Schenck v. U.S.

249 U.S. 47
Supreme Court of the United States
March 3, 1919

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA. SCHENCK v. UNITED STATES and BAER v. UNITED STATES. Nos. 437, 438.. Argued January 9, 10, 1919. Decided March 3, 1919. *Mr. Henry John Nelson* and *Mr. Henry J. Gibbons* for plaintiffs in error. *Mr. John Lord O'Brian,* Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman,* Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. 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.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to

drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams* v. *New York,* 192 U.S. 585; *Weeks* v. *United States,* 232 U.S. 383, 395, 396. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch Street and it would seem that the documents technically were not even in the defendants' possession. See *Johnson* v. *United States,* 228 U.S. 457. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt* v. *United States,* 218 U.S. 245, 252, 253.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. 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* v. *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. *Aikens* v.

Wisconsin, 195 U.S. 194, 205, 206. 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. *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439. 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. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman* v. *United States,* 245 U.S. 474, 477. Indeed that case might be said to dispose of the present contention if the precedent covers all *media concludendi.* But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. Stats., § 13.

Judgments affirmed.

Masses Publishing v. Patten

244 F. 535
United States District Court of the Southern District of New York
July 24, 1917

In Equity. Suit by the Masses Publishing Company against T. G. Patten, Postmaster of the City of New York. On motion for preliminary injunction. Motion granted. Gilbert E. Roe, of New York City, for plaintiff. Earl B. Barnes, of New York City, for defendant.

FACTS.

The plaintiff applies for a preliminary injunction against the postmaster of New York to forbid his refusal to accept its magazine in the mails under the following circumstances: The plaintiff is a publishing company in the city of New York engaged in the production of a monthly revolutionary journal called 'The Masses,' containing both text and cartoons, each issue of which is ready for the mails during the first ten days of the preceding month. In July, 1917, the postmaster of New York, acting upon the direction of the Postmaster General, advised the plaintiff that the August number to which he had had access would be denied the mails under the Espionage Act of June 15, 1917. Though professing willingness to excerpt from the number any particular matter which was objectionable in the opinion of the Postmaster General, the plaintiff was unable to learn any specification of objection, and thereupon filed this bill, and now applies for a preliminary injunction upon a statement of the facts.

The four cartoons are entitled respectively, 'Liberty Bell,' 'Conscription,' 'Making the World Safe for Capitalism,' 'Congress and Big Business.' The first is a picture of the Liberty Bell broken in fragments. The obvious implication, taking the cartoon in its context with the number as a whole, is that the origin, purposes, and conduct of the war have already destroyed the liberties of the country. It is a fair inference that the draft law is an especial instance of the violation of the liberty and fundamental rights of any free people.

The second cartoon shows a cannon to the mouth of which is bound the naked figure of a youth, to the wheel that of a woman, marked 'Democracy,' and upon the carriage that of a man, marked 'Labor.' On the ground kneels a draped woman marked 'Motherhood' in a posture of desperation, while her infant lies on the ground. The import of this cartoon is obviously that conscription is the destruction of youth, democracy, and labor, and the desolation of the family. No one can dispute that it was intended to rouse detestation for the draft law.

The third cartoon represents a Russian workman symbolizing the Workmen's and Soldiers' Council, seated at a table, studying a paper entitled, 'Plan for a Genuine Democracy.' At one side Senator Root furtively approaches the figure with a noose marked 'Advice,' apparently prepared to throw it over the head of the workman, while behind him stands Mr. Charles E. Russell, the Socialist member of the Russian Commission, in a posture of assent. On the other side a minatory figure of Japan appears through a door carrying a raised sword, marked 'Threat,' while behind him follows a conventional John Bull, stirring him up to

action. The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its Allies into a continuance of the war for purposes prejudicial to true democracy.

The fourth and last cartoon presents a collection of pursy magnates standing about a table on which lies a map, entitled ‘War Plans.‘ At the door enters an apologetic person, hat in hand, diffidently standing at the threshold, while one of the magnates warns him to keep off. The legend at the bottom runs as follows: ‘Congress: 'Excuse me, gentlemen, where do I come in?’ Big Business: ‘Run along, now. We got through with you when you declared war for us.’‘ It is not necessary to expatiate upon the import of this cartoon.

The four pieces of text are annexed to the end of this report as addenda, A, B, C, and D. After that part of B so set forth, the article continues, showing the hardships and maltreatment of a number of English conscientious objectors, partly from excerpts out of their letters, partly from reports of what they endured. These statements show much brutality in the treatment of these persons.

The challenged text, omitting the excerpts just mentioned, total about one page out of a total of 28. Throughout the rest are sprinkled other texts designed to arouse animosity to the draft and to the war, and criticisms of the President's consistency in favoring the declaration of war.

The defendant attaches to its papers as well copies of the June and July numbers of The Masses and a number of Mother Earth, a magazine edited by Emma Goldman and Alexander Berkman, recently convicted in this court for a conspiracy to resist the draft. The earlier copies of The Masses contain inflammatory articles upon the war and conscription in revolutionary vein, some of which go to the extent of counseling those subject to conscription to resist. This case does not concern them except in so far as the defendant's position is correct that in the interpretation of the August number the purpose of the writers may be inferred from what preceded, and that an audience addressed in the earlier numbers would put upon the later number a significance beyond what the contents would naturally bear if it stood alone. It is not necessary for a determination of this case to set forth in detail the contents of these numbers. The copy of Mother Earth also need not be referred to.

LEARNED HAND, District Judge (after stating the facts as above).

It is well settled that this court has jurisdiction to review the act of the postmaster. *School of Magnetic Healing v. McAnnulty,* 187 U.S. 94; *Post Publishing Co. v. Murray,* 230 Fed. 773; *Bruce v. United States,* 202 Fed. 98; *United States v. Atlanta Journal,* 210 Fed. 275. If it appears that his proposed official course is outside of the authority conferred upon him by law, the court cannot escape the duty of so deciding, just as in the case of any other administrative officer. *Noble v. Union River Logging Co.,* 147 U.S. 165; *Gegiow v. Uhl,* 239 U.S. 3. However, again, as in the case of other such officers, the postmaster's decision is final if there be any dispute of fact upon which his decision may rest, and even where it must turn upon a point of law, it has a strong presumption of validity. *Bates & Guild Co. v. Payne,* 194 U.S. 106; *Public Clearing House v. Coyne,* 194 U.S. 497. In this case there is no dispute of fact which the plaintiff can successfully challenge except the meaning of the words and pictures in the magazine. As to these the query must be: What is the extreme

latitude of the interpretation which must be placed upon them, and whether that extremity certainly falls outside any of the provisions of the act of June 15, 1917. Unless this be true, the decision of the postmaster must stand. It will be necessary, first, to interpret the law, and, next, the words and pictures.

It must be remembered at the outset, and the distinction is of critical consequence throughout, that no question arises touching the war powers of Congress. It may be that Congress may forbid the mails to any matter which tends to discourage the successful prosecution of the war. It may be that the fundamental personal rights of the individual must stand in abeyance, even including the right of the freedom of the press, though that is not here in question. *Ex parte Jackson,* 96 U.S. 727; *Re Rapier,* 143 U.S. 110. It may be that the peril of war, which goes to the very existence of the state, justifies any measure of compulsion, any measure of suppression, which Congress deems necessary to its safety, the liberties of each being in subjection to the liberties of all. *The Legal Tender Cases*, 12 Wall, 457. It may be that under the war power Congress may mobilize every resource of men and materials, without impediment or limitation, since the power includes all means which are the practice of nations in war. It would indeed not be necessary, perhaps in ordinary cases it would not be appropriate, even to allude to such putative incidents of the war power, but it is of great consequence at the present time with accuracy to define the exact scope of the question at bar, that no implication may arise as to any limitation upon the absolute and uncontrolled nature of that power. Here is presented solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered, but necessary to the existence of the state as such. Every one agrees that the exercise of such power, however wide it may be, rests in Congress alone, at least subject to such martial law as may rest with the President within the sphere of military operations, however broadly that may be defined. The defendant's authority is based upon the act of Congress, and the intention of that act is the single measure of that authority. If Congress has omitted repressive measures necessary to the safety of the nation and success of its great enterprise, the responsibility rests upon Congress and with it the power to remedy that omission.

Coming to the act itself, it is conceded that the defendant's only direct authority arises from title 12 of the act, Secs. 1 and 2. His position is that under section 1 any writing which by its utterance would infringe any of the provisions of other titles in the act becomes nonmailable. I may accept that assumption for the sake of argument and turn directly to section 3 of title 1, which the plaintiff is said to violate. That section contains three provisions. The first is, in substance, that no one shall make any false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies. The defendant says that the cartoons and text of the magazine, constituting, as they certainly do, a virulent attack upon the war and those laws which have been enacted to assist its prosecution, may interfere with the success of the military forces of the United States. That such utterances may have the effect so ascribed to them is unhappily true; publications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are

generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project, or of the correctness of the defendant's position.

All this, however, is beside the question whether such an attack is a willfully false statement. That phrase properly includes only a statement of fact which the utterer knows to be false, and it cannot be maintained that any of these statements are of fact, or that the plaintiff believes them to be false. They are all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer. As such they fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question. To modify this provision, so clearly intended to prevent the spreading of false rumors which may embarrass the military, into the prohibition of any kind of propaganda, honest or vicious, is to disregard the meaning of the language, established by legal construction and common use, and to raise it into a means of suppressing intemperate and inflammatory public discussion, which was surely not its purpose.

The next phrase relied upon is that which forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to interpret the word ‘cause‘ so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.

The defendant's position, therefore, in so far as it involves the suppression of the free utterance of abuse and criticism of the existing law, or of the policies of the war, is not, in my judgment, supported by the language of the statute. Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself. One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to

counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. The defendant asserts not only that the magazine indirectly through its propaganda leads to a disintegration of loyalty and a disobedience of law, but that in addition it counsels and advises resistance to existing law, especially to the draft. The consideration of this aspect of the case more properly arises under the third phrase of section 3, which forbids any willful obstruction of the recruiting or enlistment service of the United States, but, as the defendant urges that the magazine falls within each phrase, it is as well to take it up now. To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

It seems to me, however, quite plain that none of the language and none of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding. I come, therefore, to the third phrase of the section, which forbids any one from willfully obstructing the recruiting or enlistment service of the United States. I am not prepared to assent to the plaintiff's position that this only refers to acts other than words, nor that the act thus defined must be shown to have been successful. One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way. Here again, however, since the question is of the expression of opinion, I construe the sentence, so far as it restrains public utterance, as I have construed the other two, and as therefore limited to the direct advocacy of resistance to the recruiting and enlistment service. If so, the inquiry is narrowed to the question whether any of the challenged matter may be said to advocate resistance to the draft, taking the meaning of the words with the utmost latitude which they can bear.

As to the cartoons it seems to me quite clear that they do not fall within such a test. Certainly the nearest is that entitled ‘Conscription,‘ and the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant. There is no intimation that, however hateful the draft may be, one is in duty

bound to resist it, certainly none that such resistance is to one's interest. I cannot, therefore, even with the limitations which surround the power of the court, assent to the assertion that any of the cartoons violate the act.

The text offers more embarrassment. The poem to Emma Goldman and Alexander Berkman, at most, goes no further than to say that they are martyrs in the cause of love among nations. Such a sentiment holds them up to admiration, and hence their conduct to possible emulation. The paragraph in which the editor offers to receive funds for their appeal also expresses admiration for them, but goes no further. The paragraphs upon conscientious objectors are of the same kind. They go no further than to express high admiration for those who have held and are holding out for their convictions even to the extent of resisting the law. It is plain enough that the paper has the fullest sympathy for these people, that it admires their courage, and that it presumptively approves their conduct. Indeed, in the earlier numbers and before the draft went into effect the editor urged resistance. Since I must interpret the language in the most hostile sense, it is fair to suppose, therefore, that these passages go as far as to say:

> 'These men and women are heroes and worthy of a freeman's admiration. We approve their conduct; we will help to secure them their legal rights. They are working for the betterment of mankind through their obdurate consciences.'

Moreover, these passages, it must be remembered, occur in a magazine which attacks with the utmost violence the draft and the war. That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. Literally at least they do not, and while, as I have said, the words are to be taken, not literally, but according to their full import, the literal meaning is the starting point for interpretation. One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within the law. If they do, it would follow that, while one might express admiration and approval for the Quakers or any established sect which is excused from the draft, one could not legally express the same admiration and approval for others who entertain the same conviction, but do not happen to belong to the society of Friends. It cannot be that the law means to curtail such expressions merely, because the convictions of the class within the draft are stronger than their sense of obedience to the law. There is ample evidence in history that the Quaker is as recalcitrant to legal compulsion as any man; his obstinacy has been regarded in the act, but his disposition is as disobedient as that of any other conscientious objector. Surely, if the draft had not excepted Quakers, it would be too strong a doctrine to say that any who openly admire their fortitude or even approved their conduct was willfully obstructing the draft.

When the question is of a statute constituting a crime, it seems to me that there should be more definite evidence of the act. The question before me is quite the same as what would arise upon a motion to dismiss an indictment at the close

of the proof: Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft? I cannot think that upon such language any verdict would stand. Of course, the language of the statute cannot have one meaning in an indictment and another when the case comes up here, because by hypothesis, if this paper is nonmailable under section 3 of title 1, its editors have committed a crime in uttering it.

After the foregoing discussion it is hardly necessary to speak of section 2 of title 12. The plaintiff insists that refusal to comply with the provisions of the draft cannot be classed as forcible resistance; that such a refusal is, at most, only inaction, the neglect of an affirmative duty even to the extent of submitting to imprisonment. It may be plausibly contended that by forcible resistance Congress meant more than passive resistance, but even if this be not true, the result is the same, because, so construed, the section goes no further than the last phrase of section 3 of title 1 as I have construed it here. What was therefore said upon that section will serve here.

The defendant's action was based, as I understand it, not so much upon the narrow question whether these four passages actually advocated resistance, though that point was distinctly raised, as upon the doctrine that the general tenor and animus of the paper as a whole were subversive to authority and seditious in effect. I cannot accept this test under the law as it stands at present. The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law. It is difficult and often impossible to meet the charge that one's general ethos is treasonable; such a latitude for construction implies a personal latitude in administration which contradicts the normal assumption that law shall be embodied in general propositions capable of some measure of definition. The whole crux of this case turns indeed upon this thesis. I make no question of the power of Congress to establish a personal censorship of the press under the war power; that question, as I have already said, does not arise. I am quite satisfied that it has not as yet chosen to create one, and with the greatest deference it does not seem to me that anything here challenged can be illegal upon any other assumption.

Finally, the question arises as to how far the earlier numbers of the paper should be considered. The theory is that the August number covertly refers to the explicit counsel of resistance in the numbers of June and July. A priori such a reference might legitimately incorporate the earlier expressions; I do not doubt that the memory of those expressions may in fact remain in the minds of readers and that they may be revived by the sympathy and accord with conscientious objectors expressed in the August number. Yet the plaintiff is still entitled to ask, whatever the results of its past utterance may be, that some words be pointed out which by some reference fairly inferable from the words themselves relate back to earlier and more explicit statements. I think there are no words in the four passages which admit of such an interpretation.

It follows that the plaintiff is entitled to the usual preliminary injunction.

A.

A Question.

Often I wish we had a continuing census bureau to which we might apply, and have a census taken with classifications of our own choosing. I would like to know to-day, how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a 'round-up of slackers'? Are there none to whom this picture of the American republic adopting towards its citizens the attitude of a rider toward cattle is appalling? I recall the Essays of Emerson, the Poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. It painted the quality of her culture for those in the old world who loved her. It was a revolt of the aspiring mind against that instinctive running with custom and the support of numbers, which is an hereditary frailty of our nerves. It was a determination to worship and to love, in the living and laughing present, the same heroisms that we love when we look back so seriously over the past.

I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world.

B.

A Tribute.

Emma Goldman and Alexander Berkman
Are in prison,
Although the night is tremblingly beautiful
And the sound of water climbs down the rocks
And the breath of the night air moves through multitudes and multitudes of leaves
That love to waste themselves for the sake of the summer.
Emma Goldman and Alexander Berkman
Are in prison tonight,
But they have made themselves elemental forces,
Like the water that climbs down the rocks;
Like the wind in the leaves;
Like the gentle night that holds us;

They are working on our destinies;
They are forging the love of the nations;
Tonight they lie in prison.

C.

Conscientious Objectors.

We publish below a number of letters written last year from English prisons by conscientious objectors. It is as yet uncertain what treatment the United States government will mete out to its thousands of conscientious objectors, but we believe that our protestors against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion and not as free men.

Some discussion has arisen as to whether those whose objection to participating in war is not embodied in a religious formula have the right to call their objection a ‘conscientious‘ one. We believe that this old-fashioned term is, however, one that fits their case. There are some laws which the individual feels that he cannot obey, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. This fundamental stubbornness of the free soul, against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of this war can express itself in the same heroic firmness that has in England upheld the Christian objectors to war as murder. We recommend to all who intend to stick it out to the end, a thorough reading of the cases which follow, so that they may be prepared for what is at least rather likely to happen to them.

D.

Friends of American Freedom.

Alexander Berkman and Emma Goldman have been arrested, charged with advocating in their paper, Mother Earth, that those liable to the military draft, who do not believe in the war, should refuse to register. That they would be arrested, on some charge, and subjected to bitter prosecution, has been inevitable ever since they appeared as the spokesmen of a working class protest against the plans of American militarism. Whatever you may think of the practicability of such a protest, you must, with their friends, pay tribute of admiration for their courage and devotion.

Alexander Berkman is one of the few men whose character and intelligence ever stood firm through a quarter of a lifetime in prison. Emma Goldman has followed her extreme ideal of liberty for 30 years, up and down, in better places and worse than the federal penitentiary. They can both endure what befalls them. They have more resources in their souls, perhaps, as they have the support of a

more absolute faith, than we have who admire them. But let us give them every chance for acquittal that the constitution of the times allow. Let us give them every chance to state their faith. The Masses will receive funds for this purpose.

Brandenburg v. Ohio

395 U.S. 444
Supreme Court of the United States
June 9, 1969

No. 492. Argued February 27, 1969. Decided June 9, 1969. APPEAL FROM THE SUPREME COURT OF OHIO. *Allen Brown* argued the cause for appellant. With him on the briefs were *Norman Dorsen, Melvin L. Wulf, Eleanor Holmes Norton,* and *Bernard A. Berkman. Leonard Kirschner* argued the cause for appellee. With him on the brief was *Melvin G. Rueger. Paul '. Brown,* Attorney General of Ohio, *pro se,* and *Leo J. Conway,* Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae.*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte,* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are – we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California,*

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[1] The significant portions that could be understood were:
"How far is the nigger going to – yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas,* 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States,* 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.~ As we said in *Noto* v. *United States,* 367 U. S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry,* 301 U. S. 242, 259-261 (1937); *Bond* v. *Floyd,* 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States,* 354 U. S. 298 (1957); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); *Stromberg* v. *California,* 283 U. S. 359 (1931). See also *United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.~

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.~ Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis* v. *United States,*

341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat.*

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I – a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck* v. *United States,* 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "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."

Frohwerk v. *United States,* 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." *Id.,* at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame." *Id.,* at 209.

Debs v. *United States,* 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.,* at 215.

> "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." *Ibid.*

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams* v. *United States,* 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck,* he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.,* at 628.

Another instance was *Schaefer* v. *United States,* 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce* v. *United States,* 252 U. S. 239, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power – the greatest leveler of them all – is adequate to sustain that doctrine is debatable. The dissents in *Abrams, Schaefer,* and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce* v. *United States, supra,* at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney* v. *California,* 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673:

> "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon* v. *Lowry,* 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.,* at 259-261. And see *Hartzel* v. *United States,* 322 U. S. 680. In *Bridges* v. *California,* 314 U. S. 252, 261-263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis* v. *United States,* 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition.~

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit.' " *Id.,* at 509-511. The Court sustained convictions under that charge, construing it to mean a determination of " 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' "~ *Id.,* at 510, quoting from *United States* v. *Dennis,* 183 F. 2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates* v. *United States,* 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government by violence, *Noto* v. *United States,* 367 U. S. 290, may be

prosecuted. *Scales* v. *United States,* 367 U. S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt* v. *United States,* 360 U. S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis,* coined the "not improbable" test, 183 F. 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the Court held in *United States* v. *O'Brien,* 391 U. S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

> "The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U. S., at 377-378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 775 (DOUGLAS, J., concurring); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 501; *Hughes* v. *Superior Court,* 339 U. S.

460, 465; *Labor Board* v. *Fruit Packers,* 377 U. S. 58, 77 (BLACK, J., concurring), and *id.,* at 93 (HARLAN, J., dissenting); *Cox* v. *Louisiana,* 379 U. S. 559, 578 (opinion of BLACK, J.); *Food Employees* v. *Logan Plaza,* 391 U. S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think, that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall,* 357 U. S. 513, 536-537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales.* The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.