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The
Law of Free Speech

By

JULIUS M. MAYER
Judge of the United States District Court for the
Southern District of New York

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FOREWORD

[This little pamphlet contains an exposition of the Law of Free Speech, which should be of interest to all Americans.

The author speaks with an authority which will be recognized by everyone, as he has occupied in succession the high posts of Justice of the Court of Special Sessions, Attorney General of the State of New York, and Judge of the United States District Court for the Southern District of New York. He has had also a wide experience both as a legal practitioner and in the activities of political affairs.

This address was delivered before the Flying Squadron of the National Security League at one of its speakers' training meetings, held at the Association of the Bar of the City of New York, in March, 1919.—*The* EDITOR.]

The LAW *of* FREE SPEECH

By JULIUS M. MAYER

Judge of the U. S. District Court for the Southern District of New York

The first amendment to the Constitution of the United States, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This first amendment is, of course, dear to the American people. It safeguards a right of profound importance and a right which no true American would permit to be invaded. Realizing our devotion to that heritage, those who were enemies of the country at the outbreak of the war sought to misconstrue its meaning into the privilege of license, and to confuse those who heard or read what they had to say into believing that there was an effort at the invasion of this great amendment which is a part of our Constitution.

War was declared on the 6th day of April, 1917. At that time no provision had been made for the raising of a large army or navy. Immediately the Congress of the United States was confronted with the problem of devising means for raising an adequate armed force, and then there came as a result the debate as to the method of raising that army. That debate culminated on the 18th day of May, 1917, in the passage of the Selective Service law, often spoken of in popular language as the Draft Act.

Between the time that war was declared and this 18th day of May, 1917, there was much debate both in and out of the halls of Congress, and the debate and the discussions at times took vehement form. Two classes of people, among others, were active in vocal opposition to this law. One class was the anarchists, and the other class was what are known as the devotees of the majority of the Socialist Party.

The Socialist and the Anarchist Defined

It is important to learn and understand the distinction between these various groups or parties. The Anarchists and the Socialists represent opposite poles in their views of government. The Anarchist is opposed to all government, whether here or elsewhere. The Socialist, on the other hand, is in favor of the proposition that government shall be all-controlling, and each of these groups has within itself certain sub-divisions. There are, broadly speaking, two sets of anarchistic groups, one which professes to believe in the accomplishment of its doctrines without force and by argument, and the other which frankly confesses that it will use violence if need be to accomplish its ends. Within the Socialist Party there are many sub-divisions. Some believe in the socialization of all labor, even of the humblest. Others believe in the socialization only of large industries; and there are still others who have ideas which vary in one way or another from these broad propositions.

On April 7, 1917, the day after war was declared by the United States against the Imperial German Government, there was held at St. Louis a so-called emergency convention of the Socialist Party. Among the subjects, and, indeed, the principal subject there discussed, was the position of the party in respect of the war. They were divided. Some of the members of the party felt that every American citizen should play his part in the war, and were in favor of lending everything that they could in the way of service and of money to the prosecution of the war. But the majority of those present at that convention took a position against the war, and took it in vehement and violent fashion. Therefore, there was passed what was known as the Majority Resolution, the point of which, briefly stated, was opposition to the war, and an insistence upon a policy which in every respect was anti-war, and tended to hinder, impede and paralyze the military arm of the government, the financial arm of the government, and every other instrumentality by which the government sought to make the prosecution of the war a success.

At that convention, those in the majority pledged themselves as follows:

> "to continuous, active and public opposition to the war, through . . . all means within our power and to unyielding opposition to all military or industrial con-

scription . . . and any attempt to raise money for war expense by taxing the necessaries of life or issuing bonds which will put the burden on future generations."

Later, the International Secretary of the Socialist Party of America, and one of the leading exponents of socialism in the United States, in an introduction to a pamphlet called "The American Socialists and the War," said:

> "It will forever be to the credit of the Socialist Party of America that during the period of the acutest crisis in the life of international Socialism it has not failed or wavered."

Bearing in mind, then, that at the very outset of the war, and, indeed, preceding its formal declaration, there were these two groups entirely different, namely, the Anarchists and the Majority Socialists, who had determined to do everything in their power against the prosecution of the war, you will see directly the relation that this subject of free speech had to their activities. It is very important at the outset to make entirely clear that a person who as a member of the Socialist Party advances his views in respect of economic doctrines, is entitled to as much freedom as anyone else. It makes no difference whether the speaker is a Socialist, a Republican, a Democrat, or a member of any other party, he has full and free right to discuss to the utmost any views and principles he may entertain of government. Throughout the war there never was and there should not now be any restriction upon the fullest opportunity for any man to express his view, either in respect of the personnel of the government, or of the policies of the government, or of any economic or other doctrine to which he subscribes, and which he advocates, provided that that discussion is within the law, and not a part of a plan to counsel disobedience to the law.

The First Dangerous Malefactors

The first and most dangerous malefactors were the Anarchists, led by Emma Goldman and Alexander Berkman. Both of these persons are skilled in presentation. They have a certain amount of ability to present any proposition. They are well read and well educated, and they have the disposition, common among such people, to disregard facts, or to state them in some inappropriate or unfair manner, so that their addresses to

considerable bodies of persons not as equipped as they are themselves not infrequently have had considerable influence. They violently opposed the selective service law. They opposed it by direct statement as well as by shrewd indirection. They chose their audiences in parts of the city where they thought they could make an appeal to earnest and hard-working people who had come to this country to escape the crushing power of autocratic government; and for a little while it seemed that they were going to progress. These were the days of May, 1917, when the country was spending every effort to meet a great and unexpected situation and problem.

In due course lesser figures, like Kramer and Becker, were indicted—putting the matter briefly—for circulating at a meeting at Madison Square Garden. literature which counseled disobedience to the draft. Following their indictment, came the indictment of Goldman and Berkman for counseling disobedience to the law, and in effect urging people not to register and not to obey the provisions of the Selective Service Law.

As the trial of Goldman and Berkman proceeded, they endeavored to divert the minds of the jury from the consideration of the cold facts adduced and the determination as to whether they were or were not guilty under the indictment, to the thought and the proposition that they were being prosecuted contrary to American principles and institutions and contrary to the American Constitution, because they had availed of the right of free speech; and they sought to make violation of law an excuse for creating a sentiment to that effect. The court which tried them charged the jury on that occasion:

> "This is not a trial of political principles. This cannot be turned into a political or State trial in the political sense. You are not to be misled by any effort to digress your mind from the real issue, which simply is, whether these defendants are guilty or not guilty of the crime charged in the indictment.
>
> "This is not a question of free speech. Free speech is guaranteed to us under the Constitution. No American worthy of the name believes in else than free speech; but free speech means, not license, not counseling disobedience of the law. Free speech means that frank, free, full and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion;

and that free speech is guaranteed to us, and no court would deny it to anyone."

The jury was not misled. It convicted them. The Supreme Court of the United States affirmed the conviction and they are now imprisoned for violation of the law.

After those convictions it became clear that anything which constituted a direct appeal to disobey the law would not meet with the favor of American juries. These were not the only convictions. There were convictions in other parts of the country, based upon the same general type of facts, and involving the same questions of law; and those who are interested will find this important group of cases reported in 245 U. S. Reports, under the heading of Selective Draft Law Cases.

Malefactors by Indirection

The next step was extremely ingenious and dangerously insidious. It was the step whereby it was sought by general language to counsel disobedience to the law, and yet not to say it in so many words. We come now to June 5, 1917, the date when there was to be registration under the Selective Service Law. Congress had been very busy with many important problems, and thus it was that what has come to be known as the Espionage Law was not passed until June 15, 1917.

The Espionage Law dealt with protective measures for the country. It sought to reach those cases where persons would be engaged in espionage, or as spies, and to protect in every manner our fortifications and our industrial enterprises and establishments, and also to protect the country in its effort to raise an armed force.

There were three methods by which armed forces were to be established. One concerned the regular army and the regular navy. Another was the volunteer recruiting and enlistment, which took place between a period shortly after the declaration of war and a period that reached into the following fall. The complex machinery which was necessary to make the draft act effective was being put into operation; and the country was vitally interested in getting a volunteer force, in order that men could be sent abroad to fill the ranks of the army and of the navy in the perilous situation which existed during the summer of 1917. The third method was the draft.

The Espionage Law sought to safeguard these efforts

to raise an army, and it was provided in section 3 of that act:

> "Whoever when the United States is at war shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruting or enlistment service of the United States to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years or both."

Congress saw that it was necessary to prevent the kind of obstruction which would affect the army itself, which would move anyone to disloyalty, mutiny, insubordination or refusal of duty. Congress also saw that it was vitally necessary to safeguard the raising of a volunteer army by recruiting and enlistment, which has been held by the Supreme Court to include those subject to the draft, as well as those eligible for volunteering.

In the first trial of strength, the forces of law and order had won their first battle. Throughout the country the more violent and reckless persons had been convicted; and it was evident that the efforts of the enemies within our borders would be ineffective, unless they could succeed in obstructing the raising of an army. Then it was that this insidious and shrewd indirect method was adopted throughout certain parts of the country. What was the method? Debs arose at a public meeting and spoke upon the question of socialism. He set forth the principles of the Socialist Party, and he so framed his address that beneath it all—in accordance now with reported cases, and I speak from them—beneath it all was this purpose to paralyze the army of the Government of the United States at this vital time, in this vital enterprise.

When the time came to try him, it was urged before the trial judge that what he expressed were merely the views which any person under our Constitution has the right to express, and that he was being prosecuted for his opinions, and for a state of mind, and that the effort to prosecute him was in effect a revival of the Sedition Laws which became so unpopular in the early history of the country.

If it were true that he was being prosecuted and subsequently was convicted merely for an expression of opinion, such an effort and such a result would shock

any American. But it was not true, and Debs was convicted. No one could put the matter more clearly or more effectively than that great jurist, Mr. Justice Holmes, who, writing the opinion for an unanimous court, said this on behalf of the Supreme Court of the United States, in the case of Debs. vs. The United States, only recently decided:

> "The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was indirectly given, the immunity of the general theme may not be enough to protect the speech."

And then, after quoting from this speech, Mr. Justice Holmes, at another part of the opinion, said:

> "The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended, and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."

At practically the same time that the Supreme Court handed down its opinion in the Debs case, it handed down decisions in two other cases, both of great importance as containing expressions upon this point.

Schenck vs. The United States

One case is Schenck vs. The United States of America, and the opinion in this case was also delivered by Mr. Justice Holmes. Speaking of the defendants, he said:

> "They set up the first amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground, have argued some other points also of which we must dispose."

And, referring to a circular which Schenck and the other defendant were charged with sending forward, he said:

> "But it is said, suppose that that was the tendency

of this circular, it is protected by the First Amendment to the Constitution,"

(that is, the tendency to violate this section 3 of the Espionage Law,)

"Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson vs. Colorado, 205 U. S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

Frohwerk vs. The United States

The other case is Frohwerk vs. The United States of America, the opinion being also by Mr. Justice Holmes, who said:

"It may be that all this might be said or written even in time of war in circumstances that would not make it a crime."

(His reference is to a publication known as the Missouri *Staats Zeitung.*)

"We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor

man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on 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 be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."

Fraina vs. The United States

With these authoritative statements from the Supreme Court, we have some understanding of the limitations of free speech as constitutionally understood. It is desirable to cite another extract, taken from a case called Fraina vs. United States, which was tried here, and then went to the United States Circuit Court of Appeals of the Second Circuit. It has just been published in the advance sheets of the *Federal Reporter* (volume 255, page 28 *et seq.*) In this case the same old argument has been offered in regard to the so-called conscientious objectors. But the objector in this case was not one of those conscientious objectors safeguarded by law, those who belong to one of the religions whose believers conscientiously objected to war prior to the declaration of war, the rights of whom were safeguarded by Congress. This case involved only a "so-called" conscientious objector. There was the usual talk about mental attitude and state of mind and expression of opinion as distinguished from counseling disobedience to law, and Judge Hough said:

"The mental attitude evident throughout the conduct of defense below, and argument here, is suggested rather than plainly stated by the points that it was error to permit the jury to infer guilt from the speeches, that in so doing defendants were tried for their words, and such procedure invades the right of free speech.

"We think the contention may be thus summed up: If there was a meeting of minds, it was not actually productive of any breach of peace; no one was shown to have refused physical obedience to the law; it was all words; and men cannot consti-

tutionally and lawfully be punished for words, especially when the language relates to rights based on the moral sense—*i. e.*, the 'idealism'—of the "non-religious conscientious objector.'

"The matter at bottom is political, not legal. Men can be punished for words, if the Legislature so decrees, within constitutional limits. Men commit crimes when they counsel or procure others to sin against the statute law, and they also commit crimes when they confederate to effect that object, and yet it is difficult to imagine any more suitable or usual method of procuring or counseling than by speech. In this inaccurate sense men have very often been punished for words by statutory enactment.

"The free speech secured federally by the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character, when tested by such standards as the law affords. For these standards we must look to the common-law rules in force when the constitutional guarantees were established and in reference to which they were adopted. By legislative action the boundaries of unpunishable speech have doubtless and often been much enlarged; but the constitutional limit remains unchanged, and what the Legislature has done it can undo. Legal talk-liberty never has meant, however, 'the unrestricted right to say what one pleases at all times and under all circumstances.' Warren vs. United States, 183 Fed., at 721, 106 C.C.A. 156, 33 L.R.A. (N.S.) 800. Nothing said to the jury by the court below in this case went beyond the limits thus stated, and there was no error.

"Complaint as to inferring guilt from speeches, or letting men be found guilty therefore, when or if the speeches only expressed moral principles and social aspirations, is really objecting to the statutes. The statutes in question here, like most others, are of general application; they must be so unless exceptions of equal authority are also statutory. They operate alike on the religious, the atheist, and the unthinking."

The United States vs. Nearing

Another quotation from a case recently tried, entitled The United States vs. Nearing and the American Social-

ist Society, is pertinent. The Court in charging the jury said:

> "With the principles of the Socialist party you have no concern any more than the court. Those principles may be, so far as they deal with economic and philosophic questions, right or wrong. With them we are not concerned. But you have a right to look at those various previously issued documents to see what was in the mind of both of the defendants. What was there concerning them so far as the war situation was involved, in order to determine whether or not when Nearing wrote 'The Great Madness' it was his purpose to violate the statute; That is for you to determine."

After one more quotation, I shall attempt to make clear, in lay-language, the meaning of the subject under discussion.

The Case of Roger N. Baldwin

There was a defendant named Roger N. Baldwin who had refused to submit himself for physical examination. He differed from many of the other defendants in that there was no doubt whatever as to his earnestness and conscientiousness, from his point of view. He took the manly course, pleaded guilty, and was ready to stand his punishment. Curiously enough, he respected the processes of law under which he lived, even though he was unable, from his viewpoint, to obey the law because of his opposition to war. He did not deride the Constitution of the United States, an instrument much condemned by those who, the moment they get into difficulties, seek to avail themselves of its safeguards. This man made to the Court a statement of his point of view. The Court said:

> "It would be impossible for me to convey to your mind successfully the point of view which I think is entertained by the great masses of the people, and which must be entertained by the courts and by those, such as the Department of Justice, who are charged with the administration of the law.
>
> "In all that you have said I think that you have lost sight of one very fundamental and essential thing for the preservation of that American liberty to which, by tradition, you feel that you are genuinely devoted.
>
> *"A republic can last only so long as its laws are obeyed. The freest discussion is permitted, and*

should be invited, in the processes that lead up to the enactment of a statute. There should be the freest opportunity of discussion as to the method of administration of a statute by human beings, but the republic must cease to exist if disobedience to any law enacted by the orderly processes laid down by the constitution is in the slightest degree to be tolerated.

"That is, from my point of view, fundamental; that is essential not only from an ideal standpoint, but from a practical standpoint, and we should not be able, as I think most Americans think, to conduct what we regard as the government of the free people, if some individual, whether from good or bad motives, were able to successfully violate a statute duly, properly and constitutionally passed, because his own view of the statute might differ from that entertained by the law-makers who have enacted the law, and the executive who has given it his approval.

"That, to my mind, is the foundation of our system; its perpetuity rests upon obedience of the law.

"It may often be that a man or woman has greater foresight than the masses of the people; and it may be that in the history of things he who seems to be wrong to-day may be right to-morrow, but with those possible idealistic and academic speculations a court has nothing to do."

Free Speech, in Peace Or in War

Therefore, whether we are at peace or at war, *free speech never means advising, counseling, or urging disobedience to the law, whether by direct appeal, or by insidious indirection.*

The only difference between the law in respect of free speech in times of peace and the law of free speech in times of war is, as Mr. Justice Holmes put it, a difference of circumstances; because, in order to safeguard the country in times of war, it becomes necessary to pass statutes which of course have no part in our life in times of peace. When a statute is passed calculated to protect the country in the prosecution of the war or in the defense of itself, and that statute is constitutional, then no person under the claim of free speech or free press has the right either to violate or urge the viotion of that statute.

The subject is not difficult at all. The average American is justly noted for his common sense; and if we were to walk upon any thoroughfare in the city in which we live, and speak to the first hundred men or women, and give them two propositions, one which contained a paragraph which you and I would think was within the realm of free speech and fair and free discussion, and another which contained a paragraph to the contrary, I am perfectly confident that the overwhelming majority of those hundred persons, in the application of ordinary common sense, without the aid of any judge or any jury could tell which was fair discussion and free speech and which was not. *What are we to do?*

First we will talk about the Anarchists. It is easy to deal with a certain type of malefactor. The trouble is, that at times we are dealing with perfectly well-meaning people who, every time some new idea arises, think it is rather the fashionable thing to get excited; and, every now and then, quite contrary to their practice in private life, in one form or another, they exhibit great tenderness to the Anarchists. *When we are dealing with an Anarchist, there should be no compromise of any character or description.* The Anarchist confessedly is for the destruction of government, and it is strange to me that some people of intelligence, or a certain intelligence, seem utterly unfamiliar with the policy of this country. *When a man declares his intention to be a citizen of the United States, he must say among other things, "I am not an Anarchist."* In the final petition for his naturalization he must say:

> "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons seeking disbelief in organized government."

The Naturalization Act of 1906 as amended to date provides:

> "The petitioner shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons seeking disbelief in or opposed to organized government."

The Anarchists Must Go

Then why waste any time about it? *There is another statute now, which provides that a person who is not a citizen of the United States and is convicted of crime*

may under certain circumstances, be deported. There is only one way to deal with the Anarchist, and that is to eliminate all this nonsense about internationalism, and in every case where an Anarchist is not a citizen of the United States,—and they are very few who are,—send him back whence he came. Rid the country of them. We do not want them here.

I read in the *Sun* the other day an admirable editorial which said that there was a great deal of excitement over Bolshevism, but that, so far as we were concerned here, Bolshevism was only a new name for an old state of things. That is absolutely true. If you run through the list you will find Goldman and Berkman and Debs and the rest, and you will find that sometimes they are one thing and sometimes another. The *Sun* made a fine contribution in this brief editorial, which almost laughed them out of court. There are not so very many of them, and we do not care about the leaders at all. What we do care for is the others. We do not want the influence of these people to affect the mind of a single immigrant who comes here believing and having the right to believe that this is a country of real freedom and real liberty. We fight them, not because there is any occasion to fear them, but because we wish to prevent them from doing even the smallest harm in any quarter.

Free Speech Is for the Law-Abiding

When we come to others, who have different views, the approach is entirely clear. *It is very important in dealing with those who have views other than Anarchistic views, to let them understand that we have no quarrel with the free expression of their views, provided that that expression is orderly, and does not involve an attack upon law and order.* They are as much entitled to their views on economic doctrines as we who differ from them are entitled to our views in the matter, for instance, of the tariff. We must make clear to them that when we attack and particularly when we attack some of their leaders, we are not at all having any controversy as to their rights fully and fairly to speak and publish what they please in respect of important social and economic problems; and if we by temperate approach and temperate discussion make ourselves understood, if those who differ with us come to regard us with respect and realize that just as we desire a

hearing so at the same time we are willing to give them a hearing, then we shall carry our propaganda of Americanism to them in a way that will result at least in some degree in making them understand that our fight against license, our fight against disobedience of the law is not a fight which goes beyond the limits of those propositions, but is solely and only to maintain the perpetuity of our institutions.

We must make every one think in terms of America. We must make everyone think in terms of our own nation, and say so everywhere and every time we have an opportunity to speak. If, perchance, you are afflicted by those who are so confident of their wisdom that they are egoistic, take up with them before any public, private or social gathering and fight the battle every time the moment that battle offers. They really do not amount to very much. We must carry to the mind of everyone an appreciation of our enthusiastic love for our country. We must make them understand something of the history of the country and all that has been spent in life and treasure to make this country what it is.

It is a familiar fact that the woman who concerns herself with her neighbors has rarely a well-ordered household. It is a matter of common knowledge to all of us that the man at the club or the social organization who tells how everybody else shall run his business is rarely a good father or a good son or a good husband. *But the man who has his own house in order becomes competent to help others. So let us keep our own house in order.* You who are to go forward and have been going forward in this splendid voluntary work in trying to make things clear are contributors to a very valuable effort which has great service before it, in endeavoring to make perfectly plain these very simple schoolboy principles which you and I so well understand. If we get the other man or woman, to think in terms of America, and to think of the necessity of orderly and constitutional government, if we *make clear that changes can take place, but must take place in accordance with the law, and that a free, self-governing people can exist only so long as there is inherent obedience to as well as an outward respect for the law,*—if we can do that, we shall have made our contribution in our small way to the welfare of the country in which we live.

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