

Justice Holmes and the 'Splendid Prisoner'

Anthony Lewis

**Democracy's Prisoner:
Eugene V. Debs, the Great War,
and the Right to Dissent**
by Ernest Freeberg
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Eugene Debs is a largely forgotten man today, an odd footnote in American history of the turn of the nineteenth and twentieth centuries. But this fascinating book about his climactic last years makes clear that he really mattered. In both political and legal ways he played a significant part in reducing intolerance of dissent in this country, and bringing to life the First Amendment's guarantee of free speech.

Debs was a radical union and political leader who twice went to prison for his beliefs and twice was the subject of Supreme Court decisions. In 1895, in *In re Debs*, the Court upheld his contempt conviction for violating an injunction against the great Pullman strike of 1894, which paralyzed many railroad lines for days. In 1901 he helped to found the Socialist Party. Over the next twenty years he was five times the party's candidate for president, running the last time in 1920 from the Atlanta federal penitentiary, where he was serving a ten-year sentence for a speech that Woodrow Wilson's administration said encouraged resistance to the draft during World War I. The Supreme Court affirmed his conviction in 1919 in *Debs v. United States*.

Conflict between Eugene Debs and Woodrow Wilson is a running theme of Ernest Freeberg's book. It shatters any illusion that Wilson was a liberal-minded president. On economic issues he was a reformer, but on civil liberties he was a disaster. He pushed through Congress in 1917 an Espionage Act that criminalized not only espionage but speech critical of the government. Wilson proposed to include, but Congress struck out, a provision for censorship of newspapers. In 1918 Congress passed an amendment, known as the Sedition Act, that made it a crime to use "disloyal" or "profane" language that might encourage contempt for the Constitution or the flag.

Postmaster General Albert Bursleson, empowered by the Espionage Act to cancel the mailing privileges of journals he deemed unpatriotic, put many left-wing magazines out of business. Wilson did nothing to restrain Bursleson. (Nor did he intervene when, earlier, his cabinet members imposed racial segregation on the Treasury and Navy Departments and the Post Office.)

When the United States entered World War I, much of the public—encouraged by Wilson—turned jingoistic. Thousands of people were prosecuted for such things as overstating the horrors of war. Vigilante groups harassed suspected opponents of the war. Debs was a particular target. When he was prosecuted in 1918, *The Washington Post* said, "Debs is a public menace, and the country will be better off with him behind bars."

It is hard to understand, now, why Gene Debs aroused hatred. Unlike



Eugene Debs just after his release from the Atlanta penitentiary, December 25, 1921

many of the socialists, anarchists, and other radical figures of the early twentieth century in this country, who were immigrants from Europe, he was utterly American. He lived in a Victorian house in Terre Haute, Indiana, a small city on the banks of the Wabash. He had great personal charm. The wardens of the two prisons where he served his time starting in 1919 came to admire and befriend him; so did the prisoners, among them murderers and others who were the roughest of men.

Debs's persona was friendly, but his ideology was revolutionary, his rhetoric purple. He inveighed against bankers, judges, and other totemic conservatives for "crime against modern humanity." He was a magnetic orator who actually made his living by public speeches: the Socialists charged admission to hear Debs, and the halls were packed. He believed in a Marxist revolution that would end capitalism. But the party's platform stood for much milder reformist measures, like free kindergartens.

What led to Debs's years in the penitentiary was a speech he made in Canton, Ohio, on June 16, 1918. It was given at an afternoon picnic. Vigilante volunteers from the area went through the crowd checking the draft cards of young men to ferret out "slackers." Debs spoke, as usual, without a prepared text. But a federal agent, a stenographer, took notes; so did a journalist.

Reading what we have of the speech now, it is difficult to spot anything that

would qualify as criminal even under the condign terms of the Espionage Act. Debs made no specific reference to the war in Europe or the draft law. The criticism in the speech was mainly directed at the prosecution and imprisonment of men and women for their words. His friend Kate O'Hare had been sentenced to five years in prison for an antiwar speech. "Just think of sending a woman to the penitentiary for talking," Debs said.

Debs started out by saying that he had just visited three Socialists who were in a nearby jail for opposing the draft. Debs praised their courage and said, "If it had not been for the men and women who, in the past, have had the moral courage to go to jail, we would still be in the jungles."

Speaking of war in history, not the one then raging, Debs said:

They have always taught you that it is your patriotic duty to go to war and to have yourselves slaughtered at command. But in all of the history of the world you, the people, never had a voice in declaring war... The working class who fight the battles,... the working class who shed the blood, the working class who furnish the corpses, the working class have never yet had a voice in declaring war.

A jury convicted Debs on two counts of violating the Espionage Act. The

Supreme Court upheld the verdict on one count, "obstructing and attempting to obstruct the recruiting service of the United States." The Court's decision was unanimous, and the opinion was by Oliver Wendell Holmes Jr., who more than any other justice was admired by progressives in the country. Holmes was admired for his powerful dissents when the Court struck down progressive legislation that, for example, forbade child labor and set maximum working hours for bakers. Legislatures must be given broad discretion to take actions that we may not like, he said in those cases; now he took a similarly laissez-faire approach to the Espionage Act limiting speech.

Holmes's opinion, announced on March 10, 1919, was brief, as was his style: six paragraphs, devoted mostly to discussing the facts of what Debs had said in Canton. Holmes said the "main theme" of the speech "was socialism, its growth, and a prophecy of its ultimate success." He summarized what Debs said about war and quoted his statement that "you need to know that you are fit for something better than slavery and cannon fodder." The opinion concluded that the jury was warranted 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.

He added that the jury had been

carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind.

Debs's lawyers had argued that his conviction under the Espionage Act was unconstitutional: a violation of the First Amendment's provision that Congress "make no law... abridging the freedom of speech." Holmes disposed of that argument in a sentence, saying that it had been rejected in a case decided by the Court one week earlier, *Schenck v. United States*.

The opinion in the *Schenck* case, also by Holmes, used for the first time the phrase "clear and present danger." Schenck, who was the secretary of the Socialist Party, had been convicted under the Espionage Act for mailing to 15,000 men eligible for the draft a pamphlet urging opposition to the draft. In time of war, Holmes said things that might be said in peacetime "will not be endured so long as men fight." He phrased the legal formula in words that were analyzed and debated for decades after:

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 evil that Congress has a right to prevent.

It was easy enough to fit the facts of the *Schenck* case into that formula: the anti-draft pamphlets did raise a danger of obstruction of the draft. But it was not—is not—easy to find in Debs's meandering speech an immediate danger of the "substantive evil" at issue, obstruction of recruitment. The Holmes opinion in the *Debs* case soon came under criticism on that ground from the liberal intellectuals who had so praised Holmes. Moreover, Debs was a national figure, respected by many as he was disliked by others. He was sixty-three years old, and a ten-year prison sentence aroused considerable sympathy.

A leading Holmes biographer, G. Edward White, writes that Holmes was aware of the criticism of the *Debs* opinion and responded to it "with a certain defensiveness."^{*}

Holmes wrote his friend Sir Frederick Pollock that there was no doubt about Debs's conviction, but "now I hope the President will pardon him." He expressed the same hope to Harold Laski, the young English socialist who was another regular correspondent, adding that "to let Debs serve his sentence would be both cruel and blind."

The criticism that seems to have struck deepest in Holmes was an article in *The New Republic* by Professor Ernst Freund of the University of Chicago Law School. Freund said that Holmes had allowed the jury "to find a tendency and an intent to obstruct recruiting" when there was "nothing to show actual obstruction or an attempt to interfere with any of the [recruitment] processes." Freund said:

To be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.

Holmes was sufficiently bothered by the Freund article that he wrote a letter to Herbert Croly, the editor of *The New Republic*, defending the decision but saying that "I hated to have to write the *Debs*" opinion.

He added that he "could not see the wisdom" of the government in pressing the Espionage Act cases,

especially when the fighting was over and I think it quite possible that if I had been on the jury I should have been for acquittal but I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact.

Holmes decided not to mail that remarkable letter. But he sent a copy to Harold Laski, who knew Croly well and may have shown it to him.

All this might be regarded as an interesting but marginal sidelight on Justice Holmes, but what happened next in the

^{*}I have taken my description of the criticism and Holmes's response from White's biography, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993), pp. 418-430.

law makes it much more than that. Just eight months after the *Debs* opinion, on November 10, 1919, the Supreme Court decided another Espionage Act case, *Abrams v. United States*. And this time Holmes, joined by Justice Louis D. Brandeis, dissented from the Court's affirmation of the convictions. The rhetoric of Holmes's dissenting opinion forever changed the struggle over freedom of speech in the United States.

In the *Abrams* case five radicals had thrown leaflets from the top of a building in New York protesting President Wilson's dispatch of troops to Russia after the Bolshevik Revolution. They were convicted under the Espionage Act; four men were sentenced to twenty years in prison, a young woman, Mollie Steimer, to fifteen years. When



Supreme Court Justice Oliver Wendell Holmes Jr., circa 1924

the Supreme Court upheld the convictions, Holmes wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition....

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market....

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

It was a transformation of Holmes's view of free speech. In the *Debs* case he had said that speech could be punished if it had a "natural tendency" to

obstruct the law—an elastic phrase that the Supreme Court had regularly used to allow suppression. Now he said that there could be no criminal punishment unless the speech threatened such "immediate interference" with the law that punishment was "required to save the country." The astonishing rhetoric of the *Abrams* opinion showed that Holmes no longer regarded speech as something readily subject to government regulation, like the working hours of bakers, but saw it as the key to an open society—to the American constitutional experiment.

What had happened to change Holmes's views between March and November 1919, between his opinions in the *Debs* and *Abrams* cases? The clues we have suggest strongly that the critical reaction to the *Debs* case

of praise. Laski and Felix Frankfurter wrote him extravagant letters.

The *Abrams* dissent was the first Supreme Court opinion, ever, that treated freedom of speech as a fundamental value under the Constitution. The Court had never found that any suppression of speech violated the First Amendment's guarantee of free expression. For the next twelve years Holmes and Brandeis continued to dissent in free speech cases—until finally, in 1931, a majority of the Court for the first time enforced the amendment, with Holmes still sitting at ninety.

In a strange, roundabout way, then, Eugene Debs had moved the law crucially toward the constitutional promise of "no law abridging the freedom of speech." In the decades after 1931 the Supreme Court steadily expanded its interpretation of that freedom, making this country more open to dissenting, even hateful, speech than any other. None of that gave Gene Debs any legal succor, but it should be reckoned as part of his legacy.

Debs entered prison a month after the Supreme Court decision, going first to a prison in Moundsville, Ohio. The warden, Joseph Terrell, made Debs promise not to preach socialism to his fellow inmates. But Freeberg writes that "Terrell was charmed by the old radical's warm personality, so different from the angry agitator he had read about in the nation's editorial pages." Two months later Debs was transferred to the Atlanta penitentiary. Its warden, Fred Zerbst, also respected him and treated him well. Debs, with characteristic naïveté, wrote that prison met his dream of a world without greed, where men could aspire to nothing and dwelled in a "perfect democracy."

Debs's friends and supporters looked not to law but to politics to end his imprisonment. They campaigned fervently for a presidential pardon. Freeberg, an associate professor of history at the University of Tennessee, has done a fine job of marshaling details of the campaign. Supporters included such leading writers as George Bernard Shaw, Carl Sandburg, and H.G. Wells.

Upton Sinclair published a collection of poems, plays, songs, and testimonials in support of Debs, calling it *Debs and the Poets*. The United States attorney general, A. Mitchell Palmer, gave Sinclair permission to send five hundred copies to the Atlanta penitentiary to be signed by Debs—proceeds going to the amnesty campaign for Debs and other political prisoners.

But the efforts for a pardon or amnesty broke on the unremitting resistance of President Wilson. He freed others, not Debs. People who knew Wilson and had supported him wrote and spoke to him; he assured them that he would pay fair regard to their requests, but they never got anywhere.

While Wilson was in Paris at the peace conference, his secretary, Joseph Tumulty, forwarded a request that he grant Debs a pardon. Wilson replied to Tumulty that he was "willing to grant the respite" if Attorney General Palmer consented. But he added, "I doubt the wisdom and public effect of such an action and hope that you will discuss it in the most serious way with Palmer." Palmer warned Wilson that

an amnesty for Debs and others would embolden radicals and outrage the public, which was still largely gripped by hysterical patriotism despite the end of the war.

When an amnesty proposal from Lincoln Steffens was shown to Wilson, Freeberg writes, the President "threw it down in an angry tantrum." "Suppose every man in America had taken the same position Debs did," Wilson said. "We would have lost the war and America would have been destroyed." Freeberg says some of Wilson's friends feared that "Wilson was losing his perspective, consumed by a spirit of 'malicious vindictiveness.'" Debs himself never asked for a pardon, saying that he had done nothing for which he wanted to be pardoned.

In May 1920 the Socialist Party, at a convention in New York, nominated Debs for a fifth run at the presidency. The Socialists distributed campaign buttons with his picture and prison number: "For President—Convict No. 9653." Warden Zerbst allowed Debs to go out of the prison gates to greet a delegation of his Socialist friends, whom he introduced to Zerbst. Then, in the warden's office, the group formally offered Debs the nomination; he replied in a forty-five-minute acceptance speech.

That extraordinary scene was followed by others during the election campaign. Debs was allowed to send a five-hundred-word message to the voters once a week. By the end of the summer the authorities allowed reporters to interview Debs in the penitentiary.

"Debs made great copy," Freeberg writes. "He was a saint in denim, a stoic philosopher who befriended murderers and thieves, a kindly old man who remained an 'untamed revolutionist' but had to be admired for the courage of his convictions." Debs had indeed helped his fellow convicts, and he was praised by the federal superintendent of prisons as a "splendid prisoner."

Debs won 913,664 votes in the election: fewer than he had hoped for. But the campaign seems to have accomplished something else, an easing of public attitudes toward him. More and more people said he had been in prison long enough; he was an old man, the war was over.

But Woodrow Wilson did not budge. He issued a Christmas pardon for 180 men, including two dozen political prisoners. But releasing the "unrepentant" Debs, he said, would be "a breach of faith with the American boys who went to France." As the administration neared its end, Attorney General Palmer recommended releasing Debs. But Wilson, by now physically broken after a stroke, wrote one word across Palmer's request: Denied.

Why was Wilson so set against Debs? It had become a grudge fight, Freeberg suggests, and Wilson suffered from what some called "messianic egotism."

Despite his physical disability, Freeberg says, "Wilson dreamed to the end that his party would beg him to accept a third term."

Warren G. Harding entered the White House on March 4, 1921. (Inauguration Day was changed to January 20 by the Twentieth Amendment to the Constitution in 1933.) Harding's low esteem in history makes him seem an unlikely champion of free speech, but he had been a newspaper man and he cared about the issue. Shortly after taking office, Harding told his attorney general, Harry Daugherty (known for his later involvement in the Teapot Dome scandal), to look into the cases of those in prison for their wartime speech.

Daugherty telephoned warden Zerbst to ask about Debs; Zerbst praised him and suggested, half-seriously, that Daugherty should meet him. Daugherty liked that idea. On March 23, Zerbst put Debs on a train to Washington—alone. He talked with Daugherty for several hours, then took a train back to Atlanta. Daugherty told reporters about the secret meeting, and the American Legion and others expressed outrage. *The New York Times* denounced the "coddling of this impudent criminal."

Harding commuted Debs's sentence effective Christmas Day 1921. When he walked out of the prison, Debs was cheered by most of the two thousand inmates, who had been given permission by Zerbst to press against the windows. Then Debs got on a train to Washington to see Harding—at the President's invitation!

The visit to the Oval Office lasted thirty minutes. No one disclosed what was said, except that Harding greeted Debs by saying, "I have heard so damned much about you, Mr. Debs, that I am now very glad to meet you personally." Harding went on to release most of the other political prisoners, and his postmaster general ended the Wilson administration's bans on left-wing journals.

It is an extraordinary story. A pacifist is imprisoned for a vague speech in wartime, and a supposedly liberal president refuses to release him when the war is over. A conservative successor then quickly frees him, and rolls back other repressions imposed by Woodrow Wilson. Public opinion, at first so antagonistic toward Debs, moves under the impact of the pardon campaign to more sympathy for him and for tolerance of dissenting speech in general. H. L. Mencken scoffed at Debs's pacifism and his "Marxian rumble-bumble." But Mencken said:

Is his release denounced by *The New York Times*, the Rotary Clubs and the idiots who seem to run the American Legion? Then it is precisely because he is fair, polite, independent, brave, honest and a gentleman.



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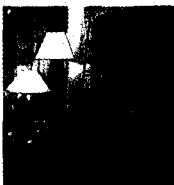
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