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Free Speech in War Time

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FREE SPEECH IN WAR TIME[1]

"Free Speech" is a very large and formidable title for an afternoon talk to a gathering of friends such as compose a Convocation audience in March. But I pray you not to be disturbed. I shall neither try to cover the entire subject after the fashion of H. G. Wells, striding with seven-league boots from mountain top to mountain top of controversy, nor shall I emulate our aspiring candidates for the doctorate of philosophy by sifting exceedingly fine all of the soil in some tiny garden plot of doctrine. And yet my purpose is not without ambition. I wish to discuss a narrowly limited and yet important phase of the general subject of free speech—one that occupies that twilight zone where constitutional law and public opinion so often seem to strive with each other mightily, amid the mists of passion and fear and misunderstanding. I wish to discuss it somewhat as a lawyer must, and yet without technicalities; somewhat as a statesman should, despite my obvious lack of qualifications; and most of all as a problem for the practical common sense of those everyday intelligent citizens of the Republic, whose sober second thought forms the background of public opinion against which our institutions function.

Free speech and a free press, like freedom of the body, of occupation, of contract, and of religious belief, have long been proclaimed as characteristic of American institutions, and have been specifically protected in our constitutions, state and federal. The meaning of "liberty" as applied to occupation, contract, and the use of property has been the subject of much litigation, and, by a multitude of decisions, certain lines have been pricked out, which, though perhaps temporarily and provisionally, do separate with some present certainty and according to a fair consensus of informed opinion the receding domain of individuality from the expanding empire of social regulation. Definitions gradually worked out, like these, in the never-ending conflict of social interests, and constantly obliged to meet the tests of everyday life, are likely to embody the practical wisdom of their time and adequately to supply its pragmatic needs.

But the meaning of free speech has enjoyed no such gradual elaboration on the loom of time and circumstance. For a brief period at the end of the eighteenth century, controversy flamed up as the expiring Federalist party enacted the Alien and Sedition Laws of 1798.[2] Its authors were doomed in any event before the rising tide of the Jeffersonian Democracy, but these unpopular laws furnished additional provocation to the opposition and inspired new epithets in their vocabulary of political abuse. This

[1] Convocation address delivered at the University of Chicago, March 15, 1921.
[2] (1798) 1 Stat. 570 and (1798) 1 Stat. 596, expired by their own limitations before March 4, 1801.

was probably due far less to any careful analysis and condemnation of them upon permanent constitutional and political grounds than to the general temper of the times and to a burning desire decisively to repudiate the Federalists and all their works. If the echoes of their unpopularity have perhaps been mistaken for the clarion notes of a proclamation of unlimited freedom, that is not strange in view of the constant effort of political theories to identify themselves with constitutional principles. At any rate, for the next 120 years the exigencies of American life only once produced any real occasion for an interference with free speech, and, for political reasons, this was chiefly dealt with very irregularly by the executive instead of by Congress and the courts.

The American Civil War was a contest that bitterly divided not only the North from the South but large sections of public opinion within the border states and some of the middle western ones. There were thousands of men in the states not in secession who were opposed to the war, and who inveighed against it in terms that unquestionably had an effect upon the morale of their sections and discouraged recruiting. And yet Congress passed no legislation curbing disloyal utterances in general, though the statutes against criminal conspiracies to hamper the government were strengthened.

Those who have criticised the recent Espionage Acts have sometimes referred to the lack of similar legislation in the Civil War as proof that such laws were unnecessary and unwise. But there is more than one way to skin a cat—or, in the more dignified langnage of political science, a powerful government in war time can find other means of dealing with disloyalty than through the courts. During the Civil War it was deemed politically inexpedient to legislate against disloyal utterances in general. In the earlier stages of the contest Lincoln earnestly sought to hold the border slave states in the Union. He was represented as praying: "Oh, Lord, we earnestly hope that Thou wilt favor our cause, but we must have Kentucky." Men not irreconcilably of Southern sympathies were to be won over, if possible, by the methods of persuasion. Many utterances that in Massachusetts would have been treated as clearly indicative of disloyalty, in Kentucky were the natural expressions of men sorely perplexed and reluctant to make a decision that either way was fraught with such sorrow. Legislation applying to all alike would have been unjust and alienating to the border state doubters, and would have been widely criticized as an illustration of the despotism so often charged again Lincoln by his opponents. But, without the sanction of legislation, the federal government arrested by the thousand men whom it knew or suspected to be dangerous or disaffected, and confined them without charges and without trial in military prisons as long as it saw fit—and public opinion generally acquiesced in this as a fairly necessary measure of war-time precaution. The number of such executive arrests

has been variously estimated up to as high as 38,000. The War Department records, confessedly very incomplete, show over 13,000.[3] Our recent record of about 2,000 prosecutions under the Espionage Acts, with perhaps half as many convictions, compares very favorably with this, and gives no ground for saying that freedom of any sort was more interfered with in the war with Germany than in the war between the states.

Shortly after the commencement of hostilities between the United States and Germany, Congress passed a statute forbidding certain kinds of utterances as prejudicial to the effective conduct of the war. The following year this statute was extended and strengthened, the two together being known as the Espionage Acts.[4] During the war about 2,000 persons are said to have been arrested for violation of these acts, and perhaps 1,000 were convicted.[5] Several of the convictions were taken to the United States Supreme Court, and all portions of the law involved in these cases were upheld, although, as to part, with some dissent.[6]

The Espionage Acts and the policy they represent have been bitterly attacked as a violation of our constitutional guaranties of free speech, and as an un-American departure from one of our greatest political traditions. They have been defended in language equally strong and undiscriminating. The needs and passions of war time create an atmosphere unfavorable to the discussion of such questions with a calmness likely to lead to judgments of permanent value. Two years after the cessation of armed conflict we can do better; and so let us then, in the light of common sense and without technicalities, examine this doctrine of free speech, which, like all doctrines that seek to limit the desires and actions of men, receives such diverse interpretations.

And first let us consider what are the purposes for which free speech is conceived to exist and to be worthy of protection against the will of governments and of hostile majorities. Doubtless it is sometimes imagined by its ardent advocates as an abstract good in itself, directly beneficial to individuals as are light and air. To a limited extent this may be true. That is, the utterer of ideas may obtain a very real satisfaction from the mere utterance, in relieving his feelings—in "getting it out of his system," as it were—irrespective of its effects upon others. If this were the chief purpose or result of free speech, there would be little controversy over the subject. Such personal gratifications of the utterer would be largely a matter of indifference to his neighbors, and it needs no very

[3] 4 Rhodes, *History of the United States* (1900) 230-32n.

[4] (1917) 40 Stat. 219; (1918) 40 Stat. 553, U. S. Comp. Stat. (Supp. 1919) § 10212c.

[5] Chafee, *Freedom of Speech* (1920) 387.

[6] *Schenck* v. *United States* (1919) 249 U. S. 47, 39 Sup. Ct. 247; *Frohwerk* v. *United States* (1919) 249 U. S. 204, 39 Sup. Ct. 249; *Debs* v. *United States* (1919) 249 U. S. 211, 39 Sup. Ct. 252; *Abrams* v. *United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; *Schaefer* v. *United States* (1920) 251 U. S. 466, 40 Sup. Ct. 259; *Pierce* v. *United States* (1920) 252 U. S. 239, 40 Sup. Ct. 205; *O'Connell* v. *United States* (1920) 253 U. S. 142, 40 Sup. Ct. 444.

mature political philosophy to tolerate opinions and acts that are really matters of indifference.

But, as an eminent judge has lately phrased it: "Words are not only the keys of persuasion but the triggers of action." [7] Freedom of speech is demanded by those who wish to use it to urge others to action, and often to momentous action; and its restriction is advocated by those who point out the undesirable character of some of the actions thus urged. The real controversy is over the desirability of the action that it is hoped or feared a certain degree of free speech will promote. It is but to utter pale and anaemic words in a world of robust deeds to say that to the genuine advocate of free speech the ends of such freedom should be so far matters of indifference that the urging of any and all of them should be equally permissible. This has been so well put by Walter Lippmann, himself generally accounted one of the leaders of intelligent radicalism in America, that I quote his words:

"There are, so far as I can discover, no absolutists of liberty; I can recall no doctrine of liberty, which, under the acid test, does not become contingent upon some other ideal. The goal is never liberty, but liberty for something or other. For liberty is a condition under which activity takes place, and men's interests attach themselves primarily to their activities and what is necessary to fulfil them, not to the abstract requirements of any activity that might be conceived. . . .

"There are at the present time, for instance, no more fervent champions of liberty than the western sympathizers with the Russian Soviet government. Why is it that they are indignant when Mr. Burleson suppresses a newspaper and complacent when Lenin does? And, *vice versa*, why is it that the anti-Bolshevist forces in the world are in favor of restricting constitutional liberty as a preliminary to establishing genuine liberty in Russia? Clearly the argument about liberty has little actual relation to the existence of it. It is the purpose of the social conflict, not the freedom of opinion, that lies close to the heart of the partisans. The word liberty is a weapon and an advertisement, but certainly not an ideal which transcends all special aims.

"If there were any man who believed in liberty apart from particular purposes, that man would be a hermit contemplating all existence with a hopeful and neutral eye. For him, in the last analysis, there could be nothing worth resisting, nothing particularly worth attaining, nothing particularly worth defending, not even the right of hermits to contemplate existence with a cold and neutral eye. He would be loyal simply to the possibilities of the human spirit, even to those possibilities which most seriously impair its variety and its health. No such man has yet counted much in the history of politics. For what every theorist of liberty has meant is that certain types of behavior and classes of opinion hitherto regulated should be somewhat differently regulated in the future. What each seems to say is that opinion and action should be free; that liberty is the highest and most sacred interest of life. But somewhere each of them inserts a weasel clause that 'of course' the freedom granted shall not be

[7] Judge Learned Hand in *Masses Pub. Co.* v. *Patten* (D. C. 1917) 244 Fed. 535, 540.

employed too destructively. It is this clause which checks exuberance and reminds us that, in spite of appearances, we are listening to finite men pleading a special cause." [8]

Now, when the First Amendment to the United States Constitution provides that "Congress shall make no law abridging the freedom of speech or of the press," what does it mean in terms of practical restraint?

In approaching this problem of interpretation, we may first put out of consideration certain obvious limitations upon the generality of all guaranties of free speech. An occasional unthinking malecontent may urge that the only meaning not fraught with danger to liberty is the literal one that no utterance may be forbidden, no matter what its intent or result; but in fact it is nowhere seriously argued by anyone whose opinion is entitled to respect that direct and intentional incitations to crime may not be forbidden by the state. If a state may properly forbid murder or robbery or treason, it may also punish those who induce or counsel the commission of such crimes. Any other view makes a mockery of the state's power to declare and punish offences. And what the state may do to prevent the incitement of serious crimes which are universally condemned, it may also do to prevent the incitement of lesser crimes, or of those in regard to the bad tendency of which public opinion is divided. That is, if the state may punish John for burning straw in an alley, it may also constitutionally punish Frank for inciting John to do it, though Frank did so by speech or writing. And if, in 1857, the United States could punish John for helping a fugitive slave to escape, [9] it could also punish Frank for inducing John to do this, even though a large section of public opinion might applaud John and condemn the Fugitive Slave Law.

It will at once be perceived how great a concession against the doctrine of any absolute right of free speech are the qualifications just made. Nor is that all that must be yielded before serious debate can begin. The state may not only forbid the counseling of crimes, great or small, but it may forbid certain direct interferences with the free will of men, who, if left alone, might make a choice beneficial to the objects of the government, though they are not bound to do so. Thus, to illustrate and contrast the two different situations, in regard to both of which the government may lawfully forbid literal freedom of speech, the Draft Act made evasion of the draft a crime. [10] Directly to urge or counsel another to evade the draft could then be made a crime, and was so made. [11] But if a man were not within the draft age, it was perfectly lawful for him not to volunteer, and he was at liberty freely to decide what he should

[8] (Nov. 1919) 124 Atlantic Monthly 616-17.
[9] (1850) 9 Stat. 462.
[10] (1917) 40 Stat. 80, (1918) 40 Stat. 884, (1918) 40 Stat. 955, U. S. Comp. Stat. (Supp. 1919) § 2044e.
[11] (1918) 40 Stat. 553, U. S. Comp. Stat. (Supp. 1919) § 10212c.

do, so far as governmental coercion was concerned. But his neighbors were not allowed the same freedom in urging him not to volunteer. This was forbidden, if intended to obstruct recruiting, on the ground that the United States had such an interest in the freedom of its citizens to choose to enlist, if they would, that it could curtail the freedom of opponents of its policies directly to urge them not to enlist. Similarly, the United States forbade certain kinds of intentional interferences by speech with the sale of Liberty bonds, [12] although it was not made a crime not to subscribe for them. Here again the United States had a sufficiently vital interest in the freedom of choice of those who might subscribe to enable it to override the freedom of those who might try by speech to oppose its aims and to induce others not to buy bonds. A similar principle is well known in the private law of torts, where one man often has a legal interest in preserving the freedom of choice of a second man from the inducements of a third.

We see then, that, without a violation of constitutional free speech, a government may further its policies either by commanding certain conduct and punishing those who disobey or who incite disobedience; or by encouraging certain conduct and punishing those who directly seek to discourage it. So much is admitted by those advocates of free speech who challenge their opponents at a later stage in the argument.

Now, in practical life, and particularly in a war that enlists cunning as well as passion, what actually happens when the lawyers have worked the matter out to this point? A certain number of naive and downright souls will express themselves with fearless candor; they will urge men to disobey the draft and not to buy bonds; and they will promptly and without a hitch in the machinery of justice be convicted and sent to prison, as an object lesson that disloyal frankness of that character gets nowhere except to jail. Then follow their shrewder brethren who fight from cover. Instead of urging resistance to the draft, they argue in passionate and extravagant language how outrageous and intolerable and tyrannical a draft law is, and how unfairly its exemptions are administered; they extol the virtue and firmness of those who have resisted it, and compare them favorably with the world's great moral heroes; they bitterly and mendaciously attack the motives of their opponents; and they picture the undeniable risks of battle and disease to the soldier in colors as lurid and frightful as imagination can conceive them. They say they are only arguing to influence public opinion to repeal or amend the draft law, and that, so long as they do not *directly* counsel *resistance* to it as it stands, they are protected in whatever they say as political agitation for its alteration. But in fact what they say, and particularly the manner in which they say it, *does* induce in some or many persons exactly the same resistance to the draft as if it were more directly urged, and,

[12] See *supra*, footnote 11.

in probably seven or eight cases out of ten, this is exactly what is intended by the utterer.

But the theoretical case the utterer makes for himself compels some pause to those who do not wish to conduct even a war wholly upon an emotional basis. A genuine believer in constitutional government can hardly afford to take the position that in war time men can lawfully be forbidden to attempt in good faith to secure changes in the laws, unless such attempts have a modicum of popularity. And the formula he brings forward to escape the dilemma is theoretically simple and satisfactory: If the utterer in fact intends his language to induce evasions of the draft, or to discourage volunteering or subscriptions to Liberty loans, he shall be liable to punishment; but if in fact he intends only to influence public opinion to bring about a change of law or governmental policy, then he shall go free.

There are legal precedents in abundance for such a distinction as this. It is a common-place in the criminal law that a man is ordinarily liable for a certain result only if he intends it, and that if he *does* intend it and brings it about, or does appropriate acts leading toward it, he shall be liable no matter how cleverly he conceals his intent, provided that its existence can be established to a jury. Civil liability in important fields of the law depends on the same distinction. It is true that intention, being a mental state, is often not unmistakably exhibited by words and acts, and that human judgment will be more fallible here than in ascertaining some other classes of facts. Indeed, a few hundred years ago, when English law was just emerging from that primitive stage of legal culture where a man was rigorously held for the consequences of his acts, regardless of care or intention, one of the greatest judges of his time said that the intention of an act was not triable by a court, "for the Devil himself knoweth not the thought of man." [13] But this idea has been long abandoned, and there is not now a court in the English-speaking world that does not daily pass on the intentions of men with reasonably acceptable results. Upon this position, then, our believer in constitutional government plants himself, and passes the Espionage Acts, which, in the main, forbid utterances *intended* to produce certain results injurious to the conduct of the war.

But at this point the argument of his opponent fairly begins. Grant, he says, the theoretical soundness of your distinction between utterances designed to cause *resistance* to a law or to *discourage* acts beneficial toward a policy, and perhaps the same utterances designed only to secure a *change* in the law or the policy—how does it really work in practice? Such a law does not administer itself, nor can it be administered by omniscience, nor even by men of unusual acumen and fairness. Some human beings must decide on fallible evidence the intent of the

[13] Brian, C. J., in (146f) Y. B. 7 Edw. IV F. 2, Pl. 2.

utterer, and, if the evidence is conflicting, as it usually will be, a jury of twelve ordinary men decides this. Such men, in war time, particularly if public opinion favors the war, are almost always impatient of adverse criticism, and almost certain to regard it as inspired by improper motives if the evidence lends any support to this. A considerable proportion of those in opposition will be generally believed to be disloyal or cranks, and their reputation is readily extended to include others. Such evidence of intention as is available generally consists of other utterances by the defendant, made at other times and under other circumstances but admitted as bearing on his general state of mind, and of such inferences as can reasonably be drawn from the fact that the utterances for which he is prosecuted are likely to influence some people to disobey the government or not to support it. All of this evidence is likely to be unfairly prejudicial to the defendant, particularly the inference of a bad intent from the probable results of his utterances. While, logically, it is perfectly true that you may often properly infer as a fact that a man actually intends the probable results of his utterances, yet, when another and innocent intent may have accompanied them, it is a grave hardship readily to permit the inference most likely to be drawn when his words are unpopular. He is all too likely to be condemned chiefly because what he says is disliked, rather than because he actually intends to induce unlawful conduct. The distinction between trying to induce men to *change* a law rather than to *disobey* it does not bite deeply into the minds of a jury who personally think as badly of one effort as of the other, and particularly when the defendant has used vigorous language. And yet only by vigorous language can public opinion already fixed be moved.

Moreover, the disadvantages of such a rule do not stop with the probable erroneous conviction of a number of persons who espouse the unpopular side. Others, with perfectly loyal intentions, become afraid to criticise the acts and policies of the government, even when such criticism would be beneficial to the public, lest they run the risk of punishment or at least prosecution, and so valuable discussion is stifled.

In all candor it must be admitted that our advocate of free speech scores on all of these points. It is practically certain that a law punishing speech of harmful tendency, when uttered with a bad intent, will in fact result in a good many errors and in some abuses. It is also certain that it will cut off some useful criticism. Is it therefore necessarily unconstitutional or even unwise? To answer this, we must examine the alternative. If speech, in fact likely to incite acts injurious to the conduct of the war, cannot be forbidden unless couched in the language of direct counsel or advice, it is also perfectly certain that ill-disposed persons, by utterances cleverly designed to keep just within any objective tests, will actually interfere to a considerable extent with governmental operations. The entire setting of modern war, with its complex mili-

tary, economic, social, and political factors, renders this easy and likely of accomplishment. The famous speech that Shakespeare puts into the mouth of Antony, over the dead body of Caesar, contains not a word of direct incitement to riot. The literal import of its language is all to the contrary:

> "Oh masters! if I were disposed to stir
> Your hearts and minds to mutiny and rage,
> I should do Brutus wrong, and Cassius wrong,
> Who you all know are honorable men.
> I will not do them wrong; I rather choose
> To wrong the dead, to wrong myself, and you,
> Than I will wrong such honorable men."

And then, when, after listening to some more of these "indirections," his hearers are on tiptoe to burn and slay, he adds:

> "Let me not stir you up
> To such a sudden flood of mutiny . . .
> I am no orator as Brutus is,
> But . . . a plain blunt man
> That love my friend . . .
> . . . I only speak right on;
> I tell you that which you yourselves do know;
> . . . but were I Brutus
> And Brutus, Antony, there were an Antony
> Would . . . put a tongue
> In every wound of Caesar, that should move
> The stones of Rome to rise and mutiny."

If he had been drafting an Espionage Act, would a loyal supporter of Brutus, albeit a staunch believer in free speech, have thought it safe and proper to leave Antony at large? You can match the thinly-veiled spirit and purpose of this speech, if not its eloquence, in many of the utterances during our war. Of course it would be absurd to say that most convictions were secured on evidence as clear as this, but, once you grant that you can punish a speaker not merely for literally direct incitement, but for language likely to incite and so intended, some cases are sure to be doubtful and perhaps to be decided erroneously.

As so often in human affairs, we have to choose between competing goods and ills. In war time, speech for everyone cannot be as free as in time of peace without the certainty of its abuse to the detriment of our war policies. Likewise, speech cannot be restricted in time of war to prevent this danger, save by methods so drastic as to be also readily susceptible of mistakes and abuse. Which is for the time being the more important social interest—a speedier successful ending of the war, or a freer public discussion of it? It may be that no finite mind can be certain of the answer, but answered it must be, and by such minds as are

responsible for what is going on. And we may take such comfort as we can in the observation that, whenever there has been a genuine fear of hostile propaganda, speech has been correspondingly restricted. Methods have differed, but the results have been the same. In ordinary times the social interest in free discussion so plainly outweighs all possible gains from its suppression that probably only somewhat direct incitements to illegal or injurious conduct may be forbidden, but, in the emergency of an important war or grave social disturbance, the pros and cons of suppressing utterances which, though indirect in form, are reasonably likely in fact to incite such conduct and are so intended, are at least evenly enough balanced to sustain a legislative decision either way.

Free speech is not the only or the predominant interest enshrined in our constitutions. Life, liberty, and property in ordinary times are also expressly and adequately protected. And just as "due process of law" in time of war means something different as regards governmental control over life, liberty, and property from its meaning in time of peace, so permissible "freedom" of speech in war time is different from that in peace time. The reasonable necessities of the situation qualify the war-time application of all our constitutional guaranties save a few that are obviously intended to be perfectly precise and absolute, and the right to free speech is no exception.

To the suggestion that advantage might be taken of a war with Haiti or Liberia to impose the same restrictions on free speech as in the war with Germany, the obvious answer is that it is not alone a technical state of war, but a reasonably conceived necessity for the restrictions, that justifies them. During an important war and for a reasonable period thereafter, while the passions engendered are still hot and the disturbances of the economic and social order unhealed, the state may lawfully limit the ordinary freedom of speech and of transactions, if this can be thought reasonably necessary for the public welfare; but the mere existence of distant or trifling military operations that have no sensible effect upon our economic or social fabric would not justify such interferences.

Finally it may be urged that, granting the theoretical correctness of this argument, it is really inapplicable to a large part of our war-time restrictions, because they were not really needed, but were the product of an excitement and quasi-panic that deprived men of the power of judging in calmness both as to the restrictions needed and as to the probable effect of particular words used. [14] But surely the meaning that may reasonably be placed upon language, and the effects that may reasonably be feared to result from it depend largely upon the circumstances under which it is uttered, including the states of mind of its hearers and the public. One who is repelling assault and battery is not required at his

[14] See the dissenting opinion of Mr. Justice Brandeis in *Schaefer* v. *United States* (1920) 251 U. S. 466, 483, 40 Sup. Ct. 259, 265.

peril to judge of the proper limits of self-defence with the detachment of a bystander. In appraising the correctness of his decision the court will take into account his naturally excited state of mind. He need only decide as well as could fairly be expected from the average man under such circumstances of provocation and excitement. At least as much latitude must be allowed in estimating the probable effect of words in war time. It is doubtless true that, during the late war, men of average intelligence and credulity believed there was much greater danger from pro-German and treasonable activities than was in sober truth the case, but this did not stamp such beliefs as unreasonable, considering the emergency and the imperfect information available. If public opinion of average intelligence generally shared the belief that certain types of utterances were reasonably likely substantially to interfere with the effective conduct of the war, it was well within a proper legislative discretion to forbid such utterances, and to take the verdict of a jury upon this inference of fact and upon the intention of the defendant in making the utterance.[15] The practical certainty that some mistakes and abuses would occur in the administration of such a law was to be weighed by Congress against the equally practical certainty that without it a good deal of ill-intentioned and actually mischievous propaganda could not be checked by lawful means and was pretty certain to be dealt with by unlawful violence. To me it seems impossible to say that the judgment Congress passed upon this question was in its essential features unreasonable, in view of the existing information and temper of the country, nor that it was even unwise, in any other sense than that much that is done in every field, under stress of war, could be bettered in the light of experience.

It is of course not difficult to find some regrettable errors and excesses in both the judicial and the executive administration of the Espionage Acts. The action taken under them, however, was far less arbitrary and unjust than were the executive arrests of the Civil War, which took the place of repressive legislation. The ordinary processes of law were followed, and the usual safeguards afforded to the accused. The acts were administered in no such highhanded and oppressive manner as was the Deportation Act.[16] Many of the sentences were doubtless too severe. This can be and is being remedied. It has been observed that political crimes here, being a novelty, have not yet acquired a recognized place in the hierarchy of offences. Our judges have inclined to place them somewhere between highway robbery and murder in the second degree. Countries in which they are more familiar rate them much more leniently. Perhaps we shall learn this, too.

[15] See *Jacobson* v. *Massachusetts* (1905) 197 U. S. 11, 34, 35, 25 Sup. Ct. 358; *Laurel Hill Cemetery* v. *San Francisco* (1910) 216 U. S. 358, 364, 366, 30 Sup. Ct. 301.

[16] (1918) 40 Stat. 1012, U. S. Comp. Stat. (Supp. 1919) § 4289¼b; see (1917) 39 Stat. 889, U. S. Comp. Stat. (Supp. 1919) § 4289¼jj.

After a war comes muck-raking. Some of it, when conducted in the proper spirit, may afford useful lessons for the future. Most of it serves only a personal and a partisan end. There has been general disappointment that a new heaven and a new earth have not more speedily followed the war. Bitterness and disillusion are untrustworthy commentators, whether upon army administration or the denial of free speech. Most of the criticisms of the Espionage Acts which I have read seem utterly extravagant. To me these Acts seem only an episode, entirely natural and reasonable, in the gigantic struggle through which we have passed. They are chiefly significant as showing the adaptability of modern society to emergency needs, and as exemplifying in constitutional law the important doctrine of the relativity of values. Private property, liberty of person, of contract, of occupation, free speech, even life itself, are not absolute goods to be preserved rigidly under all circumstances alike. Their value and the protection they receive are always relative to the dominant social needs. If they are less useful to a society at war than in peace, they will merit and will receive less protection. But when peace returns the old values reassert themselves, shorn, it may be not undesirably, of a little of their traditional prestige. The men of the North believed that liberty was safe with Lincoln, despite the thousands of arrests made under his authority in the Civil War. They were right. I think we may believe that peacetime freedom of speech is as secure in American public opinion today as ever, and a recent moving proof of this is the general condemnation that greeted the expulsion of the Socialist members from the New York Assembly. The Espionage Acts, like the draft, were war measures, tolerated and approved as such. Neither is in the least likely to become a permanent policy of peace, and those who are proclaiming the former as a deadly blow at free speech are ,in my judgment, but engaged in the age-old occupation of tilting at windmills.

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