

# Restraints Upon Individual Freedom in Times of National Emergency

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## RESTRAINTS UPON INDIVIDUAL FREEDOM IN TIMES OF NATIONAL EMERGENCY†

JOHN LORD O'BRIAN

In one sense there must be a certain appearance of unreality in the discussion of permissible restraints upon individual liberty at a time when, in the greater part of the world commonly called civilized, the rights of the individual to think, to speak, and to worship as he pleases no longer exist. And it would seem fatuous to attempt such a discussion without first taking account of the contemporary conditions affecting our national life. The happenings of the past decade together with the contemplation of the tragic days ahead are grim reminders that security and stability may be only phantom illusions of the mind. They remind some of us that the disintegrating forces in human society are always present, latent or active, and that our chief peril may lie in our failure to apply the test of moral standards to what is taking place in Europe and to act accordingly. In such a situation the necessity for informed discussion becomes of supreme importance. But it is doubtful whether anxiety over the right to freedom of discussion is generally entertained. In his *History of Freedom of Thought*, Professor Bury complains:

“At present, in most civilized countries, freedom of speech is taken as a matter of course and seems a perfectly simple thing. We are so accustomed to it that we look upon it as a natural right. But this right has been acquired only in recent times and the way to its attainment has lain through lakes of blood.”<sup>1</sup>

One constantly recurring note in criticism of modern education has been the same complaint—that too much has been taken for granted and too little accomplished in making men understand the true significance of individual liberty and the constant effort required for its preservation. Whether the fault lies in the materialistic standards of an industrial civilization, whether it be due to the increasing prevalence of intellectual scepticism, or whatever the reason may be, one of the greatest difficulties yet to be overcome by education is the readiness of the multitude to evade analytical and realistic thinking. In this country we and our forefathers have throughout so many

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†A lecture delivered at the Cornell Law School under the Frank Irvine Lectureship of the Phi Delta Phi Foundation, April 12, 1941. [Ed.]

<sup>1</sup>BURY, *HISTORY OF FREEDOM OF THOUGHT* (1913) 8.

years placed our faith in the power of persuasion as against the rule of force that the sudden rise of brute power with its threat of world embracing tyranny still seems all but incredible. We had all but forgotten the warning of John Stuart Mill that one of the most harmful illusions afflicting mankind was the belief that the triumph of truth was inevitable. Today the great bulk of our people are so mentally benumbed that they seem to have no true realization of the effect upon them and upon civilization generally of the suppression of education and of the traditional forms of religion—and the abandonment as well of the older moral values throughout the greater part of the continent of Europe. Confronted with these indubitable facts the atmosphere in which, of late years, we have been discussing certain aspects of individual liberty, such as restrictive city ordinances, teachers' oaths, flag salutes, etc., seem somewhat academic and sophisticated. The abruptness and brutal character of the challenge to our long-settled acceptance of the concept of individual freedom has also produced in certain quarters strangely unsettling if not revolutionary results. This is evident in the fatalism with which many intellectuals contemplate, without remonstrance, the world of today, and yet at the same time assert that strictness of legal restraint upon individual freedom in any emergency must inevitably lead to despotism and tyranny of a permanent character.

These somewhat philosophical considerations might well justify a discussion of the topic of this address. But the cause which provoked the topic was both simpler and more concrete. It was the grave character of the present national emergency coupled with vivid recollections of the experience of America in the Great War. For certain well-defined symptoms are now being manifested in expressions of popular opinion altogether too suggestive and reminiscent of unhappy memories of the Great War. A study of those symptoms imposes a special burden upon educated men. For we, at least, are not at liberty to adopt the light and easy way. We, more than others, should be keenly aware of what Mr. Justice Cardozo called "the tyranny of labels." The modern practice of resorting to shibboleths to use in dealing with disagreeable facts and the superficial search for formulae which will somehow provide ready solutions for complicated social problems are methods not open to us. Our training, our tradition, and our obligation alike compel us to choose the hard course of meeting ideas with ideas. And it should be our special duty and function to study contemporary agitation in the light of our history in earlier crises. This, after all, was the method characteristic of the common law. With all of its toleration for experimentation and its allowance for changing habits, the emphasis of the common law, at least in its later development, was upon the necessity of constantly re-examining conduct and

motive in the light of established facts and from the standpoint of historically recognized customs and habits of mind.

With this in mind, I ask you to consider briefly our subject in the light of historical perspective. I shall not weary you with closely reasoned analyses of numerous cases, nor undertake to discuss more than a few of the aspects of the problem of free speech in our present day world. There is not time for all this: the sweeping onrush of events is passing us by even while we ruminate upon theories of conduct.

Confused as we are by the challenge of seemingly inexplicable human cruelty and by ideologies, to us abhorrent, accepted by millions of alien peoples, with the certainty of deeper confusion in tragic days ahead, what is there in our history to which we can turn for guidance? What is there which will aid in determining what legitimate restraints may justifiably be placed by the state upon the citizen in time of emergency?

Lord Bryce once said:

“As for the love of justice, it belongs to mankind generally, and to all systems of law. Such differences as may be noted between different peoples consist not in the reality of the wish to give every man his due—*suum cuique tribuere*—but in the self-control which prevents emotional impulses from overriding justice.”

How can we prevent emotional impulses from overriding justice? And on the other hand, what degree of self regulation may safely be imposed by law to protect the nation against destruction from subversive influences?

The most severe test to which the American philosophy of government has been subjected came during the Great War, and in these present days there is a strange resemblance to the experiences of that period. Men then as now professed their faith in individual freedom and in the great humanitarian tradition of America. Yet emotions in the disguise of pseudo patriotism seriously imperilled these ideals. There came a time when even the ownership of a German name was likely to subject the owner, citizen or alien, to suspicion and even persecution. And the groundswell of hysteria long outlasted the war itself. It was nearly two years after the war, for example, when the New York Legislature ousted several of its duly elected members solely because of their membership in the Socialist Party. In a large meeting of the State Bar Association called in the hope of preventing such action, despite the influence of such leaders as Hughes, Root, Wickersham and other statesmen of equal authority, the vote of protest was carried by only about 20 majority and the Legislature ignored it. Then followed the extravagant recommendations of the legislative Lusk Committee. Similarly, the “Red” raids of painful memory, which inflicted unjustifiable suffering upon thousands of innocent people, came along after the armistice, conducted under the personal

direction of the then Attorney General of the United States. And during these intervening twenty years many of the states have enacted laws attempting to proscribe groups and organizations as well as individuals engaged in what were considered to be subversive activities.

But the significant feature of the war period was not the suppression of opinion resulting from decisions of law officers or from restraints imposed by the law itself, but the restraints resulting from the intolerant and at times violent attitude of the citizenry itself. This is an important fact commonly overlooked by historians of the period.

It is to this kind of restraint, its origins and effects, as distinguished from restraints imposed by law, that I first direct your attention. Taken by and large the number of people convicted under the Espionage Act for their utterances made in violation of law was not large. More important, it was negligible in proportion to the number of citizens whose expression of opinion was restrained by the intimidation of their neighbors and fellow citizens. For in the years 1914-1918 the same phenomena which we are now witnessing of suspicion and growing hysteria resulting from anxiety over spy activities were then present on a more acute scale. Not long ago it was stated that the daily mail of the Federal Bureau of Investigation was averaging about a thousand letters a day, but that whenever a story of alleged spy activity was published, the mail jumped for a time to three or four times that volume. A clear demonstration of this phenomenon is the fact that whenever a public official or agency makes a report on subversive activities, the effect on public opinion is immediately reflected by a substantial increase in the number of mail complaints. The same was true in the Great War. During our participation the same mail sometimes averaged 5,000 letters a day, but out of the enormous quantity of letters received less than two per cent contained any information or clues that were of any substantial value. These statistics afford a rough means of measuring the degree of ineffectiveness and uselessness of war emotion and of the hysteria common in times of national emergency. They also reflect the measure of harm done to innocent lives by groundless suspicion and accusation.

In recent years the word propaganda has once again become a kind of alibi resorted to as a weak alternative or substitute for serious analytic thinking. Propaganda does not necessarily suggest wholly false statements; it usually connotes distorted statements of fact. There is nothing new about it. In every generation intelligence has been the only real defense against it. As H. M. Tomlinson recently said:

"Propaganda is an art as old as Egypt and now science aids it. There [now] exists more precise knowledge of the springs of human behavior, especially of the tender whereabouts of self interest, which can be now more easily moved to faith in free personal benefits which have the ap-

pearance of the best of luck for everybody. The methods by which ill-will, born of life's frustrations may be gathered into national resentment, they also are better understood. And inspiring rhetoric will do the rest."<sup>2</sup>

The significant test of propaganda is not the amount of money being expended by foreign nations, nor is the test necessarily the degree of credulity with which it is accepted by the citizens of foreign nations. The true test of propaganda is how effective it is in America in achieving results when confronted by a highly educated and intelligent citizenry. As has been frequently pointed out elsewhere,<sup>3</sup> in less than three years during the Great War the propaganda mission headed by Heinrich Albert expended in this country approximately \$35,000,000. Some of this went into the purchase of munitions to prevent their purchase by the allies; some of it was used in the purchase of ships and commodities, but the bulk of it was expended in ways commonly called propaganda. Newspapers were purchased in this country and abroad; treasonable agents were paid for work here and abroad; motion-picture films were created and exhibited; lecturers, journalists, authors—contact men of all kinds were freely employed. Old organizations were financed and new ones organized on a liberal scale. The foreign language press in this country was subsidized. The 1100 German language publications were systematically organized and provided with both material and guidance. A trans-oceanic news service regularly furnished copy available for some 800 newspapers. Monies were secretly furnished to numerous seemingly American organizations, ranging from the American Truth Society down to the League of American Women for Strict Neutrality. Prior to our entry into the war sabotage was indulged in; and much property damage was caused.

The story was quite otherwise after we entered the war. Prior to that date our precautions had been meagre and ineffectual. Once war had been declared and our defense agencies went into full operation enemy activities died down. During the last 15 months of the war not a single instance of damage to property was traceable to enemy activity.

To those intimately associated with the conduct of American national affairs during the past war no phenomena are now more puzzling than the beliefs, apparently having wide currency, that America entered the war chiefly because of the machinations of munition makers, international bankers and sentimentalists generally. These vagaries—for they are that—illustrate Gilbert Murray's warning:

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<sup>2</sup>Tomlinson, *Intervention by Public Agencies in Private Litigation in the Federal Courts* (1940) 50 *YALE L. J.* 65, 72.

<sup>3</sup>Report of the Subcommittee on the Judiciary, U. S. Senate, on Investigation of German Propaganda, SEN. DOC. No. 61, 66th Congress (1924).

"There is no commoner cause of historical misjudgment than the tendency to read the past too exclusively in the light of the present and so twist the cold and unconscious record into the burning service of the controversial politics."<sup>4</sup>

A few historic incidents—the sinking of the *Lusitania*, the cable message sent by the German Minister Luxberg, the capture and publication of Doctor Albert's confidential espionage reports on American industry, the duplicity with which submarine sinkings were resumed, the Zimmerman Note, three years of growing resentment grounded in conscience—these alone afford sufficient explanation for American's entry into the war. And to the serious-minded who lived through the period of the past war there is something ignoble in the current warnings against the power of propaganda. To them these warnings suggest a belief in the prevalence of all pervasive conditions of ignorance and moral cowardice. The belief that the human mind is incapable of making moral judgments when confronted by foreign propaganda plays directly into the hands of those who would suffer from such judgments.

In short, now looking back, it is apparent that the collapse of the German effort in America was not due to lack of intelligent effort. It did not fail because England or France spent more; for they did not. It failed because in the end the educated intelligence, the shrewdness and the moral sense of the Americans asserted themselves. It failed, as any similar propaganda would fail now, chiefly because the Americans finally realized with a unanimity of conviction that the brutalities of the Germans were offenses against the common conscience of mankind.

Completing this historical review, other equally important factors should be borne in mind. The Selective Service Act, which put into uniform more than 3,000,000 soldiers, was administered by civilian officials and the entire army raised without a riot or any protest accompanied by violence. All of the prosecutions for war-time offenses were conducted by the civil courts. America was a unified nation.

Those who fear that America may not act with unity confronted now with unknown dangers will do well to remember all this history. In 1915 when the *Lusitania* was sunk, many hesitated to express themselves fearing that our people lacked unity. But Count von Bernstorff did not share this view; he has recorded his belief that if President Wilson had then acted more aggressively the nation would have united in his support.<sup>5</sup> Subsequent history demonstrates that he was right in this conclusion.

It is not true, as we are being today so strangely reminded, that the triumph of truth is inevitable. Every month—nearly every day—brings fresh news

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<sup>4</sup>MURRAY, *TRADITION AND PROGRESS* (1922).

<sup>5</sup>von Bernstorff, *My Three Years in America*.

tragically confirming the half forgotten historical fact—that the spread of truth, freedom of opinion, of speech and of religion has often been suppressed by force over long periods of time measured by centuries rather than by generations. At the end of the Eighteenth Century, freedom in expression of opinion was being suppressed in England. It is being suppressed in a great part of the civilized world today. As I have said, it is only twenty years since we saw outstanding and determined attempts in this country invoking the powers of government to suppress freedom in the expression of honest opinion.

But this freedom is not inconsistent with the right of the nation in time of grave national danger to protect itself against utterances intended to weaken its power of self defense. However fine the boundary line of limitation may seem at times, the distinction is there and it is valid. In such times we hear earnest warnings against increasing the power of the State. Many fear that any restraint will lead inevitably to lasting conditions of despotism and tyranny. Despite the painful history of reconstruction years after the Civil War and the last war, no such result came about.

Sir Frederick Pollock wrote to Mr. Justice Holmes in 1917: "My private opinion is that there is no liberty of the subject in time of war within the realm." But individual rights survived the war in England as in America. The tyrannies proved ephemeral: with the danger past, the ingrained characteristics of free men asserted themselves, and if historical example has value those same qualities will again survive all abnormal conditions of life. Doubtless the Nazi espionage system is larger and better organized in this country now than in 1917, and the dangers of subversive activities are always present. But the agencies of our Government charged with protecting the nation are infinitely better equipped than ever before. Yet the problems affecting freedom of speech and conscience in times of national emergency remain essentially the same. Alertness and intelligence are still the only dependable safeguards against false propaganda.

There are other historical analogies between the problems of those days and of these. Much valuable information on enemy activities was gained at that time through wire tapping. Wire tapping was not a general practice. Its use was limited, but the results were highly important. The same problem presents itself today on a much larger scale. The difficulty in dealing with it is the difficulty of imposing a sufficient degree of responsibility upon the officials who control the practice and the greater difficulty of providing definite standards for the exercise of their discretion.

Likewise, the problem presented by the conscientious objector is not new. In the Great War these men were dealt with by special types of tribunals. Doubtless, the problem today is magnified out of all true proportion—as

indeed it was in 1917 and 1918. During the entire period of the draft 2,810,296 men were inducted into the Army. Only about 4,000 of these made any claim in camp for exemption from combatant service or from all military service. The exact percentage was .14 of one percent, and only about 500 out of the approximate 3,000,000 refused to render any form of military service.<sup>6</sup>

Fear of sabotage and acts of violence was then, as now, generally prevalent throughout the country. Curiously enough this atmosphere seemed to pervade the civil populations of all nations engaged in the war. We now know that all of them thought that their governments were remiss in not sufficiently protecting them against danger of internal violence. But over against these emotional peculiarities are countervailing facts already mentioned.

It is with this historical background that the legal restraints imposed upon the citizen should be considered. More important, it is only with this authenticated background of historical fact in mind that scrutiny should be given to any proposals advocating additional legal restraints in the present national emergency.

At the time of America's entry into the war there were substantially no federal laws aimed at disloyalty. Several months later the Congress enacted the so-called Espionage Law in part prohibiting interference with the operation of military or naval forces, attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces, etc.<sup>7</sup> It was under this statute that the earlier prosecutions were laid. This law was not aimed at disloyal utterances *per se*: it was intended to protect the process of raising and maintaining our armed forces from the dangers of disloyal propaganda. Later, in May, 1918, Congress greatly amplified this statute by an amendment, commonly called the Sedition Law, which with more minute detail defined a series of offenses of such broad descriptive character that the Attorney General declined to request the enactment of the measure by Congress.<sup>8</sup> Among other particulars it proscribed as criminal offenses the use of profane, scurrilous or abusive language about the government, the Constitution or the flag, as well as language intended to bring any of them into contempt, scorn, contumely or disrepute. In a time of anxious and often excited public opinion, the wide latitude which might be exercised in interpreting this statute made it a source of danger. Immediately after its enactment, in order to prevent misinterpretation and mis-use at the hands of local prosecuting officials, the Attorney General issued a warning against indiscriminate prosecutions and a few months later issued a circular of instructions which centered the control of the insti-

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<sup>6</sup>TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY, War Department (Washington 1919).

<sup>7</sup>40 STAT. 217, 219 (1917), 50 U. S. C. A. §§ 31, 33 (1928).

<sup>8</sup>40 STAT. 553 (1918), 50 U. S. C. A. § 33 note (1928).

tution of prosecutions in the Department of Justice at Washington. Both of these statutes were by their terms operative only during a period when the United States was at war.

It was the first and simpler statute which brought before the Supreme Court the interpretation of the First Amendment to the Constitution guaranteeing freedom of speech and conscience. Incidentally, it is not without interest that the Republic had been in existence under the Constitution for 130 years before that Court was called upon to interpret the First Amendment in this respect as applied to oral utterance. Five cases were successively argued by the Government at the October Term, 1918, *viz.*: *Schenck v. United States*,<sup>9</sup> *Baer v. United States*,<sup>10</sup> *Debs v. United States*,<sup>11</sup> *Frohwerk v. United States*,<sup>12</sup> and *Sugarman v. United States*.<sup>13</sup> The decision in each case was that constitutional rights had not been infringed by the enforcement of the Espionage Act. And it is a fact of even greater significance that in each case the opinion was written by Mr. Justice Holmes speaking for a unanimous court. The commonsense quality of the reasoning and the saltiness of the style which characterize the opinion in the two cases, *Schenck v. United States* and *Baer v. United States*, have a typical American flavor:

"We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikins v. Wisconsin*, 195 U. S. 194, 205, 206, 49 L. ed. 154, 159, 160, 25 Sup. Ct. Rep. 3. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 55 L. ed. 797, 805, 34 L. R. A. (N.S.) 874, 31 Sup. Ct. Rep. 492. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."<sup>14</sup>

All of these cases were decided after the armistice, but each of them upheld the power of the government to protect itself as an organized society against attacks from within in times of national danger. In one of these cases (*Debs*

<sup>9</sup>249 U. S. 47, 39 Sup. Ct. 247 (1919).

<sup>10</sup>*Ibid.*

<sup>11</sup>249 U. S. 211, 39 Sup. Ct. 252 (1919).

<sup>12</sup>249 U. S. 204, 39 Sup. Ct. 249 (1919).

<sup>13</sup>249 U. S. 182, 39 Sup. Ct. 191 (1919).

<sup>14</sup>249 U. S. 47, 52.

*v. United States*) because of the life-long prominence of the defendant the decision took on adventitious importance. Debs was typical of a group of conscientious persons like Kate Richards O'Hare, Rose Pastor Stokes and the leading members of the so-called Christian Brotherhood, all of whom, by personal or religious convictions, were sincerely opposed to the war, and all<sup>15</sup> of whom were convicted for public activities deliberately carried on with the intent of opposing or weakening America's effort in the war. In his letters to Sir Frederick Pollock recently published, there are comments by Mr. Justice Holmes indicating that the writing of these opinions was not a congenial task; but no one has seriously questioned the rightness of the rules which he laid down. Later on, however, in the *Abrams* case which arose under the amendment of 1918, known as the Sedition Act, Mr. Justice Holmes in a dissent used the words which seem destined to live longest as his most characteristic utterance.

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."<sup>16</sup>

In short, the danger contemplated by the statute in his eyes was at all times one of degree, and beyond the rule of practical application which he had evolved in the *Schenck* and *Baer* cases he refused to go. Since the rendering of these decisions the Supreme Court throughout the intervening 20 years has condemned with almost uniform consistency artificial restraints affecting freedom of speech in notable opinions written by Justices Hughes, Stone,

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<sup>15</sup>*Cf. Rutherford v. United States*, 258 Fed. 855 (C. C. A. 2d 1919).

<sup>16</sup>*Abrams v. United States*, 250 U. S. 616, 630, 40 Sup. Ct. 17 (1919).

Sutherland, Roberts, Frankfurter, Murphy and Black—in short by nearly all of its members. As you are aware, the case in which the Court was confronted with the most serious difficulty was the recent one of *Minersville School District v. Gobitis*,<sup>17</sup> in which the majority held that the ordinance of a Pennsylvania school board requiring a salute to the flag was not in violation of the First Amendment guaranteeing freedom of religion. The reasoning in that case, eloquently expressed, was based on somewhat different grounds from the earlier cases, the Court saying in part:

“Unlike the instances we have cited, the case before us is not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. ‘We live by symbols.’”<sup>18</sup>

During the period of these 20 years since the war came the opinions in cases involving the same kind of controversies arising under the Fourteenth Amendment. These cases involved the right to distribute handbills, the right of free assembly, labor (picketing, etc.), the newspaper tax, and the so-called Jehovah’s Witnesses. There is not time here to review the notable decisions of the Court passing upon the state laws aimed at syndicalism, communism, etc. Practically all of the opinions I have mentioned partake of the eloquence which seems to be inherent in any discussion of the sanctity of individual right. Whatever the complexion of the Court, whatever the transient ideologies of individual members, the Court seems consistently to have dealt with these profound questions of individual freedom in line with the great tradition which had its origin in England in the Seventeenth Century. It is a record singularly free from prejudice, pettiness, and partisanship.<sup>19</sup>

Unfortunately, during this same period the tendency of the Congress has

<sup>17</sup>310 U. S. 586, 60 Sup. Ct. 1010 (1940).

<sup>18</sup>*Id.* at 596.

<sup>19</sup>*Cf.* *De Jonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1936); *Lovell v. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938); also the more recent decisions—*inter alia*, *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940); and notably the clear and forceful opinions written by Mr. Justice Roberts in *Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1940); *Schneider v. Irvington*, 308 U. S. 147, 60 Sup. Ct. 146 (1939) (four cases involving municipal ordinances in New Jersey, California, Wisconsin and Massachusetts); *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939); *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937).

not always been in the same direction. Disclosures by the Dies Committee and other governmental agencies, the agitations, sometimes ill-advised and countenanced by public officials, local and national, the persistent repetition of the sensational stories of fifth column activities have all combined to produce a state of mind in which the legislative branches of government throughout the country have been more and more inclined to favor extreme restraints upon private utterance. In addition to the federal espionage statutes, limited in their operation to time of war, we now have the statute enacted by Congress in June, 1940, prohibiting subversive activities.<sup>20</sup> This statute is operative at all times regardless of emergency and aims to prevent interference with the loyalty, morale or discipline of the military and naval forces and to discourage by severe penalties any undertaking aimed at the overthrow of government. The enactment of this law was due in part to the increasing fear of foreign influences and to the fear created by the indiscriminate use of shibboleths such as Bolshevism, Communism, Fascism, etc. These terms, so frequently misused, have also contributed much to the intermittent agitations criticizing certain teachings and certain textbooks in our schools.

In a field of law at the same time so vague in definition and so delicate in application, it is doubtful whether any statute can be so drawn that it will not operate unjustly at times.

Even though careful in its phraseology the language of this statute reposes in the law-enforcement authorities, the courts and juries vastly important powers of discretion which are perhaps necessarily vaguely defined. An illustration is the subdivision of Section 2 which makes it a crime to become a member of *or affiliated with* any society, group or assembly knowing the purposes thereof to be the advocating of overthrow or destruction of government by force and violence. The objective is clear enough and commendable; but the canon of interpretation and the nature and scope of proof in times of excited public opinion appear to present the same dangers as the Sedition Act of 1918. In the light of modern decisions giving an all-inclusive definition to conspiracy, the conspiracy section of this statute will also inevitably become a peculiarly sensitive instrument. The statute now embodies the law of the land. If experience counts for anything it would seem that Congress would have acted more wisely by following the same course as the Supreme Court.

While it is true that every proposed invasion of civil liberty, however minor in appearance, should be carefully scrutinized, there are after all greater questions confronting the individual than city ordinances, flag salutes and police wire tapping. Underlying and more profound than any of these controversies is the necessity that educated men constantly remind themselves of

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<sup>20</sup>54 STAT. 670 *et seq.* (1940), 18 U. S. C. A. § 9 *et seq.* (Supp. 1940).

the essential character of liberty and the affirmative responsibility which liberty imposes upon every free man. Freedom will not be preserved by the enactment of statutes. It is even doubtful how far they can contribute to its preservation. Liberty in any human society is a relative right. It cannot function unless the citizens composing that society are characterized by a high degree of self-restraint and self-discipline. Never can we be too often reminded of these truths.

Democracy is not a formula: it is a faith. Ideas alone can preserve it—creative beliefs alone can give it life. Freedom in discussion, freedom in expression of intelligent opinion alone can protect it. Professor Whitehead somewhere says:

“The history of ideas is a history of mistakes, but through all the mistakes it is also history of the gradual purification of conduct. Where there is progress in the development of favorable order, we find conduct protected from relapse into brutalization by the increasing agency of ideas consciously entertained. In this way Plato is justified in his saying ‘The creation of the world—that is the world of civilized order—is the victory of persuasion over force.’”

To lawyers, law students, law professors and all Americans alike, these days of human history are presenting a most terrifying challenge—a challenge to our belief in the power of persuasion—and to our faith in the worth and dignity of the individual human being. We cannot defend that power or protect the belief upon which the American polity is founded by the indiscriminate enactment of statutes. The present tendency in that direction has gone far enough and should now be definitely checked. In this one field, at any rate, we can take our places as lawyers wholeheartedly in supporting the pronouncements of the Supreme Court, historically so consistent and in substance so persuasive in protecting freedom in the expression of individual opinion and conscience.

And in these present days of emotional strain and widely divergent opinions, we would do well to keep constantly in mind the view expressed by the Chief Justice in dealing with freedom of speech and of the press in the *De Jonge* case:

“These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political dis-

cussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."<sup>21</sup>

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<sup>21</sup>De Jonge v. Oregon, 299 U. S. 353, 364, 57 Sup. Ct. 255 (1936).