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FREE SPEECH, SOCIAL CHANGE AND THE POLITICS OF LAW IN THE UNITED STATES

Professor Robert A. Sedler of the University of Kentucky Law School in addition to having taught in several Law Schools in the United States has spent three years teaching law in Ethiopia.In recent years he has spent much of his time conducting litigation with important civil rights implications, almost always without remuneration. In this interview with Geoffrey Palmer (Assistant Professor of Law at the University of Iowa), Professor Sedler discusses a new type of law practice which is emerging in the United States and the various political and social tensions which seem to make legal institutions particularly vulnerable to criticism. He talks about the way in which the Federal Judiciary has developed methods for curbing the zeal of the State Courts where those Courts may be prone to uphold local laws which are incompatible with First Amendment Rights of freedom of speech.

While this may seem rather remote to New Zealand, it may give cause for a pause to wonder how New Zealand legal institutions would stand up if they were subject to the stresses at present being undergone by those in the United States.

Palmer: Professor Sedler, you've been involved recently with what is known as "movement law practice". Could you tell me what a "movement lawyer" is?

Sedler: A "movement lawyer" is one who will represent persons who are seeking to achieve social change in society. His clients have been proceeded against by the Government in one way of another because of those efforts to achieve social change. Its more of an identification on the part of the lawyer than anything else. It is important to appreciate that there are very few lawyers in the United States who are willing to take these kinds of cases.

Palmer: A lawyer in the British Commonwealth has a duty to take the case of anyone who comes to him subject only to very narrow exceptions. Why doesn't an American lawyer have such a duty?

Sedler: It's never worked that way. The best reason that I can give—I think there's another dimension to this too—is that most of the people involved in these cases do not have money to pay fees. But our experience has been that even where there is money available it is often very difficult to get a lawyer to take the case for fear that this would injure his ability to obtain other clients. Secondly, many lawyers, probably most lawyers, in our wealth-oriented system are very hostile to people who are advocating radical social change. They simply do not want to take their cases.

Palmer: But every man has a right to a counsel; surely this is true in the United States the same as in New Zealand or in England? Surely the Bar has a duty to the public to police itself to ensure that everyone who needs it gets adequate legal help?

Sedler: The right to counsel in that context arises in connection with the criminal defence and a lawyer will accept a Court appointment for a criminal defendant, though it may be questionable just how vigorously he will pursue the defence. A good example would be draft cases. It is possible to win draft cases by showing a failure on the part of draft boards to comply with the regulations. To do so takes a good deal of digging into the facts, some very rough cross-examination of draft board members and some challenge to the whole draft system. A Court appointed lawyer who is going to represent a defendant in a draft case is only willing to go so far. Most of the draft cases that have been won by persons trying to avoid induction have been won by volunteer lawyers who make a speciality of defending draft resisters.

Palmer: Do "movement lawyers" feel that they must believe in the client's cause and his political beliefs before he can defend him? If so, that would appear to be contrary to the traditional ideas about a lawyer defending his client.

Sedler: On the whole, I would say in these kinds of cases, which I label as political trials, the answer is yes. This is because the lawyer, if he is going to do the job wholeheartedly, is going to find himself not infrequently subject to abuse by the Judges, by the prosecutor, by the press and by large segments of the public. In order to make some of the arguments for his clients, which cut against the very grain of the existing social, political and economic system, he has to be in support of

the attacks his clients are making on the system. I don't mean to say that it is not possible for a lawyer to defend a person with whose views he doesn't agree, nor would I say he would have to agree with everything these people are saying. I do think if you're going to give them a meaningful defence you must make a personal commitment. You must believe in the kind of social change that they're trying to achieve. And you must believe very strongly in their right to try to bring about social change.

Palmer: Is social change really something which can be pursued effectively in the law Courts or is it better left to the political institutions of Government such as the State Legislatures, and the Congress? Why is it not possible for effective social change to be carried out within the traditional parliamentary forums?

Sedler: The legal proceedings that we're talking about here do not in themselves involve efforts to bring about social change. They are, in a sense, defensive. By that I mean the advocates of social change are being subject to Governmental sanctions because of their efforts to achieve social change. So the lawyer's role in the proceedings is primarily a defensive one. He wants to defend his clients from these sanctions and to protect his clients from the exercise of Governmental power designed to repress efforts at achieving social change.

Palmer: I think you've had some experience in Kentucky with the Civil Liberties Union in defending some particularly unpopular causes which have arisen on a local level there. I wonder if you could tell us a little about the goings on in Pike County?

Sedler: America has many pockets of poverty. One of the biggest pockets of poverty is in what is called Appalachia. This refers to the Appalachian mountain regions covering easttern Kentucky, north-west Virginia, west of West Virginia and parts of Tennessee and North Carolina. Pike County is a large county where the main industry is coal mining. The mines have been mechanised and there is a great deal of unemployment. The people are not really trained for any other kind of employment, even if it were available, which it isn't. Many people who do work are poorly paid and many people simply live on welfare payments. There is a great deal of poverty in Pike County. This is true of much of Appalachia.

In the spring of 1967, three anti-poverty workers, that is, people who were employed by organisations working with the poor, and who were trying to help the poor improve their conditions in Pike County were arrested on a charge of teaching sedition. It was alleged that they were teaching the violent overthrow of the government of Pike County. This was an obvious attempt by local officials to discredit anti-poverty workers, who had been fairly successful in organising poor people to exercise their political powers. The three people involved were a man and his wife and another person. Their homes were broken into at night by Government officials armed with a warrant. Their homes were ransacked, all their books and papers were hauled away, they were brought into Court on this charge of teaching sedition. Suit was brought in the Federal Courts to enjoin the prosecution on the ground that the statute under which they were being prosecuted was unconstitutional in violation of the First Amendment and secondly, on the ground that the purpose of the prosecution was to repress their efforts to organise the people in Pike County for peaceful social change. This in itself would be in violation of the First Amendment's guarantee of expression and petition. In our legal system it is now possible for such persons to go directly into the Federal Courts and obtain an injunction stopping State Court criminal prosecutions. This may be done where defendants are being prosecuted under a law that is unconstitutional in violation of the First Amendment or where it can be shown that the purpose of the prosecution is to repress the exercise of the First Amendment rights.

Palmer: That would appear to an outsider, to some extent, to be a vote of no confidence in the State Courts which are, after all, responsible for enforcing State law and hearing disputes between citizens of the State. I remember in one American decision, where the Federal Judge said that if he was going to have to "ride herd" on the State Court Judges then he should be told so by the Supreme Court in no uncertain terms. But it does appear from the nature of the case that you've described that in fact Judges have been given the licence by the Supreme Court to "ride herd" on the State Court Judges. Does that lead to the conclusion that the State Courts are not to be trusted or that the sort of justice that they dispense is not an adequate brand of justice?

Sedler: I think that that is true in many respects at least in what I call political cases. It must be remembered that practically all of our lower

Court State Judges and many of our appellate Court State Judges are popularly elected. They serve for a term and then they must run for re-election. They come from the political parties and advance to judicial office only on the basis of election. As a result they are particularly responsive to local political feeling. Consequently, in these kinds of cases, the actions of the State Court Judges tend to reflect the predominant sentiment in the community. The case in which the Supreme Court made this decision, *Dombrowski* v. *Pfister* 380 U.S. 479 (1965), came out of the South where there had been a long history of repression against Negroes and their white supporters working for social change. State Courts have not been sensitive to First Amendment rights where they are asserted by people working for social change in the area. Now this is not a general indictment of all State Courts and all State Judges. I think the State Courts are very adequate to handle ordinary civil cases, they have been adequate to handle most criminal cases although here too, the Supreme Court has imposed certain limits. But State Courts are definitely not capable, and are not willing in some instances, of upholding First Amendment rights where the effect would be to exonerate unpopular persons in the community. The bitter experience in the South I think, has led the Supreme Court to tighten this rule and I think this now applies to political conditions in other parts of the country as well. So, yes, to this extent the *Dombrowski* decision does represent a vote of no confidence in the State Courts.

Palmer: Did you find that the *Dombrowski* decision was a real help to you in trying to repress the activities of the Government where they were trying to repress the activities of your clients, if I may put it that way, in Pike County?

Sedler: It made all the difference in the world from the political perspective. If the prosecution had been allowed to continue, there doubtless would have been a guilty verdict at the trial. The prosecutor would have engaged in what we call "red baiting" that is trying to make the people appear as communists or communist sympathisers and appealing to local prejudice against anything that could be construed, whether accurately or not, as associated with communism. The law was clearly unconstitutional and the conviction would ultimately have been reversed by the Supreme Court or set aside by the lower Federal Courts. But the political damage would have been done so that in our case it made all the difference that we could go into the Federal Court and have the prosecution stopped on the ground that the underlying law was unconstitutional.

Palmer: I take it that the prosecutors, as well as the Judges, tend to be elected. Does this mean that a prosecutor regards it as proper to make political capital out of decisions to prosecute and how successful he is in obtaining convictions?

Sedler: This is particularly true on the State level because there all prosecutors are elected. On the federal level prosecutors are appointed, but even on the federal level the people who are appointed are people who have been active politically. It is interesting to note that many of our Federal District Judges were formerly prosecutors. One of the best ways to get appointed to a federal judgeship is to have a successful career as a federal prosecutor. Consequently, both federal and State prosecutors are clearly aware of the political implications of what they are doing.

Palmer: I would like to get your impressions of the Chicago conspiracy trial. The trial seems to me to have been a mistake from a number of points of view. First, it was bad for the Government because the Government was placed in a position of prosecuting under a law which was of dubious constitutionality. Secondly, the defence conducted themselves in a way which didn't really appeal to very many people and concentrated on dramatic tactics and making political points rather than conducting a defence on the merits. Thirdly, the Judge who presided in the trial demonstrated partiality. so we end up with "A plague on all your houses". How would you react to that assessment of the Chicago conspiracy trial?

Sedler: I would agree with that as a general proposition, although I think that the defendants and their lawyers had no choice but to conduct themselves in the manner they did. While on the whole Federal Judges are better than State Court Judges, nonetheless, we have many politically oriented Federal Judges as well. Although Federal Judges enjoy life tenure, one becomes a Federal Judge only by appointment from the President and essentially political-type people are appointed. Judge Julius Hoffman clearly identified with the prosecution; he did a number of things evidencing his hostility to the defendants in the Chicago trial and seemed to be doing all he could to help the Government in its

political objective, which was to obtain a conviction for conspiracy. If I am right here, what the Government wanted to do was to obtain a jury verdict finding the defendants guilty of a conspiracy to start the Chicago riots. This in turn would discredit the anti-war movement and the movement for social change in general. The Government didn't care if the conviction was reversed on appeal providing they could get a conviction at first instance for conspiracy. Among some of the things Judge Hoffman did which demonstrated his animus was to refuse to pass on the constitutional question before the trial contrary to the ordinary practice. Likewise, he refused to grant an adjournment so that a lawyer of one of the defendants who was recovering from a serious operation would be available to represent that defendant. It was this kind of conduct that made it very clear to the defendants and their attorneys that Judge Hoffman was determined to help the Government in its goal of getting a conviction. I think that the response of the defendants was the only practicable one under the circumstances. Politically, they had to avoid a conviction for conspiracy and they succeeded in this regard. Though their conduct may have alienated many people, I'm not sure it alienated any of the people who were part of their national support. The trial did have the effect of making it clear that our system of justice does not always function in a fair and impartial manner. It exposed the weaknesses that ruin our system, and I think opened the eyes of many people, particularly young people. I think, in the view of the people working for social change, it is the young people who count first and foremost. So I think the defendants were justified in doing what they did and that in the political sense it may turn out to be a real victory, particularly if the convictions are reversed.

Palmer: Could you describe to us the particular legislation under which the Chicago Seven were charged, how it was enacted and why it was enacted?

Sedler: The legislation was a response to a prevalent view that disorder in the United States is caused by outside agitators. Many Congressmen focus particularly on Negro leaders such as Stokely Carmichael and Rap Brown and hold them responsible for the civil disorders. The theory behind the legislation, and I believe this is what makes it unconstitutional, is that it was to discourage the "outside agitators" from demonstrating against State laws. The statute under which the Chicago Seven were charged makes it a crime to cross State lines with the intent to incite, promote, encourage a riot *and* to "do any other overt act" for such purposes. The indictment involved the counts: first, charging conspiracy to cross State lines in this illegal way, and second, charging simply the individual act of so doing.

Palmer: Was there really any chance that the prosecution in Chicago could ever have shown the requisite intent on the facts? Even given the fact that the Judge was biased in favour of the prosecution, the jury did not return a verdict of guilty on the conspiracy count.

Sedler: Yes, but they did return a verdict of guilty on the crossing of the State lines count. What the prosecution tried to do was to prove statements that the defendants had made and tried to piece them all together to make out a conspiracy. I myself believe that if it were not for the vigorous defence, a defence which exposed the deficiencies of the system itself, although it was a defence which did not comply with the orthodox rules about how criminal defences are conducted, there would have been a conviction on the conspiracy count.

Palmer: Have you any prediction to make on what Federal Courts would do on appeal with the contempt citations which Judge Hoffman meted out?

Sedler: The Supreme Court has made it pretty clear that Federal Judges are not supposed to impose contempt citations in excess of six months' imprisonment without trial by jury. What Judge Hoffman did was to take a number of separate counts and impose a sentence of less than six months on each which, in some cases, cumulated to a total in excess of four years. I don't think that the Supreme Court of the United States will sustain this. My prediction is that they will decide that he was limited to six months in respect of each defendant and lawyer, unless there is a jury trial on the contempt issue. The lawyers appearing for the Chicago Seven were well aware that the Judge could use his contempt power to harass them, as Courts have used their contempt powers in the past to harass lawyers who appear for unpopular clients with unpopular causes.

Palmer: If Mr Kunstler and Mr Weinglass, the defence attorneys for the Seven, are imprisoned for the way in which they conducted

the defence, do you think that this will have an effect on "movement lawyers" generally and the way in which they conduct cases?

Sedler: More significant is the fact that in State after State disciplinary proceedings are instituted against "movement lawyers" far out of proportion to their numbers. It is very clear that the organised Bar does not want lawyers who represent clients who wish to bring about social change. Some States harass these lawyers time and again. The argument is always the same—we are not prosecuting them for what they or their clients believe but for the improper tactics that they use. Anything a "movement lawyer" does can be construed as constituting improper conduct.

Palmer: Have there been any examples of this in your own State of Kentucky?

Sedler: A very good friend of mine who has consistently represented criminal defendants over the years and who in the process got into a feud with the local criminal Court Judge has been under disciplinary prosecution. The fact was that the Judge was an alcoholic and should never have been permitted to sit on the bench. The Investigating Council of the Bar Association admitted this in their written report but they nevertheless recommended that my friend be suspended from practice. We are at present appealing that decision.

Palmer: How do you think judicial institutions in the United States can be reformed so that they do not have the scorn heaped upon them that they have been receiving recently?

Sedler: I'm not sure I have an answer to that question. Various reform proposals have been made concerning the selection of Judges. But the underlying problem is one of societal values. The situation in the United Kingdom and much of the Commonwealth, as I understand it, is that Judges are appointed from the leaders of the bar where there is a strong cohesive bar with its own sense of leadership. This is not the situation in the United States where we have hundreds of thousands of lawyers practising and where political considerations influence the appointment of Judges. None of the reform plans that have been proposed can cure this. Even the federal system sees the President appointing Judges. This is illustrated by the President's recent appointment to the Supreme Court. I don't know if change can be brought about institutionally until there is a fundamental change in values. It is not clear that bench and bar dislike the politicisation of the judiciary. There is no real force working for a change of values in this area. Without a change in values no institutional mechanism is likely to work.

Palmer: Do you think that the public respect judicial institutions in the United States as they exist at present?

Sedler: If you're talking about the great majority of people, I would say yes, simply because they are not likely to be brought in contact with the system. I would say that the Courts do have the respect of the public. Interestingly enough most public antagonism has been directed to the Supreme Court, which has been the most impartial of Courts in following the applicable principles of law and applying neutral standards.

Palmer: The United States has a tradition of freedom of speech and the First Amendment to the Constitution is the very embodiment of that view. Why is it, therefore, in light of such guarantees that advocacy of social change should lead to difficulty for those who express such views? Why do they find themselves coming into violent contact with the law and its institutions?

Sedler: Despite our profession of free speech values we are very ambivalent concerning the expression of unpopular views, particularly when this results or is likely to result in concerted action. Much of the opposition has been directed to demonstrations and other forms of mass protest, precisely because they are effective. Despite official pronouncements in favour of free expression we as a society don't really believe in it when we don't like the nature of the expression and the results which sometimes follow.

Palmer: How do you see the American tradition of free speech working itself out over the next decade?

Sedler: I am pretty optimistic that free speech will maintain its power as a vital force in the promotion of change. While the Courts may move for a while in both directions, they will come down, in the final analysis, in favour of freedom of expression. I think we have seen this happen in a number of contexts. Certain kinds of prohibition on freedom of expression —very wide laws restricting the publication of pornography, for example—are no longer tolerated and have been struck down as unconstitutional. This represents progress. The

clearest example has been the Vietnam war. All efforts to suppress dissent and opposition in respect of the war have failed. For the first time in American history, the Government has been forced to alter its policy in a war because of significant opposition. A President did not run for re-election because of opposition to his policies. It is achievements such as this, possible only through the instrumentality of free expression, that make me optimistic.