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Ernst Freund and the First Amendment Tradition

Professor Ernst Freund and *Debs v. United States*

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The decision in *Debs v. United States*[1] was handed down by the United States Supreme Court some fifty-four years ago. It is happily no longer good law; it is not likely to become law again. It is with little exception not studied in the law schools, and it is rarely cited or noted in even the more elaborate casebooks or treatises on constitutional law.[2] It might seem, therefore, an antiquarian indulgence for a busy law review to devote some pages to it, especially for the primary purpose of reprinting an article from the *New Republic,* an article which is also fifty-four years old.[3]

But the opinion in *Debs* was written by Justice Holmes; and the article in the *New Republic* is a criticism of the case written by Ernst Freund. Taken together these facts provide important clues to the intellectual history of the first amendment tradition, a history we had better understand if we are to hang on to the tradition today. We would do well to be aware of how far we have traveled and how difficult it was

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1 249 U.S. 211 (1919).

2 The major exception appears to be G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1061 (8th ed. 1970) (using *Debs* as a principal case). *See also* C. PRITCHETT, THE AMERICAN CONSTITUTION 416 (2d ed. 1968) (devoting a few lines' brief to it). Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 84-85 (rev. ed. 1948) does discuss it. *See* text at note 12 *infra.*

3 Except for the reference to it in Z. CHAFEE, *supra* note 2, it might well have been beyond reach for scholarly as well as popular audiences.

to get here. We need, in Learned Hand's splendid phrase, to have a sense of our "hard bought acquisition in the fight for freedom."[4]

The constitutional law dimension of American free speech and political tolerance dates, as we all know, from the opinion of Justice Holmes in *Schenck v. United States*,[5] one of the most cited and famous of American cases. It is that opinion which gave to the law, and to the culture, the "clear and present danger" formula for measuring the reach of the first amendment, and which gave us also the example of the man falsely shouting fire in the crowded theater. For better or for worse, and I believe it for worse, the formula and the example have loomed very large in the subsequent development of first amendment interpretation.[6]

It has been customary to lavish care and attention on the *Schenck* case. The point we need for present purposes is simply that *Debs v. United States* had been argued to the Court well before *Schenck* was decided and was itself decided March 10, 1919, just one week later than *Schenck*. It represented the first effort by Justice Holmes to apply what he had worked out about freedom of speech in *Schenck*. The start of the law of the first amendment is not *Schenck*; it is *Schenck* and *Debs* read together.

Read freshly with the eyes of today the outcome in *Debs* is shocking. Debs was charged with obstructing recruitment for the draft in violation of the Espionage Act of 1917. He was convicted and given a ten-year prison sentence.[7] His criminal conduct consisted of a public speech to a general audience in Canton, Ohio. "The main theme of the speech," Justice Holmes tells us, "was socialism, its growth, and a prophecy of its ultimate success." In the course of the speech, Debs expressed sharp criticism of war in general, and of World War I in particular, from the socialist point of view: "the master class has always declared the wars and the subject class has always fought the battles." He also expressed sympathy for several others already convicted and imprisoned for their opposition to the war, saying as to Rose Pastor Stokes "if she was guilty so was he." Justice Holmes, in a curious show of empathy, quotes several other passages from the speech and from Debs's statement to the jury: "Don't worry about the charge of treason to your masters; but be concerned about the treason that in-

4 Masses Publishing Co. v. Patten, 244 F. 535, 540 (1917).

5 249 U.S. 47 (1919).

6 The law may finally have worked itself pure. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

7 The prison sentence was commuted by President Harding in 1921, but Debs's citizenship was not restored.

volves yourselves." "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."[8]

The speech then fell into the genre of bitter criticism of government and government policy, sometimes called seditious libel; freedom of such criticism from government censorship marks, we have come to understand, "the central meaning of the First Amendment."[9] During the Vietnam War thousands of utterances strictly comparable in bitterness and sharpness of criticism, if not in literacy, were made; it was pretty much taken for granted they were beyond the reach of government.

There is just one more detail for our brief. Debs at the time of the speech was a national political figure. He was to run for President the following year on the Socialist ticket and, although in prison at the time, was to receive almost 900,000 votes, a considerable fraction of all votes cast in the 1920 election. To put the case in modern context, it is somewhat as though George McGovern had been sent to prison for his criticism of the war.

The *Debs* case thus put a vital, practically important test of political dissent to the Court and the Constitution. The Court's almost laconic affirmance of the conviction raises serious question as to what the first amendment, and more especially, what the clear and present danger formula can possibly have meant at the time. Justice Holmes devotes only a single clause to the defendant's constitutional objections, noting merely that they were "disposed of in *Schenck v. United States.*" He does not comment on the fact difference between the cases: the defendant in *Schenck* had sent his leaflets directly to men who awaited draft call whereas the defendant in *Debs* was addressing a general audience at a public meeting. Holmes offers no discussion of the sense in which Debs's speech presented a clear and present danger.[10] He shows no

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8 249 U.S. at 214.

9 New York Times v. Sullivan, 376 U.S. 254, 273 (1964); *see* Healy v. James, 408 U.S. 169 (1972); Street v. New York, 394 U.S. 576 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968); Bond v. Floyd, 385 U.S. 116 (1966).

10 While Justice Holmes does not pause to evaluate the danger from Debs's speech, he does, as Professor Freund notes, comment specifically on Debs's *intention.* After quoting Debs's statements to the jury about his hatred and abhorrence of war, Holmes observes:

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

Holmes's immediate concern at this point in the opinion is construing the federal statute and establishing that there was sufficient evidence of intention to permit a finding that

sensitivity to accommodating a tradition of political dissent, a sensitivity which had so characterized Hand's opinion two years earlier in *Masses Publishing Co. v. Patten*,[11] and makes no effort to suggest the parameters of improper criticism of the war. In fact the case did not move Justice Holmes to discuss free speech at all; his brief opinion is occupied with two points about admissibility of certain evidence at the trial. It was for Holmes a routine criminal appeal.

It was for Professor Freund, however, a dismal, and alarming, answer to the question of "freedom of agitation in wartime." His contemporary reaction to the decision serves to put into sharper focus the puzzles about Justice Holmes and the origins of the first amendment tradition. The Freund article makes it clear that the outcome in *Debs* was perceived as dangerously unsound by sophisticated legal intelligence of the day. If read with hindsight, *Debs*, as we said, now makes little sense and impeaches claims to serious freedom of speech; the Freund article shows that, read at the time, *Debs* made equally little sense.

Professor Chafee, after acknowledging that the *Debs* case came as a shock to many Holmes admirers, offered an explanation. "Looking backward, however, we see that Justice Holmes was biding his time until the Court should have before it a conviction so clearly wrong as to let him speak his deepest thoughts about the First Amendment." In the meantime Holmes, Chafee argues, by joining the majority in *Schenck* had been able to announce, with the backing of a unanimous Supreme Court, the rule of "clear and present danger." One more sentence, and Chafee's "benign plot" is completed. "The opportunity for which Justice Holmes had been waiting came eight months after Debs went to prison in *Abrams v. United States*."[12]

Professor Chafee is in one sense certainly correct. In *Abrams*,[13] Holmes in dissent was moved to a burst of eloquence about free speech that was to enrich and permanently to alter the constitutional tradition of the first amendment. Afterwards, *Debs* is conveniently forgotten and the dissenting *Abrams* eloquence is read back into *Schenck* as though it had been there all the time. But however we interpret the sequence of precedents, we confront a blunt question, which the *New Republic* piece so dramatically underscores: What can it mean about Justice Holmes that it was *Abrams* and not *Debs* that finally stirred him to speak seriously about freedom of speech?

Debs had violated the statute. He offers no clue as to how intention and clear and present danger are related as tests of the first amendment.

11 244 F. 535 (1917).

12 Z. CHAFEE, *supra* note 2, at 86.

13 250 U.S. 616 (1919).

Ernst Freund has been a legendary figure for The University of Chicago Law School and its alumni. As one of the original faculty, he was a major architect of the school and a major source of its national visibility. He is remembered for his pioneer work in administrative law, comparative law, and legislation, and for his generous view of the scope of legal education.[14] As the *New Republic* article shows, he is to be remembered, too, as a legal scholar playing a gallant role as public citizen. How welcome it is to know that amidst the patriotic pressures of World War I he could have written this sentence:

> But stamp a man like Debs or a woman like Kate O'Hare as felons and you dignify the term felony instead of degrading them, and every thief and robber will be justified in feeling that some of the stigma has been taken from his crime and punishment.

The *Debs* Case and Freedom of Speech*

Ernst Freund

After the affirmance of his conviction by the Supreme Court, Mr. Debs issued a statement to the effect that the real issue, the constitutionality of the Espionage law, had not been decided, and such seems to be the general impression. As a matter of fact the decision raises inevitably the question of the freedom of agitation in war time. The offense of which Debs was convicted was obstruction of recruiting; the acts proved were a violent attack upon the war, its motives and objects, and the approval of the conduct and attitude of persons who had been convicted of like offenses; and from this evidence the jury was permitted to find a tendency and an intent to obstruct recruiting. There was nothing to show actual obstruction or an attempt to interfere with any of the processes of recruiting. How can it be denied that the upholding of such a finding upon such evidence involves the question of the limits of permissible speech? If verbal or written opposition to the war, however violent or unwarranted, can be stretched to mean a form of obstruction, then Congress strikes at utterances as effectually through punishing obstruction as though it punished utterances directly. Not only is to this extent the restraint of speech clearly sanctioned by the Supreme Court, but it is made to rest on judicial interpretation rather than upon legislation.

I shall not attempt to determine what in the way of restraint is

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14 *See* Allen, *Preface* to E. FREUND, STANDARDS OF AMERICAN LEGISLATION (1965 ed.).

* *Reprinted from* THE NEW REPUBLIC, MAY 3, 1919, at 13.