remarkable story of our vanishing liberties. Grand boasts and glowing phrases are judged by the irrefutable facts of history. The disclosure is startling. This unusual book reveals why and how the dark forces of reaction and exploitation have prospered in this country, and brings home the force of that great truth: "Eternal vigilance is the price of liberty."

So say the publishers in support of the book here under brief consideration.

Any scholarly, well-documented study which challenges us to take stock of pre-existing notions and to question the meaning and extent of so-called "liberties" which are too infrequently presupposed or taken for granted, deserves a hearing and careful examination by the reading public. The American layman is too prone, perhaps, to do lip service to such intangibles as liberty and democracy, and to bow down in worship of the constitutional guarantees which he feels are the very incarnation of America and things American. We hear much loose talk about basic rights and fundamental liberties as guaranteed by the Constitution and its amendments—often when the supreme tribunal of the land appears none too certain of their meaning, application, and extent! Under such circumstances, Professor Whipple's book should prove good medicine; for the author, who is Literary Editor of *The Survey* and also Associate Professor in Journalism at New York University, here unfolds a case picture which should challenge "liberal-minded men to a new study of the meaning of civil liberty." This treatment, growing out of the struggles of important minorities and built around the fundamental thesis that "whoever has power, economic or political, enjoys liberty," should prove stimulating to those persons who, not knowing "much about liberty or its preservation . . . had indolently taken liberty for granted." The purpose, then, is to show where our ideals and guarantees of liberty have come from; what they actually have meant; and how they have been put into practice in the past.

The historian may question the postulate that "the whole pre-Revolutionary struggle was for civil liberty," but it is difficult to explain away the fundamental thesis of the book that "whoever has power has civil liberty" in the case of the colonial fathers when "the very day the balance of power began to swing to the Colonists, these libertarians promptly began to deny these

* *The Story of Civil Liberty in the United States.* By Leon Whipple. The Vanguard Press (American Civil Liberties Union), New York. 1927. Pages x, 366.

'inalienable rights' to their late oppressors, now the new minority—the Tories."

The author points out that in periods of emergency and war, liberty is placed in a precarious position, when the popular will is likely to take precedence over constitutional guarantees. The axioms, contends the author, "which in actual fact determine the exercise of civil liberty" are these: "First, whoever has power has liberty. Second, the state will and must exert all its power to preserve itself, *as it is*, regardless of scraps of paper about constitutional guarantees. Third, it is just that this righteous preservation of the state be undertaken by the majority with coercion, whether by votes or by direct action." But, Whipple hastens to inquire, "if the guarantees are no protection in a crisis, then of what good are they at all? We need them only when attacked."

The author considers in rough historical sequence the period of the Revolution, the Alien and Sedition Acts, the War of 1812, the so-called "Jacksonian democracy," and the "mob era" including the two or three decades prior to the Civil War when the state, organized for purposes of maintaining law and order, failed to afford proper protection to unpopular minority groups as, for example, the Masons, the Mormons, and the Irish Catholics. But, in support of the book's fundamental thesis, it is shown that these minor groups, later gaining power and influence, "became as intolerant as any of their persecutors."

An entire chapter is devoted to the struggles of the Abolitionists between 1830 and 1860. This group "suffered every possible denial of their liberties. . . . Their liberty was invaded by law and by the failure of the law, by mob and individual lawlessness, even by violence upon their representatives in Congress" (p. 84). The Civil War left in its wake three results as regards civil liberty: "First, it consummated the claim of one phase of the 'tyranny of the majority,' namely that a minority is not free to withdraw and set up a new state. Second, it proved again that war suspends constitutional guarantees. Third, it left the United States a legacy of violence and of weakened constitutional ideals" (p. 125). The emergency measures employed during the war, such as arbitrary arrests by executive order and Lincoln's suspension of the privilege of the habeas corpus writ, come in for their shares of treatment. It is unfortunate that Prof. J. G. Randall's thorough study of this period, *Constitutional Problems Under Lincoln*, was not available to Mr. Whipple at the time his study was in preparation.

The writer considers the negro problem at some length, pointing out that these "nominal citizens" who are "on probation to the whites" are denied many of the constitutional guarantees, some of which were deliberately added for the negro's protection. Lynching, race riots, and restriction of movement and location are each discussed in relation to the problem of civil liberty.

The conflict between labor and capital is examined and such

lively subjects as strike-breaking, the right of labor to organize, the use of martial law in labor disputes, and the injunction are treated. In each case the facts show that, upon occasion, constitutional guarantees of civil rights are denied or at least seriously interfered with.

Some constitutional lawyers will no doubt resent the allusion to the state's police power as "the tyranny of the majority"—the so-called right "to enforce the will of the majority upon the rest of the community for what is claimed to be the welfare of the whole" (p. 263). Subsequently such interesting topics as freedom of conscience, advocacy of birth control, post-office censorship, and censorship of morals are observed. The modern concept of compulsory education, contends Whipple, constitutes "the most serious danger to liberty" in that the system makes little or no provision for "the radical, the experimenter, or the creator." The author fears the "production of conventional patriots with no ideals of liberty and no desire for it" (p. 323).

The signs of the times give room for hope, however, for the author has to say in conclusion:

The true note of the period is an increased interest in and a vigorous defense of civil liberty. There has been a growing sense that we had too complacently accepted liberty as an inheritance, won by our forefathers, and somehow mysteriously embodied in the parchment of constitutions. . . . Something had to be done to resist stifling encroachments and to extend the bounds of liberty for new classes and purposes (p. 327).

Although many will object to Professor Whipple's book as being a study of the exceptional cases and not of the more numerous "standard" cases and hence one-sided and top heavy, the reviewer feels that one can not deny the force of the author's type of treatment as well as the materials presented as proof. The reader may feel that the cases presented do not justify the author's conclusions, in spite of the fact that he contends that the cases set up their own thesis. Some may lament the fact that the word "liberty" is not defined at the outset. "Liberty," at best, is a highly intangible and elusive term and the failure to define it certainly does not make clearer the meaning of the word.

Again, other readers may discount the value of the book because Professor Whipple does not consider the extent to which civil liberty can and should be limited on behalf of the public safety and the general interest. But the author admits that in the limited scope of the study here being considered he has not had room to discuss how the cause of liberty has advanced through such agencies as "progress in education, by extensions of democracy, by the increase of scientific knowledge, by the growth of religious tolerance, by the advances of labor and of women, and by the general diffusion of social tolerance." (Preface, p. vi.) But this seemingly justifiable failure of the author to show the other side of the shield no doubt will detract

from the value of the presentation in the minds of a certain type of readers.

Certain bald and unguarded statements, such as "The country belonged to the American mob" (p. 57) and the allusion to the state's police power as "the tyranny of the majority" (p. 263), already referred to, will be set down by many as questionable and unfortunate. A question of constitutional interpretation can be raised as to the author's suggestion as to the nature of the federal Bill of Rights. (As at p. 191 and p. 328.) It is not made sufficiently clear, at least to the general reader, that the Bill of Rights, as adopted, was for the primary purpose of placing limitations upon the power of Congress to disturb fundamental rights already claimed by the people.

Historians may question some of the references given as being to none too authoritative secondary materials and also to materials published by certain organizations interested in disseminating distorted propaganda in support of their particular side of certain controversial matters. All in all, however, the study is well documented—a total of 507 footnotes being offered. Nevertheless it is unfortunate that the notes are made somewhat inaccessible and awkward for reference by being grouped together at the end of the study.

The book, although valuable in its present form, seems incomplete without a consideration of the question of civil liberty during the Great War and the subsequent years. It is to be hoped that Professor Whipple will give to the public another volume which will be devoted to such highly potent subjects as conscription, sedition, espionage, and conscientious objection during the World War, and to a consideration of such important cases as *Schenck v. United States*, *Abrams v. United States*, and *Gitlow v. State of New York*, in relation to the general subject of civil liberty.

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