
Seeing Red:

Civil Liberty and the Law in the Period Following the War.

by Walter Nelles

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Civil liberty means this — that every one may think for himself upon every public question; that he may say what he thinks; and that he may do his utmost, and get his friends to do theirs, to bring what he thinks home to the minds and hearts of others.

We do not now have civil liberty in the United States. It is splendidly guaranteed in our constitutions. But words are not facts. “Though it is scarcely possible to meet an intelligent man who will defend the peace,” writes Mr. Lowes Dickinson in the *Atlantic Monthly* for April 1920, “it is almost equally impossible to find one who will say publicly what he thinks. Men seem to be terrorized by the fear each individual has of what all the other individuals taken together are supposed to be feeling and thinking; till it sometimes appears as if public opinion were the opinion which nobody holds, but which everybody supposes other people to hold.”

Our loss of civil liberty is due to the prevalence of the cowed mind. Most people hate persecution. But very few will say so in particular cases in opposition to an imagined contrary public opinion. Hence a comparatively small number of lawless and law-abusing individuals have been able to carry through a regime of repression.

The Espionage Act.

As a direct agency of repression, the Espionage Act is dormant. An observer finds almost daily evidence, however, that we are living in its wake.

I think it has done more harm to people out of jail than to those it imprisoned — and I do not make

light of what jail means in terms of human suffering. But it is upon the minds of people out of jail that fear of punishment for heresy has wrought devastation. The “mobilization of the mind of America” worked so well that it has left that organ somewhat incapacitated for independent thinking.

In addition to the harm it did to social morale, the Espionage Act furnished vicious precedents in the field of jurisprudence — precedents for vague and disingenuous statutes and for methods of administration more disingenuous and not so vague.

There was never any serious question of the constitutional validity of the Espionage Law as originally enacted.† It was not a law which forbade anyone from saying to anyone else, anywhere, whatever he thought — right or wrong, intelligent or foolish, moderate or extreme, orthodox or heretical. It did not forbid criticism of the war, or any opinion whatever about it.

It forbade certain definite things — for example, “*willful obstruction of the recruiting or enlistment service of the United States, to the injury of the service or of the United States.*”

Congress clearly had a right to forbid such things. According to the normal principles of Anglo-Saxon jurisprudence, proof of violation of the Espionage Law would have involved evidence directly establishing:

(1) *Actual infliction of definite and tangible injury upon the recruiting service, or some other military agency;*

(2) *That this injury was inflicted by the person indicted.*

In trials under the Espionage Law, such proof was not furnished or required. Thousands of persons

†- This is not the case with some of the amendments of 1918 — as to which the Department of Justice has not sought an adjudication and the appellate courts have avoided expressing themselves.

were arrested under the Espionage Act. There were 877 convictions between June 30, 1917, and June 30, 1919. I have not been able to learn of a single instance in which it was proved, or even attempted to be proved, that the recruiting service (or whatever other military agency was in question in the particular case) had sustained an injury of a character that can be seen, measured, or appraised. In general the evidence of so-called guilt consisted, and consisted solely, in proof that the person indicted had said, in good faith, something that he honestly believed. The jury's attention was not directed to any problem of ascertaining responsibility for *consequences which had actually occurred in the world of objective reality*. No such consequences had occurred. Juries were told that they could infer the injury from their opinions of the tendency of what the accused person had said!

The opinions before them for consideration were always, of course, opinions which the prevailing propaganda for "mobilizing the mind of America" had made it not only unprofitable but socially dangerous for anyone openly to tolerate, let alone agree with.

In a great many cases, perhaps in most, the criminal idea was basically identical with an idea which President Wilson himself has since the war publicly expressed; viz.,

"Why, my fellow citizens, is there any man here, or woman, who does not know that the seed of war in the modern world is industrial and commercial rivalry? This war was a commercial and industrial war. It was not a political war." —*Speech at St. Louis, Sept. 5, 1919.*

To say that verdicts of *guilty* resting upon such evidence were based upon guesswork rather than upon proof is to pay them an undeserved compliment. The verdict was not even a guess — it was an act of faith — an assertion of patriotic orthodoxy on the part of the individual jurymen.

Such administration of the Espionage Act abridged the right to express certain legitimate opinions just as effectually as if Congress had candidly proscribed the theory that the war was commercial and industrial. The Supreme Court, however, held that no question of free speech was involved, since it was not *opinions* which the act proscribed; but such *harm* as obstruction of the recruiting service; further, that visible and tangible harm and causal responsibility for it

need not be proved, the question in each case being

"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." —(*Debs. v. U.S.* 249 U.S. 211; *Schenck v. U.S.* 249 U.S. 47).

Thus the Supreme Court reestablished a form of *constructive crime* of exactly the same species as the old English crimes of seditious libel and constructive treason which the framers of the First Amendment had meant to make forever alien to the United States.

Federal Peacetime Sedition Bills.

There have been uncertainly pending in Congress a number of bills designed to continue in peacetime the work done by the Espionage Act in time of war. Following the precedent of draftsmanship set by the Espionage Act, they do not frankly prohibit communication of theories of social change. Most of them *purport* only to punish advocacy of force and violence, or "unlawful means." But persons who advocate force and violence, and so forth, in express terms are of course altogether too hard to find. When such bills become law the question which, following Espionage Act precedent, is actually put up to courts and juries is whether extremist doctrines do not *in themselves* imply advocacy of force and violence. It has been said that

"a jury of a man's peers in a free speech case means a jury of 100 Percent Americans who are also 100 Percent conservative and 100 Percent ignorant of the most elementary theories of socialism, industrial unionism, the labor movement, and social betterment in general. The very ideals of socialism and communism in their most pacifist forms shock an average jury to such an extent that they mistake the shock itself for force and violence."

It seemed for a time to some politicians that spleen against the "Reds" was an unmitigated capital asset, yielding 100 percent profit every time it was turned over. Their excesses, however, provoked a revulsion. We are now in a political campaign, and the federal peacetime sedition bills will be kept pigeon-holed in committee until after election. Those to whose interest it is that the people should not think will not, however, forget them. It is important that people concerned for freedom and progress should not forget

them either.

State and Local Seditious Laws.

While public opinion was still silenced by the war psychology, state and municipal legislatures quite generally enacted so-called *Anti-Sabotage*, *Red Flag*, *Criminal Syndicalism*, and *Criminal Anarchy* laws. Twenty-nine states now have such laws on their statute books.

The parent of a great many of these state laws is the New York statute (Penal Code, Sec. 160) under which "Criminal Anarchy" is defined as

"The doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or any of the executive officials of government, or by any unlawful means."

The most astonishing of these laws is probably the Connecticut statute (Chap. 191, of 1919) providing that

"No person shall, in public, or before any assemblage of ten or more persons, advocate in any language any measures, doctrine, proposal or propaganda intended to injuriously affect the Government of the United States or the State of Connecticut."

It is not surprising that under this astonishing statute an ex-soldier, Joseph Yenowsky by name, was convicted and sentenced to six months in prison upon the complaint of a bond salesman whose bonds he had declined to buy and who alleged that Yenowsky had said that Lenin was "the most brainiest man in the world." Friends of civil liberty gave widespread publicity to the case with the result that the prosecutor consented to Yenowsky's release even before an appellate court had passed upon the case. His arrest and prosecution show clearly the danger of injustice which is latent in the attempt to save the republic by imprisoning doctrines.

Typical definitions of "Criminal Syndicalism" and "Sabotage" are those contained in the California statute (Chap. 188 Laws of 1919):

"The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful

and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change."

A typical Red Flag Law (Minnesota, Chap. 46, Laws of 1919) is as follows:

"1. It shall be unlawful for any person to display within the state of Minnesota any red flag or black flag, provided, however, that the provisions of this act shall not prohibit the use of a red flag by any employee of a railroad company as a signal, or the display of a red flag on a public highway as a warning of obstruction.

2. It shall be unlawful for any person to have in his possession, custody, or control any red or black flag, or any picture or facsimile thereof, whether printed, painted, stamped, carved or engraved on any card, paper or insignia, with the intent to display the same in Minnesota. The possession, or having the same in possession or custody, of any such flag, or picture or facsimile thereof, as above prohibited, by any person, shall be deemed evidence of an intent on the part of the persons so having the same in possession, custody, or control, to display the same within the state of Minnesota.

3. It shall be unlawful for any person to display any flag or banner, ensign or sign, having upon it any inscription antagonistic to the existing government of the United States or the State of Minnesota."

The latest and perhaps the most complete product of the sedition hunters is the anti-syndicalist and sedition law adopted by the Kentucky legislature and signed by Governor Morrow on March 26th, 1920. It contains provisions customary in sedition legislation, penalizing by 21 years in prison membership in organizations which advocate sedition or criminal syndicalism as defined in the act, and prohibiting advocacy by speech, printing, or writing of the forbidden doctrines. It declares any assembly where such doctrines are advocated to be unlawful and sets forth other customary legislative devices for dealing with heresy. It contains one or two provisions which are unusual, however, and one which is unique. Section 8 provides that if the death of any person shall occur by reason of any violation of the act, the persons violating the act shall be guilty of murder and punished by death. In other words, if a riot occurs in which a person is killed and a jury can be persuaded that the riot was caused by a speech which is deemed to be seditious, the speaker will receive the death penalty.

Another section of the act makes it unlawful by speech, writing, or otherwise to arouse "discord or strife

or ill feeling between classes of persons for the purpose of inducing public tumult or disorder..." Section 11 makes it a crime for two or more persons to "agree, band, or confederate themselves together to do any of the things prohibited by this act..." and provides that in any prosecution it shall not be necessary to prove any overt act in order to secure a conviction.

Section 6 is unique. It follows in full:

"Any peace officer who shall have notice or knowledge of any such unlawful assembly in violation of this act shall forthwith disperse the same, using the power of the county and such force as is reasonably necessary for that purpose; and if any such peace officer shall fail or refuse actively to disperse such assembly forthwith, he shall on conviction be fined \$1000, and be imprisoned in the county jail 30 days, shall forfeit his office and be disqualified from holding any public office for a period of five years."

In Kentucky it is hazardous to be a policeman as well as to hold radical views. The difference is that the one can get thirty days in prison if his zeal is not great enough and the other can get 21 years if his zeal is too great.

Many of these state laws punish also for mere membership or association with an organization deemed to have the forbidden objects.

In addition to these state laws, scores of cities have enacted ordinances covering the same matter. In the state of Washington alone, for instance, over twenty cities have criminal syndicalism ordinances, under which thousands of convictions have been obtained. Many cities have ordinances prohibiting picketing, or regulating it practically out of existence.

All of these laws conceal their bite under a somewhat inoffensive exterior. As an academic proposition, for example, a law forbidding advocacy of the overthrow of the government by "unlawful means," would seem unobjectionable as it is unnecessary. Few people have sufficient imagination to see, in advance of experience, what trials under such laws actually entail — viz., inquiry into the ideals and motives of persons of antagonistic points of view, and inference (or more frequently wild conjecture) as to whether "overthrow of government" by "unlawful means" is necessarily implied by such ideals and motives as may be deemed discerned. Prosecutions and convictions depend less upon the defendant's acts than upon the temperature and atmosphere of his community.

Police Court Prosecutions.

The conditions of climate which make for convictions under Anti-Syndicalism laws and the like, make also for police court prosecution. In almost every city there are ordinances under which policemen and magistrates can, somewhat at discretion, send people to jail chiefly because they want to. The New York City Charter, for instance, establishes a somewhat indefinite offense called "Disorderly Conduct." Years ago the late Mayor Gaynor, then a judge, condemned the abuse of prosecutions on this charge. In Matter of Newkirk, 37 Misc. 404, he said:

"It is a loose charge which standing alone, i.e., without any statement of the acts alleged to constitute it, may mean anything a policeman or magistrate may wish, and has been very generally resorted to in the City of New York (where most abuses against individual rights originate) against persons who are guilty of no criminal offense, but whom some policeman or other person wishes to annoy by arrest or imprisonment. It is unfortunate that such a loose phrase has any statutory sanction. It is dangerous in that it affords room for false arrest and oppression, especially of those guarded, namely, the weak, uninfluential, and friendless, whose protection should be the chief aim of government."

Justice Gaynor's decision made it necessary in disorderly conduct cases to record what words or acts were deemed to constitute a case of disorderly conduct. But this has become simply a technicality of procedure, not a safeguard against oppression. A magistrate can say that anything he deems it politic to condemn constitutes disorderly conduct, and the chance is good that his decision will stand on appeal. A conviction was lately upheld where a person arrested was found by the policeman to have a number of circulars in his possession; he admitted in answer to questions that he was on his way to a place where he intended to distribute them. The magistrate read the circular and did not like it. The man's own statement that he *intended* to distribute them was held to constitute disorderly conduct!

Similar use is made of ordinances prohibiting littering sidewalks or obstructing traffic. The baseball scoreboard of a newspaper may with impunity put a main thoroughfare out of commission for hours. A knot of listeners about a radical speaker, however, is held a serious obstruction.

In Passaic, New Jersey, an attempt was lately

made to impede the organization of labor in the wool industry by a two-faced ordinance similar in respect of duplicity to the Espionage Act. It provided that no meeting could be held without notice to an official, who should, after satisfying himself that the meeting would not be detrimental to the public interest, issue a permit therefor. To enact that meetings could not be held without permission of an official would, of course, be clearly unconstitutional. The point of the ordinance was to say something else which might be held constitutional and yet at the same time accomplish the desired result.

In Passaic, this attempt was a failure. An intelligent and independent prosecutor took the position that it was not an offense for persons who had given notice and received no permit to hold their meeting anyhow. At Duquesne, Pa., however, where an identical ordinance is on the books, the authorities have taken a contrary view. The Mayor of Duquesne is the same who lately declared that "Jesus Christ himself could not speak in Duquesne under the auspices of the American Federation of Labor." The constitutionality of his position is now in litigation.

Censorship and Espionage.

In May 1920, the Post Office is still concerned with the politics of publications offered for transmission. There are maintained so-called "check lists" of persons believed to hold certain views. Letters addressed to the *Milwaukee Leader* are still returned to the sender marked "undeliverable under the Espionage Act." First class mail addressed to a person of supposed "radical" views may be detained and steamed open without notice to the addressee except from the trace left by the opener's hands — and the United States Attorney will refuse to be interested.

The names signed to a petition to President Wilson for the pardon of Mrs. Kate Richards O'Hare became the visiting list of a "patriotic" society — whose agents confess that they do not know what Mrs. O'Hare is in jail for, but entertain no question of the propriety of addressing words of serious warning to anyone so ill-advised as to think she ought to be set free. People are arrested without charge or warrant and subjected to indignity. Sometimes they are tortured. The practice of seizing persons and property without

any legal process at all or on warrants flagrantly illegal was hardly questioned until it was extended from persons concerned with the stimulation of thought to persons engaged in the manufacture of stimulants.

The Colyer case at Boston furnished proof of the long-entertained suspicion that the Attorney General [Mitchell Palmer] has made use of provocative agents. "It is perfectly clear on the evidence before me," said the United States District Judge, "that the government owned and operated a part, at least, of the Communist Party." For the convenience of the Attorney General in making his January raids, his "undercover" representatives had meetings of all the branches of the Communist Party called for the same date. The agents of the Department of Justice were instructed to obtain warrants only where local conditions made it necessary.

Cynical disregard by officials of the substance of law has led in many cases to neglect of even its forms. At the same time, however, inquisitorial agencies have procured legislation giving color of legality to unconstitutional practices. In New York, for example, under a statute jocularly nicknamed "The Peace and Safety Act," the Attorney General of the state may in his discretion appoint and determine the duties of "such deputies as he deems necessary." The names and duties of such deputies may be kept secret; their salaries and expenses are paid out of a special bank account in the name of the Attorney General and the Governor, the expenditure and application of which is subject to no audit by anyone else. "Peace and Safety" agents are empowered to examine, without ground or reason, on their own subpoenas, *any* witnesses and *any* books and papers, anywhere in the state, that they may select. Any witness who shall disclose outside anything elicited from him in the Star Chamber is guilty of a misdemeanor!

Mobs.

The lawlessness of officials usually passes unnoticed by the press. Incidents of private lawlessness are more apt to be chronicled — often in a manner to imply that the fault, if any, was all on the side of the victims.

The persons mobbed or raided have usually no redress. The perpetrators of the outrage, if they do not

themselves represent the officialdom of the locality, are apt to include that officialdom's best friends.

Injunctions.

"It is to be hoped," says the Catholic Reconstruction Program of January 1919 as to the right of labor to organize and to deal with the employers through representatives, "that this right will never again be called in question by any considerable number of employers."

It is called in question continually, both openly and by indirection. It amounts to nothing unless labor, when organized, can strike when occasion calls for it. A strike amounts to nothing unless the strikers can make known the fact of their strike and the facts about it — make it known not only to the employer and one another, but to the public opinion by which their employer's attitude may in the last analysis be controlled, and to the workers who if uninformed may innocently come in and take their places.

A normal medium of strike publicity is the picket line. The right to picket would seem to be about as basic as the right to walk or breathe. Strikes have been enjoined. And with increasing frequency since the performances of Judge Anderson and the Attorney General with respect to the coal strike, employers have been able to persuade judges to issue injunctions abridging the right to picket.

In some states the courts have practically nullified state laws specially permitting peaceful picketing, on the ground that no picketing can be peaceful!

Representative Government.

The most flagrant attempt to perpetuate in America the practice of thought-control and the prevalence of the cowed mind is the action of the New York Assembly in expelling the duly elected representatives of 61,041 citizens and voters. There was an "investigation." It lasted for eight weeks. There were no charges of wrongful acts. There was no finding of wrongful acts. The trial was not of acts, but of opinions. The finding was in substance that a certain political party,

working and acting in conformity with law, seeks to effect changes which the Assembly thinks would be harmful; the electorate in districts where approval of these changes prevails is therefore disfranchised. And it was proposed (but here the gubernatorial veto interposed) to make the right of all political parties to exist and elect members to public office depend upon opinion of certain judges in one of the four districts of the state as to whether their principles are "inimical" to the government!

In addition to this flagrant and open case in New York, there must be pointed out those industrial districts throughout the country so corporation-controlled that representative government does not exist. This is notoriously true of such districts as western Pennsylvania, southern West Virginia, northern Michigan, southeastern Colorado — and many others — and who will speak seriously of "representative government" in the entire South?

Conclusion.

Civil liberty is more important today than it was in the stagnant period when we had it because no one troubled to abridge it. The world is rising upon one of the periodic waves which carry it onward towards civilized adjustment for human welfare. The propulsive force is the awakened working class. That class is organizing its power. It is formulating its purposes. It matters greatly to civilization that its purposes should be intelligent and its power sanely guided — that aspiration rather than resentment should be its motive — that its struggle should be towards a goal rather than against an enemy.

Mitchell Palmers and Lusk Committees and sedition trials create nothing but enmity and resentment. Devotion to human welfare is not so common that we can afford to put it in jail, even when it is misguided. It is dangerous to inflict martyrdom upon brave and farseeing men of high motives. It is still more dangerous to confer the dignity of martyrdom upon the shortsighted and the immature. We need an end of choking thought and its communication.

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