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CIVIL LIBERTY AFTER THE WAR*

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No nation has ever fought a tough war without overriding for the duration some of the civil liberties of its people. The war we are fighting is more than a tough war; it is a mortal struggle in which the life of constitutional democracy throughout the world is at stake. It presents a new kind of challenge to the vitality of American civil liberty. We know from grim experience that in the peace which follows a tough war, civil liberty faces new and increased dangers. High-keyed energies and emotions, suddenly released, seek a new outlet. Wartime patriotism tends to become peacetime intolerance, and wherever there is intolerance, the traditional civil liberties of unpopular minority groups are in grave danger of being brutally suppressed. The peace which will follow the war we are now fighting will be without precedent in the complexity of its problems, the power of the emotional reactions which it will generate, and the strength of the triumphant determination of our people to preserve intact the fruits of victory. This peace will bring in its wake an unprecedented temptation to abridge some of our basic civil liberties, and this new threat will be very dangerous indeed. This is the general subject which I wish to explore.

What I have to say falls into three parts. First, I wish to review some of the salient features of our national experience with civil liberty problems down to the eve of the present war; and by experience I mean our thinking about these problems as well as our behavior with respect to them. My purpose here is to provide a sort of historical backdrop, crudely painted, against which the vitally

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important civil liberty problems of the war and of the peace may stand out in sharp relief. Second, I wish to show that the challenge to American civil liberty presented by the present war and by the coming peace is entirely unique, since it places us in the dilemma in which we must either extend freedom of speech, press, and assembly to the cynical and unprincipled enemies of democracy, or place legal restrictions upon the peaceful and orderly public expression of political opinion. Third, I shall state my own position on this highly controversial question and give my reasons for holding it. In this discussion I am using the term "civil liberties" to refer to guarantees of free speech, free press, free assembly, free religion, freedom from arbitrary arrest, and the like, which comprise the most fundamental provisions in our federal Bill of Rights—those civil liberties which Mr. Justice Cardozo referred to as "the very essence of a scheme of ordered liberty . . . the fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions."

In approaching the first part of my task, I shall not attempt any connected history of civil liberty in this country or any philosophical analysis of its nature and limits. Rather I shall discuss first the way in which as a people we have grown accustomed to think about our civil liberties, and then I shall indicate the nature and the source of the two chief dangers which have thus far threatened them. In any bird's-eye view of our national experience with civil liberty, one is struck by the highly conventionalized pattern of thought with which the American people have come to view civil liberty and the other principles of our democracy. This habit of thought and feeling has been built in part upon reason, in part upon considered experience, and in part upon national self-confidence, self-satisfaction, and wishful thinking. It takes the form of a settled conviction that in constitutional democracy, mankind has discovered the true way of life. Our definition of constitutional democracy may not have very sharp edges, but the term means to us a political society in which government rests upon the will of the people functioning through the mechanism of majority rule, and in which the basic civil liberties of minorities are carefully safeguarded. Only by keeping alive freedom of speech, freedom of press, and freedom of assembly do we make it possible for minorities by peaceful persuasion to become majorities; and only thus do we assure ourselves that the will of the people shall prevail. We have

come to attribute to these principles the sanctity of a revealed religion. We do not argue about them or attempt to defend them; we just accept them as eternal verities which have emerged from the experience of mankind. Furthermore, assuming that in the long-run reason governs the behavior of men and nations, we have developed a sublime confidence, perhaps tinged a bit with smugness, that these principles of democracy and civil liberty will finally prevail throughout the earth. We tend to measure the political maturity or backwardness of peoples in terms of their appreciation and acceptance of these doctrines. While we have maintained friendly relations with nations in which constitutional democracy and civil liberty have not been fully established, we have been inclined to regard them with a slightly patronizing pity. We have felt that they must surely be somewhat apologetic for their shortcomings, and must be looking forward to the time when truth and wisdom will triumph and they will be full partners in the family of truly democratic states.

This national pattern of thought has had important practical consequences. Our thinking and our behavior with respect to freedom of speech, freedom of press, and freedom of assembly have jogged along in the comfortable confidence that the permanent security and manifest destiny of constitutional democracy and its accompanying civil liberties are infallibly assured. We have felt that we have safely achieved fundamental agreement upon the basic principles on which American government rests. If this is true, then the most generous range of freedom of speech, press, and assembly could involve no actual danger to the public security or the stability of our institutions. Majorities and minorities might succeed each other in our political or economic life, but no minority would ever emerge and become influential in this free country which was not itself loyal to the basic principles of constitutional democracy and civil liberty. Minority opinions might be shocking, might arouse bitter resentment, might viciously attack majority policy, but they would never actually challenge the soundness of our basic system of government or threaten its safety. The occasional revolutionary crackpot or the anarchist was merely the exception which proved the general rule. He could be ignored until he actually misbehaved, and then he could be put in jail; but his theories and his arguments were discussed and analyzed as freely as scientists discuss the symptoms of a disease. We had set up no political taboos.

There were no political or economic subjects which law-abiding people might not discuss in print or in orderly public meetings.

I do not mean that we always practiced what we preached. There have been many suppressions of freedom of speech, press, and assembly caused by the intolerance of public opinion or the brutality of public officials. But until the present war we never had in our midst a minority which was bent upon destroying democracy itself and suppressing civil liberty. We never had to face the question whether we were bound by the tenets of our faith to extend freedom of speech, press, and assembly to those who viewed those basic freedoms with contempt and sought to use them to undermine the constitutional democracy which keeps them alive. In short, we have never sacrificed any of the theory of civil liberty or the scope of civil liberty, nor have we been seriously tempted to do so. As a people and as a government, we still stand for the same kind and degree and range of civil liberty which we have known and enjoyed for a century and a half.

Our national official attitude toward Communism proves the point I am making. An enormous number of Americans view the doctrines of Communism with alarm, regard them as destructive of the basic pattern of American economic life, and would be glad to prevent the spread of those doctrines. Here is an acid test of our loyalty to the principles of freedom of speech and freedom of press, a strong and continuing temptation to sacrifice these principles. Such sacrifices have been made in the laws of some American states. But Congress has not forbidden the public advocacy of the principles of a communistic society, or any other kind of economic doctrine. It has forbidden only the advocacy of the overthrow of government by violence, or membership in a political party or society which does so. And so I think we may safely say that we entered the present world crisis, if not with a wholly clear conscience with respect to our actual management of civil liberty problems, at least without having compromised in any way the basic principles of civil liberty, without having rationalized any of our freedoms out of existence. Our thinking about our civil liberties had remained orthodox and confident.

Against the background of this habit of thought, let us examine and appraise the chief dangers which have thus far threatened our civil liberties and see what scars they may have left. And the first of these dangers has come from the major wars which we have

fought. Any major war may present two entirely different threats to the civil liberties of the people of the fighting nations. One of these is an internal threat, which almost always becomes a reality, in the form of restrictions upon civil liberty necessary, or allegedly necessary, to military success and the national security. The other threat may be wholly external and lies in the possibility of military defeat by a victorious nation which would destroy the civil liberties of a conquered people.

In discussing in this connection our own list of wars, we may relegate to a footnote the War of 1812, the Mexican War, and the Spanish-American War. These were minor wars and in none of them did we restrict civil liberty at home, or face any external danger to the security of our institutions. The American Civil War, however, was a dangerous challenge to our power and existence as a united nation. Defeat of the Union armies by those of the Confederacy seemed imminent again and again, and final victory was achieved by a narrow margin. And yet if we appraise the impact of this bitter struggle on the civil liberties of the American people, several interesting facts stand out. In the first place, we fought the Civil War without placing any legislative restrictions upon freedom of speech, press, or assembly. Congress passed no Espionage Act and no Sedition Act. The issues of the war were discussed widely and publicly by those who supported the Union cause and by those who did not. In the second place, such invasions of civil liberty as did occur during the Civil War stemmed from executive and military action, and these were frankly defended on grounds of military necessity. As President Lincoln put it, "Often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by being indispensable to the preservation of the Constitution through the preservation of the nation." We should be grateful to Lincoln for thus candidly rationalizing his invasions of civil liberty on these narrow grounds of military necessity and national self-preservation, for by so doing he prevented those arbitrary acts from becoming precedents to be followed in time of peace. In the third place, the Civil War was fought by two sections of this country whose peoples shared the same political traditions and were equally attached to the principles of constitutional democracy and civil liberty. The federal Bill of Rights was incorporated bodily into the Constitution of the Confederate States. Whichever side won the

war, constitutional democracy and civil liberty would remain secure.

World War I, however, presented a different picture. It brought an internal sacrifice of civil liberty more serious than any the American people had suffered before. We were psychologically and in every other way unprepared to deal with the civil liberty problems which suddenly crashed upon us when we entered the war against Germany. Congress and state legislatures passed sweeping restrictions of freedom of speech, press, and assembly. These were drastically, and often brutally, enforced by federal and state law enforcement officers urged on by a public opinion which in many parts of the country became hysterically intolerant of any real freedom of public discussion or public criticism of national policy. Nearly five thousand people were prosecuted for unlawful speeches, unlawful publications, or unlawful meetings. Nearly two thousand of these were sent to prison, some of them for thirty years. And many of the crimes for which these people were punished consisted of the saying and printing of the sorts of things which have steadily appeared in some sections of the American press ever since Pearl Harbor and are appearing every day. The record of our behavior with respect to civil liberty during World War I is not one in which the thoughtful citizen can take much pride or satisfaction.

It is equally clear, however, that World War I did not involve any serious external threat to the safety of our institutions, or any ideological assault upon the principles of constitutional democracy. We entered the war against the Central Powers to discipline the military caste in two nations which had become too arrogant and too predatory in playing the old game of European power politics. When President Wilson asked Congress to declare war on Germany in order "to make the world safe for democracy," he was not suggesting that American democracy was in danger. He was protesting against big nations overrunning little nations. We fought an Imperial Germany which still gave its people complete security of property and of person, and a substantial measure of freedom of speech, freedom of press, and freedom of assembly. It did not subscribe to any Bill of Rights of an Anglo-American pattern, but it conducted its internal affairs in accordance with a generally liberal scheme of political values, except in those cases in which military discipline was involved. We did not call the German government a democracy, although it did not lack democratic elements. But we

accorded a substantial measure of respect to the institutions of a country in whose universities most of our older scholars had studied political science and public administration. We were fighting an insolent imperialism, but we were not fighting a crude and ruthless totalitarianism, which, having enslaved its own people, was bent upon destroying American democracy and civil liberty. We were not conscious of any serious external threat to the integrity of our institutions.

Thus we may conclude that the dangers to our civil liberty, and the sacrifices of civil liberty which until now have come from the pressures of war, have been internal dangers and sacrifices. They have been the penalties we have suffered for our own disregard of our avowed principles. We have never before fought a war in which the integrity and continuance of our constitutional democracy and civil liberty have been among the issues of the struggle.

The other important threat to our civil liberties which stands out in any review of our national experience in this field is of a very different kind. It has been a peacetime threat, though it has by no means ceased in time of war. I refer to the assaults upon civil liberty and the substantial sacrifices of it which have come from the determined efforts of one vested interest or another to protect its own security and its privileged relation to other groups or institutions from the undermining influence of criticism and hostile propaganda.

In the days before religious toleration had been achieved in England and in this country, dominant church organizations or religious sects constituted vested interests which sought thus to protect themselves by violations of the civil liberties of dissenters ranging all the way from physical torture down to the confiscation of property and the denial of political privileges. Since complete freedom and equality of religion have been achieved, assuming that they have been achieved, the vested interests which in their efforts at self-preservation have menaced civil liberties have been interests based upon property. I shall not attempt to mention all of these vested economic interests, but only enough to make my point clear.

Perhaps the earliest and most conspicuous vested economic interest to seek to protect itself at the expense of freedom of speech, freedom of press, freedom of assembly, and freedom of petition was the Southern slave-owning aristocracy. In the life-struggle of the institution of Negro slavery before the Civil War, no holds were

barred, as the fate of many an abolitionist agitator clearly showed. The "peculiar institution" of the South was disposed to brook no public criticism, no argument, no peaceful efforts to effect its dissolution or weaken its power. Next came the long and bitter struggle of American employers of labor to protect what they believed to be their vested right to dictate the terms of the labor contract. The efforts of workmen to form labor unions, to strike, to picket, and to bargain collectively with their employers through representatives of their own choosing seemed to the rugged individualists of the eighties and nineties direct assaults upon the institution of private property. There are plenty of American business men who still hold that view. It is not surprising, therefore, that many of the most brutal invasions of civil liberty in this country have been the unhappy incidents of the struggle of American labor to secure and protect for itself effective powers of collective bargaining. That struggle is far from ended today.

There is another vested interest in the protection of which dangerous assaults have been made, and are being made, upon freedom of opinion and public discussion. This is a vested interest of nationwide proportions, for it is nothing less than our traditional capitalistic system of economic life operating under what we have come to call the principle of "free enterprise." This is the system under which we have become the most prosperous nation in the world, and it commands the loyalty not merely of the business magnate but of men of all kinds and classes. We have come to refer to it sentimentally as the "American way of life," and I am not for a moment attacking it or criticizing those who feel that its overthrow would be a national calamity. This powerful vested interest, the American capitalistic system, was only mildly disturbed by the not very revolutionary economic changes proposed by the Populists in the early nineties. It began to be rather seriously worried by the more drastic and more thoroughly rationalized program of the Socialists, which was of course a frontal attack on capitalism. During World War I and the years immediately following, Socialists were by no means secure throughout the country in the enjoyment of freedom of speech and freedom of press. Then came the more serious threat of Communism. Those Communists who took their inspiration from Russia and adhered to the program of the Third International were not merely seeking to overthrow the capitalistic system but urged the use of violence as a means of doing so. This

advocacy of violent revolution in the Communistic program brought Communists clearly within the reach of the law and made it possible to protect the "American way of life," to ward off this particular attack on capitalism, without sacrificing the principles of free speech, free press, and free assembly. Clearly it was one thing to talk, argue, and write freely about the alleged advantages of a Communistic state and the shortcomings of capitalism; it was a very different thing to throw bombs, burn buildings, assassinate public officers, or to incite people to commit any of these crimes. Thus revolutionary Communism falls under the ban of both federal and state statutes which punish the advocacy of the overthrow of government by violence, or membership in political parties or societies which advocate it. If these laws are intelligently enforced, civil liberty need not be endangered or sacrificed.

Unfortunately the story does not end here. Professed Communists played into the hands of their enemies by their advocacy of violent revolution, since violence or incitement to violence is something for which the law sends men to jail. But those whose interests are bound up in our capitalistic system are not worrying about violent revolution. Few people really anticipate or fear anything of the sort. What they worry about is the peaceful spread of Communistic doctrine, or any other political or economic doctrine which is antagonistic to the basic principles of capitalism. Now I am confident that a very healthy proportion of American businessmen, professional men, and laboring men believe sincerely that our capitalistic system, with its corollaries of private profits and free enterprise, is not merely sound, but so fundamentally sound that it can defend itself in fair argument, and need not fear criticism, competition, or attack. They do not seek to protect it by suppressing the right of its critics to engage in free public discussion. But there is a dangerously large and growing body of the beneficiaries of our economic status quo who take no such tolerant attitude. They believe, with the fanaticism born of self-interest, that American capitalism is in reality the "American way of life"—a way of life grounded upon the principles of the protection of vested interests, unrestricted profits, and free enterprise. They believe further that this "American way of life" should be protected not merely against revolutionary Communists who seek to destroy it by violence, but against peaceful and orderly Communists who wish to argue Capitalism out of existence, and in fact, against any radical

—or even merely liberal—reformer who proposes any change in our economic system. They actually regard as dangerously subversive and seditious any serious public criticism of the traditional principles and structure of American Capitalism. It is the intolerance of this vested interest group which today seriously menaces freedom of public discussion by its efforts to suppress or penalize so-called liberal or radical economic and political thought.

If anyone doubts the reality of this danger to civil liberty, he need only study the recent behavior of the present Congress, in which this intolerant attitude is sharply reflected. Congress has undertaken to remove from the federal payroll officials or employees who hold political and economic opinions, or who associate with people who hold political and economic opinions, which seem to Congress radical or "un-American." The word "un-American" as used in this context actually means politically or economically unconventional. This drastic action has already been taken in the case of three men by a statute forbidding the use of federal funds to pay their salaries. I believe this action is unconstitutional, and I have elsewhere explained at some length why I hold this opinion. But whether it is unconstitutional or not, it is a dangerous and brutal assault upon the principle of freedom of opinion. None of these men stands accused of any crime, of any misconduct, of any disloyalty, of any lack of patriotism, or even of any incompetence. The offense of which they are guilty is that of holding opinions unacceptable to the majority in Congress. Out of the welter of words by which Congress has sought to explain and justify this action, the real truth lies in the cynically frank statement of a member of the House that the men were being removed from office "because we didn't like the things they said and the things they wrote." Congress and its committees apply the litmus paper of their own conventional opinions and prejudices to the views and the writings of these federal officials and dismiss them summarily if the resulting reaction looks even faintly pink. This is a serious abridgement of civil liberty. There are more than three million men and women who are officers or employees of the United States. They are free and law-abiding citizens of a great democratic nation. Their competence has not been questioned. If the recent action of Congress is sustained, they all live under the threat of dishonorable discharge if their political or economic opinions should happen to prove distasteful to as many as forty-nine Senators and two hundred and eighteen

Representatives. It would be difficult to think of a more arrogant and flagrant violation of the spirit of our constitutional guarantees of freedom of speech and freedom of press.

In this review of our national experience in thinking about and managing our civil liberty problems, I have tried to make clear that we have come to regard constitutional democracy and the principles of civil liberty as permanently established at home and destined to prevail abroad. They have thus far never been subjected to external attack, for no enemy has arisen who has desired to destroy them. We have sacrificed some of our civil liberties at home from time to time in order to fight our wars more efficiently, or in misguided efforts to protect various vested interests from criticism and hostile propaganda. But we have never deviated from the conviction that the basic principles of civil liberty are a vital and integral part of the "wave of the future."

This brings me to the second part of my discussion—the grave and wholly unique challenge which confronts American civil liberty in the present war, and the even more grave and unique challenge which will confront it when we have won that war. And I shall deal here only with civil liberty at home. This unique challenge to our civil liberty arises from the nature of the enemy we are fighting. For the first time, the constitutional democracies of the world are fighting for their lives against powers which are not merely seeking to conquer them but which are bent upon destroying constitutional democracy as a system of government and replacing it by a brutal totalitarianism. The Nazi régime is built upon the complete negation and destruction of democracy. The will of the dictator has replaced the will of the people as the source of governmental power. Hitler himself, with unconscious humor, made this very clear in a speech to the Reichstag in May, 1935. He said: "Germany too has a 'democratic' constitution. The present German government . . . has also been elected by the people. . . . It does not matter how many votes a deputy must have in the individual countries. There are countries which consider 20,000 votes necessary for a deputy, others consider 10,000 or 5,000 sufficient, while in others again the number is 60,000 or more. The German people has elected a single deputy as its representative with 38,000,000 votes." This is what democracy means in Hitler's Germany! Our present enemies, however, destroy not only democracy but every vestige of civil liberty along with it. Freedom of speech, press, and assembly are

completely obliterated. Life, liberty, and property are subject to the arbitrary decree of the dictator. And this destruction of civil liberty is not merely a means to an end, not the unpleasant but temporary incident to revolutionary change, but is an integral and carefully planned part of the "New Order" itself. Nazism, as competent scholars have pointed out, is not an ideology or a philosophy of government, but simply a political technique. It is merely a way of accomplishing results, and one of those results is the complete destruction of democracy and civil liberty.

But the present German dictatorship was not content to wipe out constitutional democracy at home. It has been bent upon spreading its gospel of tyranny throughout as much of the rest of the world as it could bring under its domination. Down to the very outbreak of war, Nazi Germany carried on a highly efficient missionary campaign in other countries to pave the way for the New Order by peaceful penetration. With the wisdom and guile of serpents, Nazi agents moved silently into democratic nations and set to work. The skill and success of this infiltration was tragically demonstrated when countries high up on the German list of intended victims found themselves fatally honeycombed with Fifth Columnists. We ourselves were finally aroused to the fact that we were harboring the same kind of undercover activity in the United States. Now the point that was novel about this menace was not the high degree of its efficiency, for in many ways the German propaganda machine has been pretty stupid, but rather the whole-hearted enthusiasm and thoroughness with which these enemies of everything which democratic nations have come to value used every freedom, every civil liberty, every device of democratic government, to undermine the governmental system which made these rights and privileges possible. As Karl Loewenstein aptly puts it, "Calculating adroitly that democracy could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation, fascist exponents systematically [seek to] discredit the democratic order and make it unworkable by paralyzing its functions until chaos reigns. They exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood, that the spirit asserts itself against force." In short, in entering the present war American democracy, as well as democracy throughout the world, found itself confronted for the first time by a powerful and ruthless enemy bent

upon destroying democracy, and bent furthermore upon using every device and method of democratic government to accomplish this destruction—an enemy that would, with cold-blooded efficiency, use our civil liberties as weapons for the ultimate destruction of civil liberty itself.

As long as we are at war, we do not need to be unduly concerned by the novelty of the Nazi challenge to the essential integrity of our democratic principles. In time of war we can deal effectively with any threats to the security of the nation, or the military success of our arms, which may arise. We do not need to rationalize the restrictions upon speech, press, and assembly which war makes necessary, beyond agreeing with Lincoln that it is better to sacrifice a limb than a life. In fact, the less we try to rationalize wartime restrictions on civil liberty, except in terms of brutal military necessity, the more secure our civil liberties will be after the war is over. Therefore, as long as the war lasts we shall not hesitate to deal sternly with Nazis and Nazi supporters wherever we find them and whether they are engaged in open hostilities or subtle undercover activities. We shall not knowingly lend them our valued constitutional freedoms to be used to undermine us.

When we have won this war, however, and face the incredibly difficult problems of peace, we shall no longer escape the dilemma in which the unique challenge of Nazism places the thoughtful and loyal defenders of constitutional democracy and civil liberty. We may state that dilemma thus. Shall we disavow our faith in the principles of civil liberty by withholding civil liberty from our defeated enemies? We intend to bring Hitler's Germany to unconditional surrender or utter defeat. We intend to destroy the military and political power of Nazism. But it would be naïve to assume that the doctrines of Nazism will automatically disappear with the coming of peace. The patience, the tenacity, the fanaticism with which these disciples of totalitarianism have been inspired compel us to face the fact that the anti-democratic faith will not be wholly exterminated and that anti-democratic propaganda and activity in one form or another are almost certain to persist. How, then, shall we deal with it? Are we to extend the full measure of our civil liberties to those who will seek to use them to destroy civil liberty? Shall freedom of speech, freedom of press, and freedom of assembly be generously granted after the war to groups which will try to use them, as they did before the war, to undermine our institutions and

heap contempt upon democratic government? Having fought and won the bitterest and most costly war in all history to destroy the enemies of democracy and establish freedom throughout the earth, shall we out of loyalty to the doctrines of civil liberty invite our enemies in again, set them up in business, and place in their hands the tools with which to begin all over the process of destroying us? Shall we, in short, deny civil liberty in order to preserve it? This is the dilemma which we shall face.

I think the average American, who is a good deal of a realist, will have a ready and confident answer to this question. He will be unaware that any serious dilemma is involved. His answer will be that we have destroyed Nazism at an appalling cost and that we are going to keep it destroyed by whatever means may be necessary. We are not going to allow it to lift its head again. He will be quite willing to deny any and all civil liberties to the enemies of democracy, and he will do so with a completely clear conscience. He will be joined in this position by many sincere and thoughtful liberals whose devotion to democratic principles is unquestioned and who will defend that position by arguments which the average American will not have thought of. Let us review, then, the case which may be made for this realistic solution of the dilemma which I have stated.

The first argument is starkly practical: Democracy and civil liberty are among the great and lasting values which civilized nations have achieved through centuries of experience. It is unthinkable that we should place all of these values in peril through a meticulous solicitude to see that the avowed enemies of democracy enjoy freedom of speech, freedom of press, and freedom of assembly. Nations are entitled to preserve themselves and, when they engage in wars necessary to that end, we recognize the propriety of sacrificing as much civil liberty as the national security may demand. Constitutional democracy is entitled to preserve its own life in peace as well as in war, and we should recognize its right to make the incidental sacrifices of civil liberty necessary to that end. What shall it profit a nation to make a Quixotic stand for unrestricted freedom of speech, press, and assembly if it thereby jeopardizes its own democratic way of life?

A second argument is built upon the experience and philosophy of democracy itself. Our democratic ideology has never included any doctrine of absolute or unrestricted civil liberties. As Burke put

it many years ago, "Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public council to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, of this restraint the community can subsist." We have never abandoned that sensible doctrine; and freedom of speech, freedom of press, and freedom of assembly have always been limited by a wide variety of restrictions designed to promote and preserve the public welfare and security. To withhold these civil liberties from those bent upon using them in order to destroy our institutions is actually no different from any of the traditional restrictions placed upon them in the public interest. Furthermore, our principles of constitutional democracy and civil liberty have meaning and reality and value only among people who understand and appreciate them. We do not impose upon aborigines the machinery and the processes of a democratic government which they do not understand and cannot administer. Is there any more reason for extending the privileges of democracy and civil liberty to those who, having once enjoyed them in large measure, have voluntarily abandoned them for the doctrines of despotism and brute force? Just as we do not intend to allow Fascism and Nazism to remain in control of Italy and Germany after the war, so should we take measures to put an end to Nazi, Fascist, or other anti-democratic propaganda in our own country. We should so broaden our laws against sedition as to suppress and punish those who advocate any of these objectionable doctrines or systems of government, or who belong to organizations which advocate them. Only in this way can we adequately protect the integrity and the security of our American heritage.

There is another body of opinion, however, equally hostile to Nazism and all its works, which vigorously rejects the views just stated. Those who take this second position refuse to countenance the suppression of any political or economic opinion within a democratic country, no matter how obnoxious or dangerous those opinions may be. They are willing to punish or suppress only unlawful conduct or the open advocacy of crime or violence. To refuse to allow the Fascist or the Nazi to stand up in public and say his piece, provided he does it in a peaceable and orderly manner, is, in their view, to announce that we believe in civil liberty for our side but not for those who disagree with us and of whom we disapprove.

It involves us in a humiliating national self-stultification. We show that we do not genuinely believe in freedom of speech, freedom of press, and freedom of assembly as our fathers did, but we believe in the freedom to say and to print only the "right sort" of things. "How shall we commend democracy to the acceptance of other people," wrote Woodrow Wilson, "if we disgrace our own by proving that it is, after all, no protection to the weak." Having proved the strength of the forces of democracy upon the battlefields of the world, shall we borrow the repressive methods of the enemies we have defeated to prevent the public expression of anti-democratic ideas at home? Have we so little faith in the essential honesty, integrity, and intelligence of the common man, upon whom in the last analysis our democracy rests, that we are afraid he will be won over by peaceful persuasion to the doctrines of a Nazism which he has just seen bring the world to the brink of ruin? If we fought this war to preserve constitutional democracy and civil liberty, let us not compromise the fruits of victory by a whittling down in peacetime of freedom of speech, press, and assembly.

These, then, are the two horns of the dilemma which we shall face after the war. Fundamentally, it is a dilemma in which we place our faith in the essential honesty and good sense of the common man over against our fears that he may be imposed upon by the enemies of democracy and be induced to sell his democratic birthright. We must choose whether to be led by a disillusioned realism to seek to purchase complete safety at the cost of a portion of our democratic faith, or to refuse to sacrifice any of our democratic faith, at the cost of some possible danger to the security of our institutions.

I speak, of course, for no one but myself when I state my deep conviction that we must make no compromise of our principles, that we must sternly refuse to place any new peacetime restrictions of any kind on freedom of speech, freedom of press, or freedom of assembly. We must resist every temptation to deny these basic civil liberties to any group or class in our midst, no matter how objectionable we believe their doctrines or opinions to be. I shall state briefly the arguments which have led me to take this position.

Two definitely minor arguments may be stated first. They are minor because they have nothing to do with the basic principles involved, but relate to purely practical matters. The first of these arguments is that any repressive legislation directed in peacetime

against anti-democratic propaganda not otherwise unlawful seems to me entirely unnecessary. The dangers we are supposed to be warding off by such restrictions on civil liberty are greatly overrated. The amount of hostile and obnoxious propaganda carried on after we have won this war will be very small. No foreign-inspired anti-democratic organization is going to be very strong or very vocal. When we have destroyed the Nazi régime in Germany, it is likely to be a very dispirited and very discreet lot of Nazi disciples left in this country. But even if these people were more numerous and more powerful than they are likely to be, it is quite unnecessary to restrict their freedom of public discussion and publication in order to protect our national security against them. No one seriously believes that they can argue us out of our democratic principles. We do not fear the public expression of their ideas. And when they resort to other tactics we can fully equip ourselves to deal with them by law. We may punish them for advocating crime or violence, or for conspiring together to carry out subversive programs. We may require full publicity with respect to their organizations with regard both to membership and to foreign associations. We may forbid the possession of military weapons or the wearing of uniforms, and we may require that all meetings be peaceful and orderly. We have by no means exhausted the scope of the disciplinary action which we may take to prevent criminal or subversive conduct or conspiracies. Such practical and reasonable precautions will fully protect the public safety without resorting to any restrictions upon freedom of speech, press, or assembly.

A second minor argument may be stated even more briefly. If we deny freedom of public discussion to anti-democratic groups, we may actually increase rather than diminish the danger to the public security. By such suppression we drive these people under cover, and we make it infinitely more difficult to know who they are, how strong they are, and what they are up to. History is full of examples which show that if a minority has virility enough to be an actual danger to the majority, governmental action outlawing it or forbidding it to function in public often makes it more dangerous by forcing it to resort to concealment and subterfuge. Groups which are allowed to talk and to print can at least be identified and counted and watched. They are less dangerous when we know about them than when they are driven to hide in cellars and to wear false whiskers.

There are vastly more compelling arguments than these, however, against new postwar restrictions on civil liberty, and these are grounded in the very heart of our democratic creed. Such restrictions would constitute a humiliating confession that we have lost our faith in the basic principles upon which our civil liberties rest. We are afraid to expose our democratic institutions and principles to the dangers of public and hostile criticism. We no longer trust the intelligence and the integrity of our people to see the difference between fascism and democracy and to repudiate the one and cleave to the other. We no longer believe in the power of truth and decency and honor to prevail in what Mr. Justice Holmes called the "competition of the marketplace." We have, in short, become skeptical of the capacity of democracy to hold its own against the competition of undemocratic doctrine. We can no longer trust ourselves to listen to talk, or to read printed material, which offends us or which criticizes or attacks our institutions. We will no longer let people say out loud the things we do not like to hear. We borrow from the Nazis whom we despise a device of repression which repudiates the old and valued principle of free speech and press. All this seems a very tragic aftermath of a titanic struggle in which the democracies of the world have proved their strength and their capacity to survive. We are fighting this war with an amazingly small amount of interference with free public discussion on the home front. How can we justify increasing the measure of that interference after we have won the war? To do so is, in my opinion, to recant our democratic faith.

My final reason for opposing any new repressive legislation is that to do so would establish a precedent for the suppression of free public discussion, and such a precedent would prove an insidious and far-reaching danger. It would encourage and fortify the forces of intolerance with sinister results. It would be the first peacetime attempt by Congress since the notorious Sedition Act of 1798 to forbid the public expression of ideas unaccompanied by violence or incitement to crime. We have a statute which forbids people to advocate the overthrow of government by violence. But it is a very different thing to make it a crime to advocate in an orderly manner an undemocratic system of government to be brought about by peaceful methods. Consider the problem of drafting such a statute. How would it read? It would be bound to sound much like the West Virginia statute referred to by Professor Zechariah Chafee which

makes criminal any teaching "in sympathy with or in favor of ideals hostile to those now or hereafter existing under the constitution and laws of this state." It will inevitably use words and phrases which are vague in meaning. It will try to shut the mouths of the people who openly preach or publish their hostility to the principles of constitutional democracy. How shall we define constitutional democracy with the precision required in a criminal statute? Or, if we attempt to punish utterances or publications which are "subversive," how shall we define the term "subversive"? Congress and its committees have been struggling with that task for some time without making much headway. It seems certain that the terms which we shall have to use will be terms into which can be read dozens of different meanings reflecting the varying political and economic opinions, philosophies, prejudices, and phobias which make up the mosaic of American public opinion. If we try to build in this way a protective barrier around what I can already hear described as "our American way of life," we shall seriously jeopardize the freedom of speech, press, and assembly of every honest and outspoken critic of our political and economic status quo. I have already shown that the most frequent and dangerous attacks upon civil liberty in this country have come from various vested interests, some political and some economic, which have sought by arbitrary and repressive methods to ward off criticism and hostile propaganda. These people are allergic to any kind of radical, liberal, or unconventional public discussion of our political and economic institutions. They have fully convinced themselves that they, and the interests which they stand for, are an integral and essential part of the "American way of life," and perhaps they are. They will certainly climb with enthusiasm on any bandwagon of repressive policy toward free discussion which is stated in vague and broad terms, and which can perhaps be construed to forbid the kind of talk and publication which they dislike and fear. There will be a strengthening and intrenching of the forces of intolerance, and a corresponding weakening and suppression of liberal and independent thought. We may succeed in stamping out anti-democratic propaganda, but we shall have established the principle and the precedent of repression.

These are the reasons which I believe should lead this country to maintain during the troubled days of the peace to come the most scrupulous protection of the doctrines of civil liberty. I am not suggesting that we should sit idly by and see our institutions wrecked.

We have ample criminal statutes to safeguard us against any such calamity. Nor am I suggesting that we shall cease to be an essentially democratic and liberty-loving people if we adopt the policy of limited repression against which I have argued. We shall undoubtedly be much the same as we have always been. We shall be safe and we shall be happy. We shall probably grow increasingly smug, and talk glibly about freedom and the Bill of Rights. But I hope we shall have an uneasy conscience, for we shall have compromised our democratic faith. We shall have traded for a comfortable sense of security a measure of that freedom of public discussion which for a century and a half we have regarded as perhaps the most valued civil liberty which a free people can enjoy.