

**FREEDOM OF  
SPEECH IN WAR  
TIME; PP. 932-973**

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IN WAR TIME

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## FREEDOM OF SPEECH IN WAR TIME

NEVER in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as to-day.<sup>1</sup> Over two hundred

<sup>1</sup> BIBLIOGRAPHICAL NOTE. — Important decisions under the Federal Espionage Act are printed in the various Federal and United States Supreme Court reports; the BULLETINS OF THE DEPARTMENT OF JUSTICE ON THE INTERPRETATION OF WAR STATUTES (cited hereafter as BULL. DEPT. JUST.) contain many *visi prius* rulings and charges not otherwise reported. The cases before July, 1918, have been collected by Walter Nelles in a pamphlet, ESPIONAGE ACT CASES, with certain others on related points, published by the National Liberties Bureau, New York. This has some state cases and gives a careful analysis of the decisions. The Bureau has also published WAR-TIME PROSECUTIONS AND MOB VIOLENCE, involving the rights of free speech, free press, and peaceful assemblage (from April 1, 1917, to March 1, 1919), containing an annotated list of prosecutions, convictions, exclusions from the mail, etc.; and "The Law of the Debs Case" (leaflet). Mr. Nelles has submitted to Attorney General Palmer "A Memorandum concerning Political Prisoners within the Jurisdiction of the Department of Justice in 1919" (MS. copy owned by the Harvard Law School Library).

The enforcement of the Espionage Act and similar statutes is officially summarized in the REPORTS OF THE ATTORNEY GENERAL for 1917 (page 75) and 1918 (pages 17, 20-23, 47-57). A list of prosecutions is given with the results. See, also, Atty. Gen. Gregory's Suggestions to the Executive Committee of the American Bar Association, 4 AM. BAR ASSOC. JOURN. 305 (1918).

The best discussion of the legal meaning of "Freedom of the Press in the United States" will be found in an article under that name by Henry Schofield, in 9 PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY, 67 (1914). This volume is devoted entirely to "Freedom of Communication," and contains several valuable papers on different aspects of the problem. Other legal articles not dealing with the situation in war are: "The Jurisdiction of the United States over Seditious Libel," H. W. BIKLÉ, 41 AM. L. REG. (N. S.) 1 (1902); "Restrictions on the Freedom of the Press," 16 HARV. L. REV. 55 (1902); "Free Speech and Free Press in Relation to the Police Power of the State," P. L. EDWARDS, 58 CENT. L. J. 383 (1904); "Federal Interference with the Freedom of the Press," LINDSAY ROGERS, 23 YALE L. J. 559 (1914), substantially reprinted as Chapter IV of his POSTAL POWER OF CONGRESS, Baltimore, Johns Hopkins Press, 1916; A. V. DICKEY, THE LAW OF THE CONSTITUTION, 8 ed., Chap. VI; "Freedom of Speech and of the Press," 65 UNIV. OF PA. L. REV. 170 (1916); Joseph R. LONG, "The Freedom of the Press," 5 VA. L. REV. 225 (1918). Freedom of speech is discussed by Dean Pound as an interest of the individual in his "Interests of Personality," 28 HARV. L. REV. 445, 453 (1915); and as an alleged bar to injunctions of libel in his "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 648 (1916).

The situation in war is specifically treated in the following: "Freedom of Speech and of the Press," W. R. VANCE, 2 MINN. L. REV. 239 (1918); "The Espionage Act



prosecutions and other judicial proceedings during the war, involving speeches, newspaper articles, pamphlets, and books, have been followed since the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism. It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress. The United States Supreme Court has recently handed down several decisions upon the Espionage Act,<sup>2</sup> which put us in a much better position than

Cases," 32 HARV. L. REV. 417 (1919); "Threats to take the Life of the President," 32 HARV. L. REV. 724 (1919); "The Vital Importance of a Liberal Construction of the Espionage Act," Alexander H. Robbins, 87 CENT. L. J. 145 (1918); "Sufficiency of Indictments under the Espionage Act," 87 CENT. L. J. 400 (1918). The Espionage Act is one of the topics covered by Judge Charles M. Hough, "Law in War Time—1917," 31 HARV. L. REV. 692, 696 (1918). The issues involved in the current decisions are presented in nontechnical form by these articles: "Freedom of Speech," Z. Chafee, Jr., 17 NEW REPUBLIC, 66 (November 16, 1918); "The Debs Case and Freedom of Speech," Ernst Freund, 19 NEW REPUBLIC, 13 (May 3, 1919); 19 46. 151 (May 31). William Hard, "Mr. Burleson, Espionagent," 19 NEW REPUBLIC, 42 (May 10, 1919), and "Mr. Burleson, Section 481 1/2 B," 19 NEW REPUBLIC, 76 (May 17, 1919), reviews exclusions from the mails. "The Trial of Eugene Debs," Max Eastman, THE LIBERATOR (November, 1918), gives a defendant's impression of the operation of the act.

The history of freedom of speech in America has not yet been fully investigated, but CLYDE A. DUNTWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS, Cambridge, Harvard University Press, 1906, is extremely useful. Much light is thrown on the problem by sedition trials in England, before our Revolution and during the French Revolution. The best account of these is in ERSKINE MAY, 2 CONSTITUTIONAL HISTORY OF ENGLAND, 2 ed., 1912, Chaps. IX-X, summarized by Charles A. Beard in 16 NEW REPUBLIC, 350 (October 19, 1918). See, also, 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, Chap. XXIV; and G. O. TRUVELYAN, THE EARLY HISTORY OF CHARLES JAMES FOX, for the Wilkes and Junius controversies.

The legal meaning of freedom of speech cannot properly be determined without a knowledge of the political and philosophical basis of such freedom. Four writings on this problem may be mentioned as invaluable: PLATO'S APOLOGY OF SOCRATES; MILTON'S AREOPAGITICA; the second chapter of MILL ON LIBERTY; and Walter Bagshot's essay, "The Metaphysical Basis of Toleration." The second chapter of J. F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY, has an important critique on Mill. See, also, J. B. BURY, A HISTORY OF FREEDOM OF THOUGHT, the first and last chapters; GROTE, PLATO, Chap. VI; GRAHAM WALLAS, THE GREAT SOCIETY, 195-98; H. J. LASKI, AUTHORITY IN THE MODERN STATE, *passim*. For a caustic point of view, see Fabian Franklin, "Some Free Speech Delusions," 2 UNPOPULAR REV. 223 (October, 1914). The proper course in war is discussed by Ralph Barton Perry in a book review, 7 YALE REV. 670 (April, 1918). The difficulties of the problem as seen from actual experience on both sides are presented in VISCOUNT MORLEY'S RECOLLECTIONS.

<sup>2</sup> Schenk v. United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, BULL. DEPT. JUST., No. 194 (1919), is the leading case. See, also, Frohwerk v. United States, 249 U. S. 204,

formerly to discuss the war-time aspects of the general problem of liberty of speech, and this article will approach the general problem from that side. At some later day it may be possible to discuss the proper limits of radical agitation in peace, and also to make a detailed historical examination of the events and documents leading up to the free speech clauses in our state and federal constitutions. For the present it is not feasible to do more than consider the application of those clauses to the treatment of opposition to war.

We shall not, however, confine ourselves to the question whether a given form of federal or state action against pacifist and similar utterances is void under the constitutions. It is often assumed that so long as a statute is held valid under the Bill of Rights, that document ceases to be of any importance in the matter, and may be henceforth disregarded. On the contrary, a provision like the First Amendment to the federal Constitution,

"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 their grievances,"

is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions. Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional. It should influence the judges in their construction of valid speech statutes, and the prosecuting attorneys who control their enforcement. The Bill of Rights in a European constitution is a declaration of policies and nothing more, for the courts cannot disregard the legislative will though it violates the constitution.<sup>3</sup> Our Bills of Rights perform a double

<sup>3</sup> 39 Sup. Ct. Rep. 249, BULL. DEPT. JUST., No. 197 (1919); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. Rep. 252, BULL. DEPT. JUST., No. 196 (1919); *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. Rep. 191, BULL. DEPT. JUST., No. 195 (1919).

<sup>4</sup> A. V. DICKEY, *LAW OF THE CONSTITUTION*, 8 ed., 130: "This curious result therefore ensues. The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort

function. They fix a certain point to halt the government abruptly with a "Thus far and no farther"; but long before that point is reached they urge upon every official of the three branches of the state a constant regard for certain declared fundamental policies of American life.<sup>4</sup>

Our main task, therefore, is to ascertain the nature and scope of the policy which finds expression in the First Amendment to the United States Constitution and the similar clauses of all the state constitutions,<sup>5</sup> and then to determine the place of that policy in the conduct of war, and particularly the war with Germany. The free speech controversy of the last two years has chiefly gathered about the federal Espionage Act. This Act contains a variety of provisions on different subjects, such as the protection of ships in harbors, spy activities, unlawful military expeditions, etc., but the portion which concerns us is the third section of Title 1.<sup>6</sup> As originally enacted on June 15, 1917, this section established three new offenses: (1) false statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces; (3) obstruction of enlistments and recruiting. Attorney General Gregory reports that, although this Act proved an effective instrumentality against deliberate or organized disloyal propaganda, it did not reach the individual, casual, or impulsive disloyal utterances. Also some District Courts gave what he considered a narrow con-

will be enforced by the Courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas."

<sup>4</sup> "No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows." J. B. THAYER, LEGAL ESSAYS, 38. See his quotation from 1 BRYCE, AMERICAN COMMONWEALTH, 1 ed., 377.

<sup>5</sup> Massachusetts, New Hampshire, Vermont, North and South Carolina retain a short clause like the federal Constitution. The other states follow the New York form: NEW YORK CONSTITUTION, 1822, Art. 7, § 8. "Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press." See Schofield in 9 PROC. AM. SOCIOLOG. SOC. 95.

<sup>6</sup> Act of June 15, 1917, c. 30, tit. 1, § 3; 40 STAT. AT. L. 217, 219; COMP. STAT. 1918, § 10212c amended by Act of May 16, 1918, c. 75. The full text of the original and amended sections will be found in notes 91 and 131, *infra*.