

I grow – if grow may be said of a biodegradable man – I grow daily more desperate as I see my own, my native land trampled into the dust under the hooves of the four horsemen of the age – capitalism, racism, nationalism, and war. Nor do I see salvation in either my fellow Americans or in the American Civil Liberties Union.

As for my fellow Americans, they live, a comfortable majority of them, in nice – that is, Jim Crow – neighborhoods or, better yet, in Jim Crow towns like Carmel, California (where I live), from which non-Caucasians do not need to be excluded by statute or subterfuge as long as they can be excluded by poverty inflicted by prior racism. Most of them voluntarily pay their income tax, the preponderance of which is used for past, present, and future genocide. More and more of them spend their last days fallen among lawyers and racing between the bank and the bucket shop trying to maximize their unearned increment. When they are not ossifying in front of the television set, they idle away their leisure eating, drinking, and writing to Dear Abby to find out why they aren't merry.

So much for my fellow Americans – always excepting thee and me – and by way of biting the hand that feeds me a buffet lunch, I am tempted to say so much for the ACLU.

What is wanted in these parlous, perilous times, is equal justice. The ACLU is not interested in equal justice. The ACLU is interested in equal justice *under law*.

But all the most execrable and epidemic injustices are constitutional. As constitutions go, the American is a pretty good one. But so was the Weimar, under which the Nazis came to power. So was the Masaryk constitution under which the Communists came to power in Czechoslovakia.

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There is no constitution, however valiantly defended, which will sustain the liberties presently trampled by the four horsemen. Our own is valiantly defended by the ACLU, but the horsemen laugh at courtrooms. On occasion – and with laudably increasing frequency – the ACLU turns its attention from the courtroom to the legislative chamber and does what it can to forestall the enactment of a bad law or to overturn one. But as long as the bad law is on the books, the defense of the Constitution requires the citizen – the sovereign citizen, mind you – to perform the bad actions the bad law commands or abstain from the good actions the bad law forbids. In so far as the four horsemen are encased in the armor of the Constitution, they are untouchable.

Nationalism, for instance, is no proper business of a national organization interested in equal justice under national law. But nationalism is a monstrosity – an archaic monstrosity at that – which asserts the particular welfare of the tribe over the general welfare of the race. Nationalism, recognizing no authority but its own, sets every tribe against every other in perpetual warfare in the tribal, or national, interest. It permits alliance but not community and truce but not peace.

So, too, war, the full flower of nationalism, consuming the tribal substance along with the lives, the fortunes, and the sacred honor of every citizen of every nation. As long as American law refuses to put an end to American aggression in Indochina or to proclaim the self-evident illegality of an undeclared war in Korea, the ACLU is helpless to say a mumbling word. It can maintain the soldier's right to wear his hair long; it can not maintain his right not to be a soldier and kill as many of his fellow-men who have never offended him as he possibly can.

The same Constitution which legitimates nationalism and war – the twin monstrosities which condemn the tribes to fight to the death – this same Constitution permits and prospers the consummate abomination of capitalism, pitting man against man out of the tribe and in it. Aristotle tells of the stranger in Athens who was asked what country he belonged to and

replied, "I am one of the rich." Every man against every other and each against all, one eating four meals a day while another eats two, or none.

Impotent, irrelevant, the Constitution, and, if the Constitution, the ACLU, when within two weeks of each other the Christian John Paul and the Communist Castro rise on the same platform in the great metropolis of the nation which consumes 40 percent of the world's produce and plead with the rich to share with the poor. Never a mumbling word from the Constitution; only the *tu-quoque*, or you-too, alibi that socialism perverted in Russia is as heinous as capitalism pure in America.

So, too, in so far as we represent an organization operating *under law*, are we members of the ACLU incapable of any least action against the ageless atrocity of racism unless and until the law does not forbid it.

The lovers of liberty – the ACLU foremost among them – cheered when *Brown v. Topeka* permitted them at last to exercise the right of free association. But they had had to wait fifty-eight years after the inhumane separate-but-equal decision in 1896 until, at longest last, the juridical wind blew fair instead of foul.

The Constitution is the law, but the law is what the judges say it is. And, as Robert Hutchins observed, what the judges say it is may depend on what they had for breakfast. If, like the Germans of the 1930s, we are law-abiding citizens, we are at the mercy of good and bad legislators who make the laws, of good and bad judges who interpret them, and of good and bad executives who enforce them.

It is "in vain," says Justice Story, in his classic *Commentaries*, "to oppose Constitutional barriers to the impulse of self-preservation." Confronted with the claim of national security, the courts are loath to challenge the emergency powers granted the executive by the legislature in time of war or impending war. In these marvelous days of the black box and the red button, the national security is ever more clamant and the national emergency ever more instantaneous: As the tech-

nology of "first-strike capability" proceeds, we may look to ever greater incursions on our liberties in the name of survival of the tribe at the expense of its members.

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I need hardly remind the survivors of the Nixon Administration of the three terrible years in which the writ of *habeas corpus* – the most sacred of secular liberties – was in suspension in this country by virtue of the President's arrant exercise of executive privilege. This unconscionable act of a President who exalted liberty at every oratorical turn was performed under wartime emergency in the year 1863 and was not nullified by the courts until 1866 – two years after the American Civil War was over.

Nor need I remind a post-Nixon audience of the so-called wartime emergency in which a supine Supreme Court foreclosed freedom of speech in an opinion which held that "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that these utterances will not be endured so long as men fight and no court could regard them as protected by any constitutional right. . . . Conviction affirmed." This opinion of this supine Court was not delivered by a Nixon appointee. It was delivered by Justice Oliver Wendell Holmes in *Schenk v. The United States* at the time of the first World War.

Neither need I remind my fellow-Californians of the Supreme Court decision that "compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . . Conviction affirmed." That, of course, was the Court's decision flouting due process *and* equal protection in upholding the military seizure, in March 1942, of 110,000 of our unoffending Japanese-descended neighbors and their deportation into what the dissenting minority of the Court called concentration camps. The opinion of the Court – *Kore-*

*matsu v. The United States* – was not written by one of the “nine old men” of the Harding-Coolidge-Hoover era – it was written by Justice Hugo L. Black.

Black, Holmes, Lincoln (he of the *habeas corpus* suspension): If there have been three paladins of the rights of man, three watchdogs of American liberties since the storied days of Jefferson, it is these three. But it was precisely these three watchdogs who were prepared to strike down those rights and liberties in the name of the war-making State.

Who – as the Romans used to say in their broken English – who will watch the watchdogs? In the last resort, only the American Civil Liberties Union. We may be sure that the ACLU, had it existed in 1863 and 1917, would have tackled Lincoln and Holmes on behalf of the supposed traitors of the day just as, when nobody else would, it tackled its great friend, Hugo Black.

I have deplored the nonfeasance of the ACLU with regard to the four transcendent, but Constitutional, evils of nationalism, racism, capitalism, and war. Now, in the light of the melancholy conduct, not of a Nixon or a Nixon court but of men like Lincoln, Holmes, and Black, I begin to understand that nonfeasance. The American Civil Liberties Union has been busy not about other things but about one other thing. While the rest of us are running around like heads with our chickens chopped off, the ACLU is sleeplessly minding the American store whose stock in trade is liberty – not the liberty of the Junior Chamber of Commerce Young Man of the Year, who is not in jeopardy, but the liberty of the unpopular and the obnoxious, of the depreciated and the disadvantaged.

It is the single and singular mission of the ACLU – a mission that is usually thankless and often detested – to make the liberties of the least among us as secure as liberty can be made under law. Right now, the ACLU is in court in Carson City, along with the Episcopal bishop of Nevada, challenging the constitutionality of the death penalty on behalf of a convicted murderer. This hand-to-mouth organization commands the unpaid services of the genuinely best and brightest men and

women of the bar all across the country. But its extraordinary effectiveness lies, I think, in its steadfast single-mindedness – a single-mindedness which always makes me think of the last line of a gospel hymn called “The St. James Infirmary”: “Put a twenty-dollar gold piece on my watch chain, so the boys will know I died standing pat.”

The ACLU stands pat. It stood pat thirty-five years ago in the landmark *Terminiello* case in Chicago to support free speech for fascists, and it stood pat two years ago in Skokie when it supported freedom of assembly for Nazis and, in doing so, lost almost half of its financial support in Illinois. It stood, and stands, and will stand pat for freedom of speech and assembly and the press for Communists in the United States and (with some logistical difficulty) for anti-Communists in the Soviet Union. It has supported blacks against whites and whites against blacks; unions against bosses and bosses against unions; citizens against police and police against citizens; poor against rich and, yes, rich against poor. But going wherever its single-minded mission calls it, it has usually found itself on the side of those who have nobody else on their side, the publicans and sinners, the rejected, the desolate, and the dispossessed.

This habitual association with the unloved or forgotten of the world suggests to me, and to my amazement, a profoundly religious, and a profoundly Christian, wellspring in a rigorously secular institution.

After all these decades of unrelenting struggle to maintain the separation of church and state, what a shock it would be to the ACLU to discover that it itself is a church, moved to care for the uncared-for by a power which exceeds its nature and ours.

This organization may be mistaken for a church. There is no danger of its being mistaken for a state. In season and out it carries the fight to City Hall and endures the contumely of all those upright persons and personages who seem to believe that there would be no hell if the ACLU didn't raise it, no trouble if the trouble-makers didn't make it.

These do be parlous times, parlous unto tindrous. So far is the peculiarly American commitment to progress from being axiomatic, it is not even spoken of any more. Our fondest hope is that things will grow worse no faster than they are growing worse now.

But here and there a good sign is seen. A little headway has been made, if not against nationalism, capitalism, and war, against racism in this, the homeland of racism. And while it is true, thanks in part to free-enterprise television, that our society is plunging headlong from literacy to illiteracy – another first in human history – it is also true that recently the denizens of Elk City, Oklahoma, could, and some of them did, see and hear James Earl Jones in his public television portrayal of the magnificent life of Paul Robeson.

And along with the sweep of hedonistic materialism, the material insecurity of our old and our ill and our poor has been slightly, if only slightly, alleviated by national insurance. There have been other small gains and wavering intimations that the rising generation may yet fool us by turning out better than we are, just as we fooled our elders by turning out worse than they were. The end, in a word, is not yet.

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Civil liberties do not civilize a society; the Bill of Rights was amended into the Constitution and it can be amended out. What civilizes society is the determination above all else to be civilized. It is not too late – it is never too late – to hope that ours will one day be such a society and once again be, as it once was, a beacon to mankind.

When, and if, it is, it will surely be because the example of a very few single-minded Americans from generation to generation perpetuated the singular heritage of liberty passionately prized – a heritage whose very existence once struck tyranny into the hearts of tyrants everywhere and raised the hopes of a suffering and sorrowing world.