

THE AMERICAN CIVIL LIBERTIES UNION

BY H. L. MENCKEN

*An appraisal of the dispute between the ACLU and THE MERCURY;
with a letter in comment from the Union.*

IN THE AMERICAN MERCURY for December, 1936, there was an article by Harold Lord Varney entitled "The American Civil Liberties Union" with the sub-title "Liberalism à la Moscow". The general thesis thereof was that the Union, in recent years, has shown, at times, a certain partiality in its operations. The nature of that partiality was indicated in the first paragraph, which alleged, on grounds subsequently adduced and relied upon, that the Union is "the organization which is doing the most fruitful work to advance the so-called Class War in America today".

The officers of the Union objected to this, and the ensuing controversy was handed over to the legal advisers of both sides. Having heard last December (a year after the article was printed) that these gentlemen had so far failed to effect a composition, I took the

liberty of suggesting, as a friend to both parties, that the principals have a meeting and try to resolve their differences. This meeting was held in the office of Arthur Garfield Hays, counsel for the Union, on December 28. Present: Mr. Hays, Roger N. Baldwin (director of the Union), Paul Palmer (editor of THE AMERICAN MERCURY), and myself.

The discussion was amicable, and all hands adopted my suggestion that the conflicting contentions be submitted to some friendly but disinterested person, of sober years and notorious virtue, for examination. After various other candidates for that office had been discussed, the high contracting parties, to my considerable surprise and disquiet, proposed that I take it myself. My qualifications from the standpoint of the Union, appeared to be that I had supported its battles for the Bill of Rights

since its organization, and had been closely associated with Mr. Hays in various other enterprises to that end. On the side of THE AMERICAN MERCURY I came in as its first editor, and hence a person naturally interested in its doings and fortunes.

But I have had no voice in the conduct of the magazine since January 1, 1934, do not own any stock in it, appear in it only rarely and as an ordinary contributor, and dissent in more than one way from its present program. I am not acquainted with Mr. Varney. As for the Union, I am not now and have never been a member of it, and have never solicited or accepted its aid in any of the defenses of free speech that I have had a hand in—for example, the “Hat-rack” case of 1926, in which Mr. Hays appeared as my counsel, but not as counsel for the Union.

Mr. Palmer elected to stand on the evidence presented in Mr. Varney’s article, and the Union undertook to prepare an answer to it. That answer was handed to me on March 16 by Miss Lucille B. Milner, secretary of the Union. It includes a detailed analysis of the article, page by page, and a mass of accompanying documents, mainly pamphlets and press-releases published by the Union dur-

ing the past few years. I have examined all these papers with care, and read Mr. Varney’s article. My conclusions are as follows:

There are two questions to be considered: (a) whether all of the allegations of fact made by Mr. Varney are given adequate support by the record, and (b) whether there is enough other evidence in the record to justify an unfriendly critic (allowing something for the heat of controversy) to challenge the Union’s impartiality in any case or class of cases. My answer to the first question is no. My answer to the second must be yes.

II

I believe that Mr. Varney falls into both an exaggeration and an irrelevance in his very first paragraph, when he says that the Union “is doing the most fruitful work to advance the so-called Class War in America today”, and that “it is doubtful if, without [it], there would exist a Red problem in the Republic in anything approaching its present seriousness”. That the Union, by fighting for free speech for so-called Reds, has facilitated their dissemination of their doctrines is too obvious to need statement, but it does not fol-

low that it should be held responsible for the nature of those doctrines, or for their effect. If it were so responsible, then it would be equally responsible for the doctrines preached by other unpopular groups that it has defended, for example, the sect called Jehovah's Witnesses. In defending the right of Jehovah's Witnesses to preach and practice their bizarre theology, the Union has undoubtedly furthered it, but it would be absurd to argue that it has thereby subscribed to it, or favored it more than it favors any other theology.

This incidental furthering of strange and suspected ideas is an essential concomitant of the right to free speech, and cannot be escaped by those who advocate and defend that right. The guarantees of the Bill of Rights are unconditional. They do not apply to one class of men alone; they apply to all men equally, including the vast party of fools. It was the apparent notion of the Fathers that whatever evil would flow out of fools being permitted to speak their minds freely would be more than counterbalanced by good, and they deliberately risked the former in order to get the latter. The same notion is implicit in every effort, by whomsoever made, to prevent invasions of the First Amendment,

whether by official agencies or private persons. It is always the fools who need the most help.

The Reds are admittedly not creatures of the Union. They exist in any given case prior to its intervention in their affairs, and I see no ground for believing that it commonly intervenes, or indeed has ever intervened, until their rights under the First Amendment have been formally threatened. It may be that it is deceived on occasion by false reports of such threatening, for Reds, as a class, are not above resorting to chicane, but such deceptions must be relatively rare, and their occurrence, if they actually occur, must be laid to the great natural law that the practice of public spirit carries a certain inescapable risk of being made a sucker.

In the normal case the Union appears to withhold action until it has sufficient evidence that one of the guarantees of the First Amendment is actually threatened. It may be that it horns in with greater alacrity than would be shown by some other agency, but that fact seems to me to be only natural, for it was organized for the express purpose of horning in with special alacrity. Moreover, something must be allowed for its wide and tumultuous experience, which nec-

essarily gives it a high capacity for detecting invasions of the Bill of Rights in what may be called their larval stage, when they appear to the untutored eye to be only measures to secure the public peace.

As for the charge that the Union has counseled labor agitators and other professional nuisances to use guile in maintaining their rights, and even encouraging them, on occasion, to violate the laws, I can see nothing in it to complain of seriously. It may have been imprudent, but it was hardly anything more. Here, again, the Union's experience must be allowed to direct its actions. It has learned all the tricks that enemies of free speech employ in their art, and it has naturally invented some tricks of its own to circumvent them. There is no evidence, so far as I know, that it has ever staged a riot in a place where free speech commonly prevails. All its enterprises in that direction, if any may be charged to it, have been carried on in communities where a little healthy sedition probably has a salubrious effect. A citizen menaced in his rights by the cops is not bound to wait until they club him; he may also challenge them when they merely menace him.

The Union never goes into court arguing that the Marxian gospel is

true; it simply argues that the persons who subscribe to it have a right to preach it. Similarly, it did not, in the Sacco-Vanzetti case, maintain that the crime laid to the two men was virtuous; it only maintained that they were accused on insufficient evidence. This distinction, when a dispute between angry men runs high, and both sides resort to demagoguery, is sometimes vague and hard to see, but I believe that it remains a distinction nevertheless.

In the matter of Communism this distortion must be very real to some of the members of the Union's national committee, else it would be impossible to imagine them continuing to lend the Union their names. Glancing through the list, I find at least three gentlemen who have been denounced by the official Communist organs, within the past few months, as enemies of the Class War and fiends in human form, to wit, Oswald Garrison Villard, John Dewey, and John Dos Passos. Proceeding further, I encounter the names of Judge George W. Anderson, Dr. Edwin M. Borchard, and Dr. Mary E. Woolley, all of whom, it seems reasonable to assume, are in no more danger of succumbing to the Marxian theology than they are of submitting to baptism by

Jehovah's Witnesses. And there are yet others.

III

But there remains an important part of Mr. Varney's case, part of it allegation of fact, and the other part inference. The allegation is that, whatever may be the official purpose and program of the Union as a whole, some of its most important and active officers incline in their sympathies toward the so-called Left, and have indicated that leaning on various occasions. The inference is that this fact, if it be a fact, is enough to set up a plausible doubt of the impartiality of the organization, and to influence, under easily imaginable circumstances, its actual operations. It is my finding that the allegation is supported by the record, and my belief that the inference, though it may not be compelling, is nevertheless reasonable.

I do not doubt for an instant, of course, the *bona fides* of the officers in question. But I believe that Mr. Varney is justified in arguing that their participation in partisan controversy is incompatible with an appearance of complete impartiality, and that it inevitably throws doubts upon the impartiality of the Union itself. The organization oc-

cupies a sort of quasi-judicial position. It is pledged to further free speech, regardless of the cause that free speech may serve. It is certain to get into difficulties the moment any responsible officer offers public aid and comfort to one such cause against another, or adheres, however gingerly, to a cause that rejects free speech altogether.

The case of Roger N. Baldwin, the director, naturally comes first. The Union, in its reply to Mr. Varney, argues that "Mr. Baldwin's personal views on economics and politics have nothing to do with the Union's program", and that he is only "the agent of the board in carrying out its decisions, and has only the influence in the board or in the Union of a paid executive who carries out group decisions". All this seems to me to be far from convincing. No one familiar with the conduct of such organizations will believe that Mr. Baldwin is the mere lackey of the board. In the very nature of the case he must be one of its chief sources of information, and hence one of the chief agents in the framing of its judgments. He is a man of great energy, notable courage, strong convictions, and engaging personality, and of large and special information in the field wherein he and the board jointly oper-

ate. The board can be imagined as refusing to give his counsel polite consideration only on the theory that it distrusts him, which is an absurdity. He may influence it without opening his mouth in argument. However fair he may try to be—and I believe that his fairness runs far beyond the common—his very statement of the case before it must be colored inevitably by his private convictions.

It thus becomes relevant to examine such of those convictions as have become publicly known. I find that, as a fact, he has sought on at least one occasion to set up a distinction between violations of civil liberties in this country and their violation in Russia. His argument is that here such acts "are violations of professed and constitutional guarantees", whereas in Russia they are "weapons of struggle in a transition period of Socialism". He is not, I believe, a Communist, but it must be plain that he here repeats with approval a classical Communist argument, and that it is not only extremely unpersuasive, but in direct conflict with the principles on which the Union was founded.

I simply can't imagine any thorough-going friend of civil liberties acquiescing in it. If the bosses of Russia are free to suspend

or abolish the common liberties of mankind in order to attain some chosen political end, then the bosses of the United States are free to do the same thing to attain some other end. In brief, liberty becomes a mere gift from above, to be granted or withheld at will by the current repositories of power, and a Hague is as free to destroy it as a Stalin.

Certainly the Union does not stand on any such platform. If it is pledged to anything at all, it is pledged to the doctrine that civil rights are fundamental in civilized society, and irrevocable by any legal process. This was the doctrine that Mr. Baldwin entertained when he went to jail during the World War, and it is the doctrine that the Union must fight for today.

The rejoinder to Mr. Varney argues that "what Mr. Baldwin has had to say about Soviet Russia . . . is within his rights as a citizen". Admitted. No one, as far as I know, denies it. But he is not under discussion as a citizen; he is considered here, as he was considered in Mr. Varney's article, as the agent of the Union, and its spokesman. In that character, it seems to me, he cannot argue for civil liberties with one breath, and condone their suspension with the

next. If he actually believes that suspending them is justifiable in Russia, then his defense of them in this country becomes to that extent diluted and enfeebled, and a fair man may reasonably question his essential devotion to them, and along with it the devotion of the Union that he serves and represents. And if he simply indulged himself in inconsidered talk, motivated by speculation rather than by conviction, then the Union must suffer no less, just as Holy Church would suffer if the Cardinals around the Throne of St. Peter began to debate in public the theology of Islam or the Foot-Wash Baptists.

My commission does not oblige me to offer what are called constructive suggestions, for it is recognized, I suppose, that I have no gift for them, but I can't help hinting that there is a better way of getting rid of the suspicions entertained by Mr. Varney (and, as I gather, by many other persons) than by resorting to casuistry. Mr. Baldwin has the remedy in his own hands. It is perfectly possible to think of his unhappy condonation of the Communist war upon civil liberties as a mere transient aberration, born of a brief visit to the Moscow Zion. He has on other occasions denounced some of the

effects of that war, and in plain terms. His career at home justifies the belief that he is in favor of civil liberties *in themselves*, as essential to the primary dignities of man. Let him say so in a clarion voice, with no ifs or buts in favor of the Hagues of Russia, and the whole matter may be conveniently forgotten.

The case of Dr. Harry F. Ward, chairman of the Union, is analogous, but more difficult. The reply to Mr. Varney makes much of the fact that Mr. Baldwin "has no political or economic connections and is engaged in no public activities conflicting with his duties to the Union", but on the very same page it is categorically admitted that the League Against War and Fascism (now the League for Peace and Democracy), of which Dr. Ward is likewise the chairman, is an agency "in which Communists are active". This last is a frank admission of a notorious fact, and certainly does not run to understatement. The League's recent change of name was widely interpreted as an effort to get rid of a reputation for partiality, not to say dissimulation. It seems to me that, in the circumstances, his retention of both offices was, and is, confusing and imprudent, and that he cannot complain if it has raised doubts

about the judicial impartiality of the Union.

It is not necessary to prove that he shares the ideas of his associates in the League; it is enough to show that he must be aware of them, and has done nothing publicly to dissociate himself from them. His position as chairman of the Union makes his associations a public matter, as the associations of Mr. Baldwin are a public matter. He cannot, any more than Mr. Baldwin, be a defender of civil liberties on one side and a willing consorter with persons who deny all civil liberties to their opponents on the other. So long as the two chief officers of the Union permit themselves that dichotomy, or anything resembling it in the eye of a reasonable man, they can't complain if the organization they serve is beset with criticism.

The Union is an agency relying for support upon the general confidence, and it must submit to judgment by ordinary public opinion. Its chief stock in trade, and the main gauge of its usefulness, is the common reliance upon its unqualified devotion to its declared purposes. Its officers, without question, have a right to entertain any private opinions they incline to, but to the extent that those opinions appear to be in material con-

flict with its purposes, it is certainly not surprising to find the Union itself challenged. It would be challenged in the same way if Baldwin undertook to frame an apologia, however academic, for violations of the Bill of Rights by the American Legion or the Ku Klux Klan, or if Ward began to associate himself publicly with Catholics who hold in conscience that birth control should be put down by law. In such matters, doubts are easily set afloat, and may do great damage. In the present case, it seems to me, the way to still them is not to dismiss them as irrational or to denounce them as immoral, but to remove any possible excuse for them. That excuse will remain so long as officers of the Union are publicly associated with persons whose belief in civil rights, if it exists at all, is undeniably too narrow to take in the rights of those who differ from them in politics. Nothing will be achieved by arguing that that association is irrelevant and immaterial.

IV

I close with a reiteration of my confidence in the public usefulness of the Union, and in the honest desire of its officers to serve it faith-

fully. I am sorry indeed that doubts about either should have been raised at this time, with free speech under heavy fire by Communists, Fascists, Nazis, New Dealers, and various sects of Christians alike, and many of its ostensible friends wavering. The public services of the Union in the Mooney case, the Sacco-Vanzetti case, the Puerto Rico case, the Jennings case, and the Scopes case, to name only a salient few, surely need no defense by me. It has done more than any other agency, whether official or non-official, to preserve the common liberties of the citizens of this country.

Naturally enough, it has provoked criticism, and some of that criticism—though certainly not all—has been partisan and unfair. When such attacks expose weak-

nesses in its position those weaknesses should be rectified as quickly as possible, lest they do irreparable damage. In the present case I see nothing unreasonable in asking the principal officers of the Union to clarify their position upon the principles for which the Union fundamentally stands. If, in fact, they, or any one of them, admit doubts about the universal validity of the ordinary civil rights, then I think they should, in fairness to the organization, retire from office in it. If, on the contrary, they have been misunderstood, or their doubts have been allayed and abandoned, then a comprehensive statement to that effect will be accepted by every reasonable man, and the whole unhappy difficulty will be at an end.

A LETTER FROM THE ACLU

Dear Mr. Mencken:

The Board of Directors of the American Civil Liberties Union appreciates your findings that Mr. Varney's factual charges against us are not supported by the evidence. We can only regret that you did not dispose more fully of his grotesque perversion of our record as impartial defenders of civil rights.

You give us entire credit for sincerity. Mr. Varney gives us none. You have thus disposed completely of his main charge that we are the knowing dupes of "Moscow".

Despite the fact that you give us a verdict on the record you more or less justify the erroneous impression that the Union is somehow committed to promoting

Radicalism and ignores the defense of the rights of others. In doing so you take what seems to us the amazing position that defenders of civil liberties cannot co-operate or consort with those who do not accept 100 per cent defense of civil rights for all.

You will concede, we think, that the Civil Liberties Union should be judged not by the personal views or associations of its officers but by its record. We challenge anyone to point out in our twenty years of effort where we have failed to meet any important issue of civil liberty that has arisen, regardless of whom it concerned. That we have more often defended the rights of labor and Radicals is due solely to the fact they are more often attacked. But we have spoken up quite as vigorously, when infrequent occasion demanded, for the rights of those not associated with the labor or Radical movements — notably in connection with the attacks on the Ku Klux Klan's right to assemble in the North; similar attacks on the rights of German-American Nazis; and in the case of a Senate committee's unjustified procurement of telegrams from a telegraph company and income tax returns from the Treasury Department. A large part of our work has not con-

cerned the "Left" at all. It has dealt with freedom in our schools and colleges, with religious liberty, with censorship of the radio, press, books, and movies. You give us credit for a fair record, but you obscure it by an assumption that our fairness is somehow compromised by the personal views and associations of some of our officers.

You even go to the length of suggesting that our officers could not in good conscience associate with Catholics opposed to the dissemination of birth-control literature and still be consistent. You apply the same reasoning to the association with Communists and presumably others who recognize some limitations on their own advocacy of civil liberty. If this line of reasoning were followed out, we would have to defend civil liberties almost in a vacuum; certainly in an ivory tower of purity, impossible of practical achievement.

We co-operate in defense of constitutional guarantees with Catholics as we do with Communists or any others who go along on the major issues of civil rights. We have, and have had, Catholics on our National and other committees. We even have on our Board of Directors one member of the Communist Party, indeed one of the Union's incorporators, who did

not happen to become a member of the Communist Party until a year or two ago. We make no political, religious, or racial distinctions in our membership or in our boards. Any other position would violate the tolerance for which we stand and limit the forces available for defense of civil rights.

You ascribe to Mr. Baldwin as director a dominating influence on the Board. Let us dismiss at once the notion that Mr. Baldwin's personal views or attitudes outside our platform influence the work of the Union. That assumption might be valid with many organizations, but ours is exceptional in having a Board of Directors of thirty-three members, meeting weekly throughout the year and handling every issue with which the Union deals. In cases of policy or differences of opinion a National Committee of almost eighty persons all over the country votes by mail. Most of the Union's public work is carried on by lawyers. Mr. Baldwin, as the executive, carries out the policies and decisions of the Board and the National Committee.

As to Mr. Baldwin's personal views on Soviet Russia which you think compromise his position in the United States, we quote his position as he states it:

"Mr. Mencken has wholly confused what I have had to say in favor of the economic experiment in Russia with condonation of its dictatorship. I need not discuss the relative merits of economic and civil liberties. I need only point out that I have on many occasions spoken up against political persecution in the Soviet Union as I have against it in other lands. In 1924 as chairman of the International Committee for Political Prisoners I was responsible for the publication of a book, *Letters from Russian Prison*, highly critical of political persecution. My views are fully set forth in my book *Liberty Under the Soviets*, published in 1928. In the introduction to it I said:

I recognize fully the danger in extreme measures of control in effect in Russia today. I deplore them for their unnecessary cruelties; even more for their threat to the development of the popular forces which the Communists themselves profess to encourage. As for the future, no system seems to me permanently tolerable without unrestricted civil liberty as a means toward its continuing growth.

I hold precisely the same views today. Nothing in them compromises my defense of civil liberties in the United States. The Civil Liberties Union as such has no concern with issues in foreign countries."

Your characterization of the associations of Dr. Ward in another organization is fully met by the views we have already expressed concerning the associations of our officers and Board members. Since Dr. Ward has been Chairman and Mr. Baldwin Director during the entire life of the Union, it is obvious that we could not have the record with which you credit us if your assumption were true that the personal views and associations you ascribe to them colored our activities.

We submit that even if the un-

thinking confuse the personal views of some of the officers with the Union's official position, it offers no justification for approval by a man like yourself who has examined the facts. Indeed, a hostile critic on the radical side could make out just as good a case by using your implications to show that the Civil Liberties Union is hopelessly tied up with the economic *status quo* because of the personal associations and views of the more conservative members of our Board.

Sincerely yours,

DOROTHY D. BROMLEY
CARL CARMER
MARGARET DESILVER
JOHN F. FINERTY
OSMOND K. FRAENKEL

WALTER FRANK
ARTHUR GARFIELD HAYS
JOHN HAYNES HOLMES
CHARLES H. HOUSTON
B. W. HUEBSCH
DOROTHY KENYON

CORLISS LAMONT
ELIOT D. PRATT
WM. B. SPOFFORD
NORMAN THOMAS
RAYMOND L. WISE



*(Editor's Note — A letter from Mr. Varney to Mr. Mencken
appears in the Open Forum.)*

THE TRUTH ABOUT AARON BURR

BY NATHAN SCHACHNER

ASK the university-graduate-in-the-street what he knows of Aaron Burr, and he will tell you that: (1) Aaron Burr intrigued with the Federalists to wrest the Presidency from the great and noble Thomas Jefferson; (2) Aaron Burr murdered the great and noble Alexander Hamilton in cold blood; (3) Aaron Burr betrayed his country and managed to escape the halter that he richly deserved; (4) Aaron Burr seduced every woman he met.

This is usually the sum total of the educated American's knowledge of the subject. But he is hardly to blame: every textbook, from the jejune performances that are dished out as history in the elementary schools to the more voluminous affairs used in the colleges, repeats the well-worn theme. Burr was a traitor; Burr was a master of intrigue; Burr was a man of selfish and restless ambition; Burr was without honor or morals; Burr was unprincipled. These are the phrases, the very turns of expression, that are parroted over and

over again. The question is — are they true?

They are not true — though they have passed for more than a century as current coin of the realm. What manner of man, then, was the real Aaron Burr? Wherein does he differ from the distorted caricatures of the textbooks? What are the true facts concerning his career, as the contemporary documents show them?

I intend to take up each of these accusations in order, submit to you the pontifications of the historians concerning them, place in evidence the proof of their falsity, and let you, a jury of his peers, bring in the final verdict on the guilt or innocence of Aaron Burr.

Charge No. 1: Aaron Burr intrigued with the Federalists to wrest the Presidency from the great and noble Jefferson.

On this the textbook writers are unanimous. Burr was guilty as charged. Writes Professor Muzey:

Had Burr been an honorable man, he would have immediately acquiesced